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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 4

(T.D. 86-1)

Amendment to the Customs Regulations Concerning the Coastwise Transportation of Certain Articles by Vessels of Guatemala or The Bahamas

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to add Guatemala and The Bahamas to the lists of nations which permit vessels of the U.S. to transport certain articles specified in § 27, Merchant Marine Act of 1920, as amended, between their ports.

Customs has been furnished satisfactory evidence that neither Guatemala nor The Bahamas place any restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country. This amendment provides reciprocal privileges for vessels registered in either Guatemala or The Bahamas.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in Guatemala became effective on October 11, 1985. The privileges extended to vessels registered in The Bahamas became effective on November 29, 1985.

FOR FURTHER INFORMATION: Paul Hegland, Carriers, Drawback & Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. 883) (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the U.S. except in vessels built in and documented under the laws of the U.S. and owned by U.S. citizens. However, that 6th proviso of the Act, as amended, by Pub. L. 89-194 (79 Stat. 823, T.D. 66-176)

and Pub. L. 90–474 (82 Stat. 700, T.D. 68–227), provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the U.S., reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the U.S. will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Section 4.93(b)(2), Customs Regulations (19 CFR 4.93(b)(2)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of equipment for use with cargo vans, lift vans, or shipping tanks; empty barges specifically designed for carriage aboard a vessel and certain equipment for use with these barges; certain empty instruments of international traffic; and certain stevedoring equipment and material.

On October 9, 1985, the Department of State advised the Director, Carriers, Drawback & Bonds Division, of the Customs Service Headquarters that Guatemala places no restrictions on the transportation of the articles listed in the Act by vessels of the U.S. between ports in Guatemala. The effective date of such notification was October 11, 1985.

On November 19, 1985, the Embassy of the Commonwealth of The Bahamas advised the Commissioner of Customs that The Bahamas place no restrictions on the transportation of the articles listed in the Act by vessels of the U.S. between ports in The Bahamas. The effective date of such notification was November 29, 1985.

The Carriers, Drawback & Bonds Division of Customs is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.93(b). Therefore, the Director of the Division has determined that, effective retroactively to the dates of notification stated above, Guatemala and The Bahamas should be added to the lists of nations set forth in § 4.93(b)(1) and (2).

By Treasury Department Order 165–25 the Secretary of the Treasury has delegated authority to the Commissioner of Customs to prescribe regulations relating to §§ 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f), Customs Regulations, (19 CFR 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f)). These sections relate to lists of nations entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated this authority to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then re-delegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Secretary of State, and the Embassy of the Commonwealth of The Bahamas, as described above, it is determined that neither the Government of Guatemala nor The Bahamas places any restrictions on the transportation of the articles specified in the 6th proviso of § 27 of the Merchant Marine Act of 1920, as amended, by vessels of the U.S. between ports in either Guatemala or The Bahamas, respectively. Therefore, reciprocal privileges are accorded as of October 11, 1985, to vessels registered in Guatemala, and as of November 29, 1985, to vessels registered in The Bahamas.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, cargo vessels, maritime carriers, vessels.

REGULATIONS AMENDMENTS

To reflect the reciprocal privileges granted to vessels registered in either Guatemala or The Bahamas, Part 4, Customs Regulations (19 CFR Part 4), is amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4, continues to read as follows:
Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103;
§ 4.93 also issued under 19 U.S.C. 1322(a); 46 U.S.C. 883.

2. Sections 4.93(b)(1) and (b)(2), Customs Regulations (19 CFR 4.93(b)(1), (b)(2)), are amended by adding "Guatemala" and "Bahamas, The", in appropriate alphabetical order to the list of nations entitled to reciprocal privileges.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this is a minor amendment in which the public is not particularly interested and there is a statutory basis for the described extension of reciprocal privileges, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d)(1), a delayed effective date is not required because this amendment grants an exemption.

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of 5 U.S.C. 603, 604, as added by § 3 of Pub. L. 96-354, the "Regulatory Flexibility Act." That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices in the Customs Service participated in its development.

Dated: December 20, 1985.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, December 30, 1985 (50 FR 53144)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC.

The following are decisions of the United States Customs Service which are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 86-1)

This ruling holds, under 19 U.S.C. 1313(a), that drawback may be claimed on the exportation of articles manufactured or produced in the United States with merchandise imported under item 807.00, Tariff Schedules of the United States.

Date: August 12, 1983
File: DRA-1-09-CO:R:CD:D
216162 GS

Issue: May drawback be claimed on the exportation of articles manufactured or produced with merchandise imported under item 807.00, Tariff Schedules of the United States?

Facts: Integrated circuits are fabricated in the United States on raw silicon wafers of both foreign and domestic origin. The fabricated wafers and other components are exported to Malaysia for assembly into protective packages and then returned to the United States as unfinished integrated circuits under item 807.00, TSUS. In the United States the unfinished integrated circuits are used in manufacture or production to produce finished integrated circuits, some of which are exported.

Law and Analysis: When the unfinished integrated circuits are returned to the United States, if entry under item 807.00 is claimed and also drawback on the fabricated wafers used in their assembly, the claim for entry under 807.00 will be granted if it is in order and the claim for drawback denied (C.S.D. 82-160, August 25, 1982; Circular Letter DRA-1-DB, March 28, 1962).

Some of the unfinished integrated circuits are used to manufacture or produce finished integrated circuits (I.C.'s) which are exported. The manufacturer wishes to claim drawback on the duties paid on the merchandise used to manufacture or produce these finished I.C.'s. This merchandise was imported into the United States under two entries—that for the silicon wafers and that for the unfinished I.C.'s.

The first question therefore is whether two or more consumption entries covering the same merchandise may be identified or designated for drawback. In C.S.D. 81-215, May 7, 1981, it was ruled that this is permissible. The situation in the current case is slightly different, in that the second consumption entry covers merchandise which incorporates articles manufactured from the merchandise imported on the first consumption entry. This is not a material difference for the legal issue under consideration and therefore C.S.D. 81-215 applies.

The next issue is whether drawback is payable upon the exportation of products manufactured with the use of fabricated American-made components assembled abroad and imported under 807.00, TSUS.

This question was decided in an unpublished ruling dated December 19, 1977 (DRA-1-R:CD:D RS, 208439) which is quoted below in its entirety.

> You asked whether drawback is payable upon the exportation of products manufactured with the use of fabricated American-made components assembled and imported under item 807.00, TSUS. The duty on such components is measured by the value added to the American parts as the result of the foreign assembly operation.
>
> The drawback statute relevant to this case, 19 U.S.C. 1313(a), provides for payment of drawback "upon the exportation of articles manufactured or produced in the United States with the use of imported merchandise. * * *" There is no requirement in the statute or the relevant Customs Regulations that the duty-paid imported merchandise be of foreign origin. The only requirement is that the merchandise designated as the basis of claim be imported and duty-paid.
>
> Accordingly, drawback of duties paid under item 807.00, TSUS, is permissible under the provisions of 19 U.S.C. 1313(a) and Part 22 of the Customs Regulations.

It should be noted that the holding reached below is completely in accord with both the intent and technical wording of Headnote 1(b) of Subpart B, Part 1 of Schedule 8, TSUS. This Headnote states that this "subpart shall not apply to any article exported * * * (b) with benefit of drawback;"

The intent of this provision is to prevent one from using both drawback and 807 to avoid duties. Thus if drawback were not denied on the fabricated wafers when entry under item 807 was granted, assuming both were claimed (first paragraph above under

Law and Analysis), the finished IC's which remained in the United States would have been produced from silicon wafers imported free of duty. Duty on these IC's would have been paid only on the assembly operation. However, the intent of the headnote is not to deny drawback on merchandise which is exported, for if it did it would be in conflict with the drawback law, which permits drawback of all duties on exported articles. Furthermore the headnote is written to apply to past exportations—not future exportations taking place after the admission under 807.

Holding: Drawback may be claimed on the exportation of articles manufactured or produced in the United States with merchandise imported under 807.00, TSUS

(C.S.D. 86-2)

This ruling holds that under 19 U.S.C. 1677(g)(a), voluntary interest payments made by an importer on deposits of countervailing or antidumping duties before liquidation may be refunded if found not to be payable, upon liquidation or reliquidation, and may also be the subject of a protest under 19 U.S.C. 1514.

Date: July 9, 1985
File: ENT-1 CO:R:E:E
728393 JL

LEONARD L. ROSENBERG, Esq.,
SANDLER & TRAVIS, P.A.,
444 Brickell Avenue,
Miami, Florida 33131.

DEAR MR. ROSENBERG: In your letter of May 2, 1985, you asked for a binding ruling on behalf of your client, Meldisco, Division of Melville Corporation, that countervailing duties paid voluntarily as the result of the findings of a review by the Department of Commerce are refundable with interest in the event of a later decision reducing or eliminating duties and that said deposit would stop the accrual of interest which could legally be assessed pursuant to 19 U.S.C. 1677(g).

You state that in Treasury Decision 80-13 Customs published a suspension of liquidation of all entries of certain Brazilian footwear and your client was required to make a deposit of countervailing duties in the amount of 1 percent as a result. You state that on April 19, 1985, the Department of Commerce published the results of its administrative review conducted pursuant to 19 U.S.C. 1675 and found countervailable bounties or grants in the amount of 8.84 percent *ad valorem* for entries made during calendar year 1980 and ordered Customs to begin liquidations of those entries which had been suspended pursuant to Treasury Decision 80-13. You continue that the Customs Service has been enjoined from liquidating those entries by the United States Court of International Trade (Case No. 85-04-00579). Your client is offering to make the voluntary pay-

ments in order to stay the accrual of additional interest at the time of liquidation.

19 U.S.C. 1677g(a), was amended on October 10, 1984, by Public Law 98-573, and provides as follows:

> (a) General Rule.—Interest shall be payable on overpayments and underpayments on amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—
>
> (1) The date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or
>
> (2) The date of a finding under the Antidumping Act, 1921.

This provision therefore provides for the payment of interest on the difference between the cash deposits of estimated countervailing or antidumping duties and the duties finally assessed on the entries. Where there is no difference between the two figures, then no interest would be collected.

You asked that if it is finally determined that if any part of the countervailing duties deposited voluntarily as well as any amount representing interest alleged to be due on the amount of the countervailing duties voluntarily deposited are not owed, that such duties would be returned to the importer with all applicable interest charges, in the same manner as countervailing duties deposited at the time of entry.

Customs is of the opinion that all monies voluntarily tendered and accepted on an entry before its liquidation are characterized as "estimated duties" and may be refunded pursuant to a liquidation or reliquidation, and may be the subject of a protest under 19 U.S.C. 1514.

(C.S.D. 86-3)

This ruling holds that replacement tires and repair parts designated for use with containers are considered "equipment for use with containers" under the sixth proviso of the Jones Act (46 U.S.C. 883 and 19 CFR 4.93).

Date: September 19, 1985
File: VES-3-03-CO:R:CD:C
107844 DHR

Mr. JOHN E. BOUCHARD,
General Manager,
Moller Steamship Company, Inc.,
1667 K Street, NW.,
Washington, D.C. 20006.

DEAR MR. BOUCHARD: Reference is made to your letter of August 9, 1985, concerning the applicability of the Sixth Proviso of the Jones Act (46 U.S.C. 883) and section 4.93, Customs Regulations (19

CFR 4.93), to certain merchandise transported between points in the United States.

Under the Sixth Proviso and section 4.93, foreign-flag vessels of certain nations and United States-flag vessels not qualified to engaged in the coastwise trade may transport empty cargo vans, empty lift vans, and empty shipping tanks and equipment for use with cargo vans, lift vans, or shipping tanks between points embraced within the coastwise laws of the United States if those articles are owned or leased by the owner or operator of the transporting vessel and are transported for his use in handling his cargo in foreign trade. In accordance with section 4.93(c), Customs Regulations, the articles must be identified on any Cargo Declaration, Customs Form 1302, required to be filed under part 4 of the Customs Regulations (19 CFR part 4). Section 4.93(c) also requires that such a Cargo Declaration include a statement that the articles are owned or leased by the owner or operator of the transporting vessel and are transported for his use in handling his cargo in foreign trade.

You ask whether replacement tires and repair parts can be considered "equipment for use with" cargo vans, lift vans, or shipping tanks, as that phrase is used in the Sixth Proviso and section 4.93. You state that because of contrary Customs rulings, you and other vessel operators have been forced to transport your own replacement tires and repair parts for containers between points in the United States by trucks or rail at a significant expense even though your own vessels are moving between those points. The Honorable Mario Biaggi, Chairman, House Subcommittee on Merchant Marine, has also written us concerning this matter.

After a complete review of this matter, we have concluded that the phrase "equipment for use with" cargo vans, lift vans, or shipping tanks in the Sixth Proviso of the Jones Act and in section 4.93, Customs Regulations, includes replacement tires and parts for cargo vans, lift vans, or shipping tanks, provided that the tires and parts are owned by the owner or operator of the transporting vessel, are intended for cargo vans, lift vans, or shipping tanks owned or leased by the owner or operator of the transporting vessel, and are transported for his use in handling his cargo in foreign trade. The requirements of section 4.93(c), Customs Regulations, regarding any required Cargo Declaration, Customs Form 1302, are applicable to replacement tires and parts for cargo vans, lift vans, or shipping tanks being transported coastwise.

If replacement tires or parts for cargo vans, lift vans, or shipping tanks are transported between coastwise points on foreign-flag vessels of nations not granted reciprocal privileges under the sixth proviso (see list in section 4.93(b)(1), Customs Regulations) or, even if transported by qualifying vessels, are not owned or leased by the owner or operator of the transporting vessel and transported for his use in handling his cargo in foreign trade, severe liabilities will

be incurred under 46 U.S.C. 883. If the requirements of section 4.93(c), Customs Regulations (see also section 4.81(e), Customs Regulations), relating to any required Cargo Declaration, Customs Form 1302, are violated, penalties will be assessed under 19 U.S.C. 1584.

(C.S.D. 86-4)

This ruling holds that privileged foreign merchandise removed from a foreign trade zone is subject to the rate of duty and tax in effect on the date privileged foreign status was filed for and not at the rate of duty in effect at the time of transfer to a Customs territory for consumption (19 U.S.C. 81c and section 146.21(c)(3)(i), Customs Regulations).

Date: September 24, 1985
File: FOR-1-CO:R:CD:D
218295 L

Issue: Imported distilled spirits are admitted to a foreign trade zone and are granted the status of privileged foreign merchandise prior to October 1, 1985. Are these spirits subject to the increased distilled spirits tax imposed by section 27 of P.L. 98-369, effective October 1, 1985, if transferred to customs territory for consumption after that date?

Facts: No specific facts are presented. The question is raised in connection with the impending increase in the distilled spirits tax rate.

Law and Analysis: Section 27 of P.L. 98-369 increases the rate of tax on distilled spirits from $10.50 to $12.50 per proof gallon. Section 27 also establishes the effective date of the amendment as October 1, 1985.

The first proviso to section 3 of the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81c) provides:

> That whenever the privilege shall be requested and there has been no manipulation or manufacture effecting a change in tariff classification, the appropriate customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon. Merchandise so taken under supervision may be stored * * * and * * * be sent into customs territory upon the payment of such liquidated duties and determined taxes thereon.

The Customs Regulations, section 146.21(c)(3)(i), provide that when privileged foreign status is requested "* * * merchandise shall be subject to * * * the rates of duty and tax in force, on the date of filing * * *".

Section 146.21, Customs Regulations, provides in part that "[A] status as privileged foreign merchandise and the consequent determination of taxes and liquidated duties cannot be abandoned".

Statute and regulation require that when privileged status is requested taxes be determined and duties liquidated. Once privileged status is attained it cannot be abandoned. Accordingly, imported distilled spirits in a foreign trade zone prior to October 1, 1985, with the status of privileged foreign and removed from the zone for consumption subsequent to October 1, 1985, are subject to the rates of duty and tax in effect at the time the request for privileged foreign status was filed.

Holding: Privileged foreign merchandize removed from a foreign trade zone is subject to the rate of duty and tax in effect at the time the request for privileged foreign status was filed and not at the rate in effect at the time of transfer to Customs territory for consumption.

(C.S.D. 86-5)

This ruling sets forth the country of origin marking requirements applicable under 19 U.S.C. 1304, 19 CFR 134.41(b) and 19 CFR 134.46 to certain athletic footwear and shoe boxes displaying symbols associated with a country other than the country of origin.

Date: January 2, 1986
File: MAR-3 CO:R:E:E
729096 LR

Issue: Whether the country of origin marking at the base of the tongue or inside the heel on athletic footwear satisfies the requirements of 19 U.S.C. 1304 where the footwear and/or the box also displays symbols associated with a country other than the country of origin.

Facts: It has been brought to Customs attention that certain athletic shoes are being imported which may not satisfy the country of origin marking requirements of 19 U.S.C. 1304. The specific circumstances are described below.

Case I

The shoes in question are manufactured in the Republic of Korea. Although they are marked "Made in Korea" at the base of the tongue label, a variety of British symbols appear on the shoes. First, a British flag is prominently displayed on the top of the footwear. Second, the size labels on the inside of the shoe and on both ends of the box make reference to UK and USA sizing. Finally, the shoe box lid is a reproduction of the British flag. There is no country of origin marking on the shoe box.

Case II

The shoes are manufactured in the R.O.C. (Taiwan). The country of origin is printed on the inside of the heel of the shoe and on the bottom of the shoe box. The American flag appears on the side of the shoe. The box has a reproduction of the American flag as its

lid and the sides of the box are labeled "Action Shoes Dallas, Texas."

Applicable Law and Analysis: Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) requires that every article of foreign origin imported into the United States be marked in a *conspicuous* place as legibly, indelibly, and permanently as the nature of the article will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin (emphasis added). The Customs Service has interpreted the requirement that articles be marked in a conspicuous place to mean that they must be marked in a place where the ultimate purchaser is able to find the marking easily. (*See* 19 CFR 134.41(b)).

Although Customs would normally consider a country of origin marking at the base of the tongue label or on the inside of the heel to be conspicuous, this is not necessarily the case where foreign symbols (other than that of the country of origin) appear on the article and/or its container.

The Customs Service has recognized that the presence of a geographic location other than the country in which the article was produced on an imported article or its container may mislead the ultimate purchaser as to the true country of origin. Thus, in cases where words indicating possible origin other than the actual country of origin appear on the article, Customs requires that the country of origin marking shall appear in close proximity to and in at least comparable size letters to such words, and preceded by "Made in," "Product of," or other words of similar meaning. (19 CFR 134.46). The purpose of this regulation is to alleviate the possible confusion that is created by these words.

We believe that the presence of symbols associated with a country other than the country of origin may also mislead the ultimate purchaser as to the country of origin. This is especially true where the foreign symbols are more readily visible than the country of origin marking.

In this case, the British and American symbols on the shoes and the boxes are far more prominent than the country of origin marking in the shoes or at the bottom of the box. After viewing the British or American flag on both the lid of the box and the shoes, the UK/USA size label on the shoes and the box (or the words "Action Shoes Dallas, Texas" on the box), we believe that most consumers would conclude that Great Britain or the United States is the country of origin. In light of these prominently displayed British or American symbols, it would take a very determined consumer to ascertain that the country of origin is the Republic of Korea or Taiwan. Based on the facts presented, we find that the country of origin marking at the base of the tongue or inside the heel is not conspicuous.

In order to satisfy the statutory requirements that the imported articles be marked in a conspicuous place, Customs will require

that both the shoes and the shoe box be marked with the country of origin (in the manner described below). The marking of the shoe box will immediately alert the ultimate purchaser of the true country of origin and eliminate any confusion caused by the symbols. Although 19 CFR 134.24(d)(3) states that if the container is normally opened by the ultimate purchaser prior to purchase, only the article need be marked, this regulation would not apply where Customs finds that the article itself is not conspicuously marked and that the marking of the container was necessary to satisfy the basic requirements of section 1304.

We also find that the presence of the UK/USA size labels on both the shoes and the box or the words "Action Shoes Dallas, Texas" on the box creates confusion as to the country of origin which can be alleviated by application of 19 CFR 134.46.

Holding: Due to the presence of symbols associated with a country other than the country of origin on the shoe and/or the shoe box, the country of origin marking at the base of the tongue or inside the heel is not conspicuous. This defect would be cured by an additional permanent country of origin marking on the outside of the box which is: (1) preceded by the words "Made in" or "Product of"; (2) placed either on the top of the lid or the side of the box—preferably on the side of the box containing information about the size and style of the shoe; and, (3) in lettering at least ⅛ inch high.

Also, due to the presence of words or geographic location (*e.g.* UK/USA on the size labels on the shoes and the shoe boxes or the words "Action shoes Dallas, Texas" on the boxes) the country of origin marking on the inside at the base of the tongue or on the inside of the heel does not satisfy the requirements of 19 CFR 134.46. This defect would be cured by placing a country of origin marking preceded by the words "Made in" or "Product of" in close proximity to and in letters of at least comparable size to such words.

Case I

In order to satisfy the statutory requirements, both ends of the shoe box must be permanently marked "Made in Korea" or "Product of Korea" in close proximity to and in at least comparable size letters to the UK and USA references. The shoes must also be permanently marked "Made in Korea" or "Product of Korea" in close proximity to and in at least comparable size letters to the UK/USA sizing labels.

Case II

In order to satisfy the statutory requirements, in addition to the country of origin markings on the shoes, both sides of the shoe box must be permanently marked "Made in Taiwan" or "Product of Taiwan" or other similar words in close proximity to and in at least comparable size letters (but not less than ⅛ inch high) to the words "Action Shoes Dallas, Texas".

Effective date: Merchandise entered for consumption or withdrawn from warehouse for consumption on or after March 1, 1986, is subject to the ruling.

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 141

Proposed Customs Regulations Amendments Relating to Entry of Merchandise

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: The Tariff Act of 1930 allows the consignee of imported merchandise to designate a customs broker to make entry. Small shipments of merchandise having various consignees are more efficiently and effectively handled if consolidated into large shipments under a master bill of lading or master air waybill prepared by a foreign freight consolidator which covers the numerous individual packages in the shipment. The foreign freight consolidator normally consigns the consolidated shipment to a freight forwarder, courier service or other person in the U.S. This consignee is normally not the same consignee identified on the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill. When the consignee named in the master bill of lading or master air waybill appoints a broker of its own choosing to make entry, the actual consignees of the merchandise named in the individual bills are often frustrated in two respects. First, entry is made by a broker not of their choosing and, second, entry is often made at a port not of their choosing. Further, additional expenses may be incurred. This document proposes to amend the entry procedures to prevent frustration of the wishes of the actual consignees identified on the individual bills.

DATES: Comments must be received on or before February 24, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Comments relating to the information collection aspects of the proposal should be addressed to Customs, as noted above, and also the Office of Information and Regulatory Affairs, Atten-

496-724 O - 86 - 2

tion: Desk Officer for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Entry, Licensing, and Restricted Merchandise Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

A customs broker is a person who is licensed by the Customs Service to transact Customs business on behalf of importers and other persons. Section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), provides for the entry of merchandise. Section 484(a)(1)(C) provides that when an entry of merchandise is made, the required documentation shall be filed either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a broker. A problem has arisen with respect to the appointment of a broker by the consignee of consolidated shipments.

Small shipments of merchandise having various consignees are more efficiently and effectively handled if consolidated into a large shipment. Consolidated shipments to the U.S., usually by containers, have two sets of documents. One set of documents consists of a master bill of lading or master air waybill covering the container and its contents. Individual bills of lading or individual air waybills, also known as "house" bills of lading or "house" air waybills comprise the second set of documents. The master bill of lading or master air waybill is prepared by a foreign freight consolidator who ordinarily consigns the container to a freight forwarder, courier service or similar party in the U.S. The consignee designated by the foreign freight consolidator is normally not the same consignee identified on the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill. When the consignee named in the master bill of lading or master air waybill appoints a broker of its own choosing to make entry, the actual consignees of the merchandise named in the individual bills are often frustrated in two respects. First, entry is made by a broker not of their choosing and second, entry is often made at a port of entry not of their choosing. Further, additional expenses may be incurred.

To prevent the foregoing situation from happening, Customs proposes to amend § 141.11, Customs Regulations (19 CFR 141.11), relating to evidence of the right to make entry for importations by common carrier by adding a new paragraph (c) covering consolidated shipments. The proposal would provide that in the case of consolidated shipments by common carrier, entry will not be made by a broker appointed by the consignee named in the master bill of

lading or master air waybill, if (1) a consignee on any one of the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill, has designated another broker to make entry, or (2) any one of the individual bills of lading or individual air waybills indicates that entry will be made by the actual owner or purchaser. However, if the broker designated on an individual bill of lading or individual air waybill is contacted and fails to timely respond to make entry, the consignee named in the master bill of lading or master air waybill may disregard the designation and appoint a broker of its choosing to make entry. Under the proposal, the consignee named in the master bill of lading or master air waybill will submit with the entry filed with Customs a signed statement to the effect that none of the individual bills of lading or individual air waybills which make up the master bill of lading or master air waybill have designated a broker, or a different broker from the one identified in the master bill of lading or master air waybill, or have indicated that entry will be made by the actual owner or purchaser, or in the case of an actual designation, the designated broker was contacted and failed to timely respond to make entry. The statement may be stamped, typed or printed on the entry documentation provided to Customs. It will not be treated as a missing document for which a bond may be provided. If the signed statement is not submitted, entry will be made by the broker designated by the consignee of each individual bill of lading or individual air waybill which makes up the master bill of lading or master air waybill or by the actual owner or purchaser.

Because the proposed amendment applies only to consolidated shipments, it will not apply to those aspects of express delivery operations, courier service operations or similar delivery operations that do not involve consolidated shipments, or delivery operations that do not use individual house bills of lading or air waybills. Nor will it apply to any carrier where the shipper contractually agrees that the carrier is the consignee and may appoint a broker of its own choosing to make entry.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 522), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), or regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), it is certified that, if adopted, the proposed regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis requirement of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

This document is subject to the Paperwork Reduction Act. Accordingly, a copy has been submitted to the Office of Management and Budget for review and comment pursuant to 44 U.S.C. 3504(h). Public comments relating to the information collection aspects of the proposal should be addressed to Customs and to the Office of Management and Budget at the addresses set forth in the ADDRESS portion of this document.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 141

Customs duties and inspection, Imports, Brokers.

AMENDMENTS TO THE REGULATIONS

It is proposed to amend Part 141, Customs Regulations (19 CFR Part 141), as set forth below.

PROPOSED AMENDMENTS

PART 141—ENTRY OF MERCHANDISE

1. It is proposed that the general authority citation for Part 141, Customs Regulations (19 CFR Part 141), continue to read as set forth below:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to amend § 141.11 by adding a new paragraph (c) to read as follows:

§ 141.11 Evidence of right to make entry for importations by common carrier.

* * * * * * *

(c) *Consolidated shipments by common carrier.* In the case of consolidated shipments by common carrier, entry shall not be made by a broker appointed by the consignee named in the master bill of lading or master air waybill, if (1) a consignee on any one of the individual bills of lading or individual air waybills, which makes up the master bill of lading or master air waybill, has designated on the individual bills of lading or individual air waybills another broker to make entry, or (2) any one of the individual bills of lading or individual air waybills indicates that entry will be made by the actual owner or purchaser. Except that, if the broker designated on the individual bill of lading or individual air waybill is contacted and fails to timely respond to make entry, the consignee named in the master bill of lading or master air waybill may disregard the designation and appoint a broker of its choosing to make entry. The consignee named in the master bill of lading or master air waybill shall submit with the entry a signed statement to the effect that none of the individual bills of lading or individual air waybills which makes up the master bill of lading or master air waybill have designated a broker, or a different broker from the one identified in the master bill of lading or master air waybill, or have indicated that entry will be made by the actual owner or purchaser, or in the case of an actual designation, the designated broker was contacted and failed to timely respond to make entry. The required statement may be stamped, typed or printed on the entry documentation provided to Customs. The signed statement shall not be treated as a missing document for which a bond may be provided. If the signed statement is not submitted, entry shall be made by the broker designated by the consignee of each individual bill of lading or individual air waybill which makes up the master bill of lading or master air waybill or by the actual owner or purchaser.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: December 9, 1985.
DAVID D. QUEEN,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 24, 1985 (50 FR 52532)]

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19 CFR Parts 4, 6, 10, 12, 19, 54

Proposal to Eliminate Certain Information Collection Requirements From Customs Regulations

ACTION: Proposed rule.

SUMMARY: In accordance with the directives of the Paperwork Reduction Act, Customs has reviewed its regulations in an attempt to reduce or eliminate obsolete or burdensome regulatory inform-

tion collection requirements. That review revealed numerous collection requirements which Customs believes may no longer be necessary. This notice invites comments in regard to this matter before making a final decision as to the retention or deletion of these requirements.

DATES: Comments must be received on or before February 24, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to, and inspected at, the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Herb Geller, Duty Assessment Division, (202-535-4161), or Pat Barbare, Office of Inspection and Control (202-566-8151), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 10, 1983, a general notice was published in the Federal Register (48 FR 26831), which advised the public that in compliance with the Regulatory Flexibility Act (5 U.S.C. 601), Customs was undertaking a review of its regulations to identify those regulations having a significant economic impact on a substantial number of small entities and to seek ways of modifying procedures to reduce or eliminate obsolete or burdensome regulatory requirements. The initial comment period was to have closed on August 9, 1983, however, by notice published in the Federal Register on July 27, 1983 (48 FR 34061), an extension of the comment period was granted to October 11, 1983. Four comments were received in response to this notice. All respondents agreed with the idea of regulatory reduction. There were several specific suggestions for modifying existing regulations and one generalized comment endorsing regulatory reform but only if it could be accomplished without diminishing Customs enforcement and revenue collection capabilities.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501), as part of Customs continuing effort to ensure that paperwork burdens are not imposed on the public unless the practical value of information sought is worth the burden of its collection, and after analysis of the comments received in response to the 1983 notice, Customs now proposes to amend the Customs Regulations (19 CFR Chapter 1), by deleting certain information collection requirements contained in Parts 4, 6, 10, 12, 19 and 54, Customs Regulations (19 CFR Parts 4, 6, 10, 12, 19, 54). Because of these proposed deletions, conforming changes would also be necessary to other sections of the regulations.

A list of those regulations proposed for deletion follows:

19 CFR section	Description
§ 4.41(a)	Application for permission to enter wrecked cargo.
§ 6.12(g)	Requirement to post a copy of schedule of charges for servicing aircraft at an airport.
§ 10.6(a)	Certificate of foreign shipper that boxes or barrels were made from American shooks or staves.
§ 10.6(b)	Certificate of box maker that boxes or barrels were made from American shooks or staves.
§§ 10.9 (g), (h)	Certificate of owner, importer, consignee or agent that processed articles entered are a portion of articles exported for processing that are covered by a certificate of registration.
§ 10.10	Statement of cameraman, shipper, or other person identifying films and stating that they were exposed abroad and are shipped for use as newsreel of current events abroad.
§ 10.35(b)	Declaration by importer of a model of women's wearing apparel that the article will be used solely as a model, etc.
§ 10.35(d)	Requirement to mark for identification purposes imported models of women's wearing apparel.
§ 10.50	Declaration of American artist residing temporarily abroad in support of duty-free entry of a work of art.
§ 10.53 (a), (b)	Declaration in connection with the entry of antiques.
§ 10.54(b)	Certificate of manager or other responsible employee of the Gobelin or other factory or producer establishing the character of the Gobelin or other hand-woven tapestry in support of duty-free entry.
§ 10.56(f)	Declaration of owner or consignee that vegetable oil has been rendered permanently unfit for use as food.
§ 10.58(a)	Requirement as to marking of bolting cloth for milling purposes in support of duty-free entry.
§ 10.64a	Declaration for withdrawal of fuel from a Customs bonded warehouse to be laden as aircraft supplies.
§ 10.66(a)(2), (b)	Declaration of foreign shipper that merchandise was exported from the U.S. for temporary use at an exhibition and is being returned.
§ 10.70(a)	Declaration in connection with the entry of purebred animals for breeding purposes.
§ 10.72	Declaration in connection with the entry of horses or mules imported solely for slaughter.
§ 10.73	Certificate of ultimate consignee of cows being imported solely for dairy purposes in support of claim for reduced rate of duty.
§ 10.74(a)	Owners descriptive list of domestic animals driven across boundary for pasturage.

19 CFR section	Description
§ 10.74(b)	Declaration in connection with the return of domestic animals previously driven across boundary for pasturage.
§ 10.79	Declaration of master of taking vessel in support of duty-free entry of products of American fisheries.
§ 10.82(a)(1)	Certificate of person making withdrawal of salt used in curing fish taken by an American vessel.
§ 10.82(a)(2)	Certificate of master and at least one other person employed on vessel in connection with the withdrawal of salt used for curing fish.
§ 10.82(a)(3)	Certificate of at least two persons employed on shore in curing fish with salt.
§ 10.82(b)	Certificate of person employed on shore curing fish with salt.
§ 10.90(a)	Application of importer for the importation of master records and metal matrices.
§ 10.90(b)	Statement evidencing agreement between importer and manufacturer concerning the use of master records and metal matrices.
§ 10.90(d)	Declaration of importer as to use of master records and metal matrices.
§ 10.93	Record of receipt by manufacturer, processor or dealer who enters, withdraws, or receives wool or hair under bond.
§ 10.94	Records of manufacturers or processor with respect to products or substances resulting from wool or hair.
§ 10.95 (a), (c), (f)	Records of manufacturer, processor or dealer pertaining to enumerated articles of wool or hair delivered from his premises.
§ 10.95(b)	Declaration of manufacturer, processor or dealer pertaining to delivery of wool or hair.
§ 10.96	Reports of use or transfer of wool or hair in violation of bond.
§ 10.98(e)	Report of smelting or converting plant pertaining to the use of copper-bearing fluxing material.
§ 10.106	Declaration of importer in connection with wheat unfit for human consumption.
§ 10.108(b)	Statement in connection with entry of articles previously imported into U.S. with duty paid, exported under lease, and now being reimported.
§ 10.110	Certificate for strategic materials acquired by the Commodity Credit Corporation as result of barter or exchange of agricultural commodities or products.
§ 10.134	Declaration by importer of intended use of merchandise imported under actual use provisions of tariff schedules.

19 CFR section	Description
§ 12.99	Declaration by importer or consignee in support of a permitted entry of a switchblade knife.
§ 19.16	Various reporting requirements relating to the operation of cigar manufacturing warehouses.
§ 54.6(a)	Statement of importer that articles in chief value of metal are to be used in such a manner which renders them fit only for recovery of the metal content.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.6, Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, DC 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 4, 6, 10, 12, 19, AND 54

In general

Customs duties and inspection, Imports, Exports

Part 4
Cargo vessels, Reporting requirements, Vessels

Part 6
Airports

Part 10
Arts, Exports, Fisheries, Oil imports, Packaging and containers, Tobacco, Wildlife

Part 12
Imports

Part 19
Tobacco

Part 54
Metal

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Parts 4, 6, 10, 12, 19, and 54, Customs Regulations (19 CFR Parts 4, 6, 10, 12, 19, 54), as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103.

2. It is proposed to amend § 4.41(a) by removing the words "written application for permission to enter the wrecked cargo", and inserting, in their place, the words, "entry on Customs Form 7501".

PART 6—AIR COMMERCE REGULATIONS

1. The general authority citation for Part 6 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624, 49 U.S.C. 1474, 1509.

2. It is proposed to amend § 6.12(g) by removing the last sentence.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1623, 1624.

2. It is proposed to revise the heading and text of § 10.6 to read as follows:

§ 10.6 Shooks and staves; claim for duty exemption.

An importer, seeking an exemption from duty on account of boxes or barrels made from American shooks or staves, must make such claim on Customs Form 3311 at the time of filing the entry. Upon receipt, from the district director at the port of exportation of the shooks and staves, of corroboration that the records of expor-

tation do not conflict materially with such claim, the exemption may be allowed. If the claim for an exemption is disallowed in full or in part, the importer may file a request within 15 days of the date of the district director's notice to him of any disallowance, for referral of the question to the Commissioner of Customs for review.

3. It is proposed to amend § 10.9 by removing paragraphs (g) and (h) and redesignating paragraphs (i), (j), (k), and (l) as (g), (h), (i), and (j), respectively.

4. It is proposed to amend Part 10 by removing § 10.10 and marking it "Reserved". It is also proposed to amend Part 10 by removing footnote 8 to § 10.10.

5. It is proposed to amend § 10.35 by removing paragraphs (b) and (d), and redesignating paragraph (c) as (b).

6. It is proposed to amend Part 10 by removing § 10.50 and marking it "Reserved". It is also proposed to amend Part 10 by removing footnote 45 to § 10.50.

7. It is proposed to amend § 10.53 by removing paragraphs (a) and (b) and redesignating paragraphs (c), (d), (e), (f), (g), (h), and (i) as (a), (b), (c), (d), (e), (f), and (g), respectively. It is further proposed that Part 10 be amended by removing footnote 48 to § 10.53.

8. In redesignated §§ 10.53 (b) and (c), and phrase, "paragraph (g)" is removed and, "paragraph (e)" is inserted, in its place.

9. In redesignated § 10.53(e)(6), the phrase, "paragraphs (a), (b) and (c)" is removed and, "paragraph (a)" is inserted, in its place.

10. It is proposed to amend § 10.54 by removing the "(a)" in front of the first paragraph and by removing paragraph (b).

11. It is proposed to amend § 10.56(f) by placing a period after the word "denatured" and removing the remainder of the paragraph, including the form.

12. It is proposed to revise § 10.58(a) to read as follows:

§ 10.58 Bolting cloths; marking.

(a) As a prerequisite to the free entry of bolting cloth for milling purposes under item 357.25, Tariff Schedules of the United States, the cloth shall be indelibly marked from selvage to selvage at intervals of not more than 4 inches with the words "bolting cloth expressly for milling purposes" in block letters 3 inches in height. Bolting cloths composed of silk imported expressly for milling purposes shall be considered only such cloths as are suitable for and are used in the act of process of grading, screening, bolting, separating, classifying, or sifting dry materials, or dry materials mixed with water, if the water is merely a carrying medium.

* * * * * * *

13. It is proposed to amend Part 10 by removing footnote 55 to § 10.58.

14. It is proposed to amend Part 10 by removing § 10.64a and marking it "Reserved".

15. It is proposed to amend § 10.66 by removing subparagraph (a)(2) and by redesignating subparagraphs (a)(3) and (a)(4) as (a)(2) and (a)(3), respectively.

16. It is also proposed to amend § 10.66(b) by removing the last sentence.

17. It is proposed to amend § 10.70 by removing paragraph (a) and by redesignating paragraph (b) as (a) and revising the section heading and first sentence to read, as follows:

§ 10.70 Purebred animals for breeding purposes; certificate.

(a) In connection with the entry of purebred animals for breeding purposes under item 100.01, Tariff Schedules of the United States, no claim for free entry shall be allowed in liquidation of the entry until the district director has received from the Department of Agriculture a certificate that the animal is purebred of a recognized breed and duly registered in a book of record recognized by the Secretary of Agriculture for that breed. * * *

18. It is also proposed to amend § 10.70 by redesignating paragraph (c) as (b).

19. It is proposed to amend Part 10 by removing footnote 64 to § 10.70.

20. It is proposed to amend Part 10 by removing § 10.72 and marking it "Reserved." It is also proposed to amend Part 10 by removing footnote 66 to § 10.72.

21. It is proposed to amend Part 10 by removing § 10.73 and marking it "Reserved." It is also proposed to amend Part 10 by removing footnote 67 to § 10.73.

22. It is proposed to revise the heading and text of § 10.74 to read as follows:

§ 10.74 Animals straying across boundary for pasturage; offspring.

When domestic animals for which free entry is to be claimed under item 100.03, Tariff Schedules of the United States, have strayed across the boundary line, they may be returned; together with their offspring, without entry if brought back within 30 days; otherwise entry shall be required. The owner of any such animal shall report its return to the nearest Customs offices and hold it for such inspection and treatment as may be deemed necessary by a representative of the Agricultural Research Service of the Department of Agriculture and any such arrival found not to have been so reported or held shall be subject to seizure and forefeiture pursuant to 18 U.S.C. 545.

23. It is proposed to amend Part 10 by removing footnote 68 to § 10.74.

24. It is proposed to revise § 10.78(a) to read as follows:

§ 10.78 Entry.

(a) No entry shall be required for fish or other marine products taken on the high seas by vessels of the U.S. or by residents of the

U.S. in undocumented vessels owned in the U.S. when such fish or other products are brought into port by the taking vessel, or are transferred at sea to another fishing vessel of the same fleet and brought into port.

* * * * * * *

25. It is proposed to amend Part 10 by removing § 10.79 and marking it "Reserved."

26. It is proposed to amend Part 10 by removing § 10.82 and marking it "Reserved."

27. It is proposed to revise § 10.83(a) to read as follows:

§ 10.83 Bond; cancellation; extension.

(a) If it shall appear to the satisfaction of the district director holding the bond referred to in § 10.80, that the entire quantity of salt covered by the bond has been duly accounted for, either by having been used in curing fish or by the payment of duty, the district director may cancel the charges against the bond. The district director may require additional evidence in corroboration of the proof of use produced.

* * * * * * *

28. It is proposed to amend § 10.90 by removing paragraphs (a), (b), and (d) and by redesignating paragraphs (c), (e), (f), and (g) as (a), (b), (c), and (d), respectively.

29. It is proposed to amend Part 10 by removing footnote 81 to § 10.90.

30. It is also proposed to amend newly designated paragraph 10.90(d) by removing the phrase, "If and when the application is approved" and changing the word "entries" to "Entries".

31. It is proposed to amend Part 10 by removing §§ 10.93 and 10.94 and marking them "Reserved." It is also proposed to remove footnote 86 to § 10.94.

32. It is proposed to amend § 10.95 by removing paragraphs (a), (b), (c), and (f) and by redesignating paragraphs (d) and (e) as (a) and (b), respectively.

33. It is proposed to amend Part 10 by removing § 10.96 and marking it "Reserved". It is also proposed to remove footnote 87 to § 10.96.

34. It is proposed to amend § 10.98 by removing paragraph (e).

35. It is proposed to amend Part 10 by removing § 10.106 and marking it "Reserved."

36. It is proposed to amend § 10.108 by removing the "(a)" in front of paragraph (a), and by removing paragraph (b).

37. It is proposed to amend Part 10 by removing § 10.110 and marking it "Reserved." It is also proposed to remove footnote 103 to § 10.110.

38. It is proposed to amend § 10.134 by removing the words, "filing with the entry for consumption or for warehouse a declaration as to the intended use of the merchandise, or by".

39. It is proposed to revise § 10.136 to read as follows:

§ 10.136 Suspension of liquidation.

Liquidation of an entry covering merchandise pursuant to § 10.134, shall be suspended until proof of use is furnished or the 3-year period allowed for production thereof has expired.

40. It is proposed to amend § 10.139 by removing the phrase, "the declaration of intent required by § 10.134" and inserting, in its place, "an entry pursuant to § 10.134".

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 is revised to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624. §§ 12.105–12.109 also issued under 19 U.S.C. 2094. §§ 12.110–12.117 also issued under 7 U.S.C. 136 *et seq.* §§ 12.118–12.127 also issued under 15 U.S.C. 2601 *et seq.;*

§ 12.1 also issued under 21 U.S.C. 371(b);
§ 12.3 also issued under 7 U.S.C. 135h, 21 U.S.C. 381(b);
§ 12.4 also issued under 21 U.S.C. 381(b);
§ 12.6 also issued under 7 U.S.C. 1854, 19 U.S.C. 1303;
§ 12.10 also issued under 7 U.S.C. 151–162;
§ 12.15 also issued under 19 U.S.C. 1558;
§ 12.16 also issued under 7 U.S.C. 1592(b);
§§ 12.21–12.23 also issued under 42 U.S.C. 262;
§ 12.26 also issued under 18 U.S.C. 42;
§ 12.28 also issued under 18 U.S.C. 42, 19 U.S.C. 1527;
§ 12.34 also issued under 19 U.S.C. 1202 (Sch. 7, 9A, hdnote 1);
§ 12.37 also issued under 27 U.S.C. 203;
§ 12.39 also issued under 19 U.S.C. 1337, 1623;
§§ 12.40–12.41 also issued under 19 U.S.C. 1305;
§§ 12.42–12.44 also issued under 19 U.S.C. 1307;
§ 12.73 also issued under 19 U.S.C. 1484, 42 U.S.C. 7522, 7601;
§ 12.85 also issued under 19 U.S.C. 1623, 46 U.S.C. 4302, 4306, 4310;
§§ 12.95–12.103 also issued under 18 U.S.C. 545.

2. All other statutory authority cited at the end of various sections in Part 12 is removed.

3. It is proposed to amend Part 12 by removing § 12.99 and marking it "Reserved."

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for Part 19 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624.

2. It is proposed to amend Part 19 by removing § 19.16 and marking it "Reserved."

PART 54—CERTAIN IMPORTATIONS TEMPORARILY FREE OF DUTY

1. The authority citation for Part 54 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624.

2. It is proposed to amend § 54.6 by removing paragraph (a) and by redesignating paragraphs (b), (c), and (d) as (a), (b), and (c), respectively.

3. It is also proposed that in redesignated paragraph (a), the phrase "paragraph (c)" be removed and "paragraph (b)" inserted, in its place.

4. It is proposed to amend Part 54 by removing footnote 1 to § 54.6.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: December 12, 1985.

DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 26, 1985 (50 FR 52799)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-1163)

SURFACE TECHNOLOGY, INC., PETITIONER *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, RESPONDENT

(Appeal No. 85-1862)

ELEKTROSCHMELZWERK KEMPTEN, GMBH, ET AL., PETITIONERS *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, RESPONDENT

(Appeal No. 85-1863)

W. SCHLAFHORST & CO., ET AL., PETITIONERS *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, RESPONDENT

Kenneth J. Burchfiel, Sughrue, Mion, Zinn, Macpeak & Seas, of Washington, D.C., argued for appellant. With him on the brief was *Thomas J. Macpeak,* P.C. *Italo H. Ablondi, F. David Foster* and *Sturgis M. Sobin,* Ablondi & Foster, P.C., of Washington, D.C., of counsel.

Judith M. Czako, Office of the General Counsel, United States International Trade Commission, of Washington, D.C., argued for appellee ITC. With her on the brief were *Lyn M. Schlitt,* General Counsel and *Michael P. Mabile,* Assistant General Counsel.

Donald D. Evenson, Barnes & Thornburg, of Washington, D.C., argued for intervenor W. Schlafhorst & Co. With him on the brief was *Ryan M. Fountain. Dalbert U. Shefte,* Richards, Shefte & Pinckney, of Charlotte, North Carolina and *Donald E. Knebel,* Barnes & Thornburg, of Indianapolis, Indiana, of counsel.

Herbert I. Cantor, Cantor & Lessler, of Bethesda, Maryland, argued for intervenor Elektroschmelzwerk. *Milton J. Wayne* and *Richard M. Goldberg,* Burgess, Ryan & Wayne, of New York, New York, of counsel.

Appealed from: United States International Trade Commission.

(Appeal No. 85-1163)

SURFACE TECHNOLOGY, INC., PETITIONER *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, RESPONDENT

(Appeal No. 85-1862)

ELEKTROSCHMELZWERK KEMPTEN, GMBH, ET AL., PETITIONERS *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, RESPONDENT

(Appeal No. 85-1863)

W. SCHLAFHORST & CO., ET AL., PETITIONERS *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, RESPONDENT

Before FRIEDMAN, RICH, and DAVIS, *Circuit Judges.*

ORDER [1]

Surface Technology, Inc. (STI) filed a complaint alleging unfair acts and methods of competition in violation of § 337 of the Tariff Act of 1930 before the International Trade Commission. Elektroschmelzwerk Kempten, GMBH (ESK) and W. Schlafhorst and Co. (Schlafhorst) participated as respondents before the ITC. Ultimately the Commission found no violation of § 337. All three parties have filed appeals from the ITC's determination.

Pursuant to 19 U.S.C. § 1337(c), a party adversely affected by a final determination of the ITC may appeal to this court.

In view of the ITC's finding of no violation of § 337 by ESK and Schlafhorst, these parties are without standing to appeal. *American Telephone and Telegraph Company* v. *U.S. International Trade Commission,* 626 F.2d 841 (CCPA 1980). Accordingly, their appeals will be dismissed.

ESK and Schlafhorst are entitled to participate in STI's appeal before this court in which they may raise any claim in support of the ITC's determination of no violation. *Krupp International, Inc.* v. *U.S. International Trade Commission,* 626 F.2d 844 (CCPA 1980). This court, however, will not review those portions of the presiding officer's determinations on which the Commission has taken no position. *Beloit* v. *Valmet Oy,* 742 F.2d 1454 (Fed. Cir. 1984). Accordingly,

It is ordered:

(1) ITC's motions to dismiss cross-appeal Nos. 85-1862 and 85-1863 are granted.

(2) ESK's and Schlafhorst's motions to intervene as appellees in appeal No. 85-1163 are granted.

---

[1] This Order, originally issued on April 10, 1985, as an unpublished order, is reissued for publication, with correction of typographical errors.

(3) ESK's motion to consolidate appeal Nos. 85-1862 with 85-1863 and STI's motions to intervene in appeal Nos. 85-1862 and 85-1863 are rendered moot.

(4) The Clerk shall set a revised briefing schedule.

FOR THE COURT

Dated: December 5, 1985.

GILES S. RICH,
Circuit Judge.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 85-128)

ASSOCIATION OF FOOD INDUSTRIES, INC. (PISTACHIO GROUP), ZENOBIA COMPANY, J.F. BRAUN AND SONS, INC., AMERICAN PISTACHIO CORPORATION, SETTON INTERNATIONAL FOOD, INC., ACE PECAN COMPANY, JOHN B. SANFILIPPIO AND SONS COMPANY, INC., PLAINTIFFS *v.* WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE, DEFENDANT, AND CALIFORNIA PISTACHIO COMMISSION, ET AL., DEFENDANT-INTERVENORS

Court No. 85-11-01578

Before WATSON, *Judge.*

Memorandum Opinion and Order

(Decided December 17, 1985)

Olsson and Frank, P.C., (Richard L. Frank, and *David F. Weeda* on the brief), for the plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, (*Platte B. Moring III*), for the defendant.

Busby, Rehm, and Leonard P.C., (Will E. Leonard, Jonathan Hemenway Glazier and *Munford Page Hall II* on the brief), for the defendant-intervenors.

WATSON, *Judge:* The plaintiff importers and processors of pistachio nuts brought this action for declaratory and injunctive relief against a ruling of the Customs Service, the effect of which would be that the containers of pistachio nuts which they sell must be marked to show the country of origin of the nuts.

The ruling in question, T.D. 85-158, was published on September 18, 1985, (50 Fed. Reg. 37842) and determined that roasting and other treatment of imported pistachio nuts did not result in their substantial transformation. Substantial transformation is the standard used by the Customs Service to determine whether articles are exempt from the general requirement of Section 304 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1304) that all articles of foreign origin be marked to indicate the country of origin.

The effective date of the ruling in question was postponed for two months and is now scheduled to go into effect on December 18,

1985 (50 Fed. Reg. 42683, October 22, 1985). Further postponement of the effective date was denied by the Commissioner of Customs on November 8, 1985.

On November 12, 1985 plaintiffs commenced this action, which, together with the government's cross-motion to dismiss, has been given an expedited schedule of briefing. A hearing on all pending matters was held on December 12, 1985.

As a result, the court has determined that the action does not satisfy the jurisdictional requirements of 19 U.S.C. § 1581(h), the only jurisdictional basis available to plaintiffs for judicial review prior to the importation of the affected articles.

The provision of 19 U.S.C. § 1581(h) reads as follows:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

The action described in 19 U.S.C. § 1581(h) is also controlled by the terms of 19 U.S.C. §§ 2639(b) and 2643(c)(4) which read as follows:

> 19 U.S.C. § 2639
>
> * * * * * * *
>
> (b) In any civil action described in section 1581(h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence.
>
> 19 U.S.C. § 2643(c)
>
> * * * * * * *
>
> (4) In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

It is clear that this dispute centers on the consequences of a ruling, the effect of which is sufficiently certain to represent a genuine legal dispute. This disposes of the government's argument that the matter is not yet sufficiently related to a specific import transaction to obtain jurisdiction under subsection (h). In this case, the consequences of the ruling will be felt by all importations of pistachios made after December 18, 1985.

On the question of the ripeness of the dispute, the case of *Pagoda Trading Co.* v. *United States,* 6 CIT 296, 577 F. Supp. 22 (1983) is easily distinguished. In that unsuccessful attempt to obtain pre-importation judicial review, it was not clear that the classification

ruling involved would apply to the articles which plaintiff was going to import. Here there is no such doubt; the legal dispute is sufficiently concrete, and it is the failure to show irreparable harm which is the impediment to jurisdiction.

The general appropriateness of 19 U.S.C. § 1581(h) also disposes of plaintiff's attempt to assert an alternative jurisdictional basis under 19 U.S.C. § 1581(i), the residual jurisdiction of this court. It is plain that an action designed to obtain judicial review of a ruling prior to importation cannot avoid the special provision of § 1581(h) by stating a cause of action under the court's residual jurisdiction. No claimant would willingly choose the strictures of 1581(h) if they could be avoided by bringing the action under 1581(i), and the former provision would become a dead letter. See generally, *United States* v. *Uniroyal, Inc.*, 69 CCPA 179; 687 F.2d 467 (1982).

The fact remains that for those who consider themselves sufficiently aggrieved by rulings to seek judicial review prior to importation of the articles involved, 19 U.S.C. § 1581(h) is the proper jurisdictional vehicle. The question then becomes whether the harm of the ruling is sufficient to justify an exception to the normal post-importation procedures for obtaining relief.

In this action the harm is alleged to be the cost of conforming to the country-of-origin labeling requirements. The court has carefully examined the affidavits submitted by the parties on this point. It is the considered judgment of the court that the costs of conforming to the ruling have not been shown to be of such magnitude as to constitute a clear threat to the profitable continuation of a prudently operated business. The court has not been persuaded that the use of adhesive labels to add the country of origin is an unacceptable or impractical interim measure. This method would allow the use of current label inventories until they are depleted.

In any event, even the prospect of having to print completely new labels, was not sufficiently connected to injury to the overall financial health of the plaintiffs to demonstrate the requisite harm.

In sum, the court has not been persuaded that the normal post-importation methods of obtaining judicial relief will be inadequate to deal with the grievances raised by plaintiffs.

For these reasons the court decides to grant the government's cross-motion to dismiss the action.

In this disposition of the action, the court does not reach the merits of plaintiffs' claims that the ruling was contrary to law, arbitrary, capricious and discriminatory.

For the reasons given above it is hereby

Ordered that defendant's motion to dismiss be, and the same hereby is, granted.

ERRATA

FRANK E. ALLEN *v.* DONALD R. REGAN, SECRETARY OF THE TREASURY, WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, AND UNITED STATES CUSTOMS SERVICE (Court No. 84-11-01655, Slip Op. 85-126)

Citation beginning on line 11 and ending on line 12 of page 6 should read as follows: 19 U.S.C. § 1641(e)(1) (1982 & West Supp. 1985).

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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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U.S. Customs Service

Treasury Decisions

(T.D. 86-2)

Revocation of Harbor Weighers Incorporated as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Harbor Weighers Incorporated, P.O. Box 485, Wilmington, California 90748, was approved to gauge imported petroleum and petroleum products on March 23, 1977. Notice of the approval was published as T.D. 77-97. Harbor Weighers recently informed Customs that it will discontinue its services as a public gauger.

Accordingly, the approval of Harbor Weighers Incorporated to gauge imported petroleum and petroleum products in all Customs Districts is revoked.

EFFECTIVE DATE: December 31, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington D.C. 20229 (202-566-2446).

Dated: December 30, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 86-3)

Approval of Captain G. McKay & Sons Marine, Inc., to Gauge Imported Petroleum and Petroleum Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Captain G. McKay & Sons Marine, Inc., 9 Park Lane, Galveston, Texas 77551, has applied to Customs for approval to

gauge imported petroleum and petroleum products. It has been determined that Captain G. McKay & Sons Marine, Inc., meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of Captain G. McKay & Sons Marine, Inc., to gauge imported petroleum and petroleum products in the Customs Districts of Houston, Texas, Port Arthur, Texas, and Laredo, Texas, is approved.

EFFECTIVE DATE: January 1, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington D.C. 20229 (202-566-2446).

Dated: December 30, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

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U.S. Customs Service

Treasury Decisions

(T.D. 86-4)

Revocation of Lowell L. Glenn (All-Glenn's, Inc.) as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Lowell L. Glenn (All-Glenn's, Inc.) of 9952 Spinnaker Drive, Huntington Beach, California 92646, was approved to gauge imported petroleum and petroluem products in all Customs districts on May 9, 1979. Notice of approval was published as T.D. 79-140. One of the conditions which each public gauger must comply with in order to be approved and to keep approval in force is to notify Customs, in writing, within 60 days of any change in name, address, ownership, or financial condition. After exhausting all feasible means to establish contact with Mr. Glenn, Customs has been unable to locate him or even to determine if he is still in business.

Accordingly, the approval of Lowell L. Glenn (All-Glenn's, Inc.) to gauge imported petroleum and petroleum products in all Customs Districts is revoked.

EFFECTIVE DATE: December 31, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

DATED: December 31, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 86-5)

Recordation of Trade Name: "UNITEK CORPORATION"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On June 6, 1985, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "UNITEK CORPORATION" was published in the Federal Register (50 FR 23866). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in opposition to the recordation and received not later than August 5, 1985.

Unipacific Corporation, a California corporation, commented in opposition to recordation of the trade name, citing concern that "UNITEK CORPORATION" is confusingly similar to Unipacific Corporation's "UNITECH" trademark registered on the Principal Register of the U.S. Patent and Trademark Office (Reg. No. 1,222,480), used for consumer electronic equipment, namely, portable stereo radios, mini-portable cassette players, FM Converter cassette modules, stereo headphones and televisions.

We find that the two trademarks lawfully co-exist. Therefore, genuine articles bearing the "UNITECH" trademark shall not be seized or detained as confusingly similar to "UNITEK CORPORATION."

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "UNITEK CORPORATION" is recorded as the trade name used by Unitek Corporation, a corporation organized under the laws of the State of California, located at 2724 South Peck Road, Monrovia, California 91016. The trade name is used in connection with the developing and marketing of products manufactured in the United States for orthodontists, endodontists and other dental specialists, as well as for general dentists and dental laboratories.

DATE: January 9, 1986.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

DATED: January 2, 1986.

EDWARD T. ROSSE,
Acting Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, January 9, 1986 (51 FR 1057)]

(T.D. 86-6)

Approval of Halcyon Transport Corporation to Gauge Imported Petroleum and Petroleum Products in Additional Customs Districts

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval to gauge in additional districts.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Halcyon Transport Corporation was approved to gauge imported petroleum and petroleum products in the Houston District on February 10, 1984, under T.D. 84-44. Recently, Halcyon Transport Corporation notified Customs that its area of operations had expanded, and requested that its approval be modified to include cities within the Customs Districts of Port Arthur, Texas, and New Orleans, Louisiana. Since Halcyon Transport Corporation has complied with all requirements, Customs is granting this request.

Accordingly, Halcyon Transport Corporation is approved to gauge imported petroleum and petroleum products in the Customs Districts of Houston, Texas, Port Arthur, Texas, and New Orleans, Louisiana.

EFFECTIVE DATE: January 6, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229. (202-566-2446).

DATED: January 6, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 86-7)

This notice limits the decision in Appeal No. 85-670, decided June 14, 1985, holding that certain sewing machine needles may be entered free of duty under the Generalized System of Preferences.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., December 20, 1985.

In *The Torrington Co.* v. *United States*, —— CAFC ——, No. 85-670 (Fed. Cir. June 14, 1985), the Court of Appeals for the Federal Circuit affirmed a Court of International Trade decision holding that certain industrial sewing machine needles made in Portugal

are entitled to duty-free entry under the Generalized System of Preferences. The court held that the raw material imported into Portugal, wire, was substantially transformed into new and different articles of commerce, swaged needle blanks, and that the swaged needle blanks were then substantially transformed into other new and different articles of commerce, sewing machine needles. As a result, the value of the swaged needle blanks was includable in the value of the materials produced in the beneficiary developing country (Portugal) for purposes of section 503(b)(2) of the Trade Act of 1974, 19 U.S.C. 2463(b)(2). Since the sum of the value of the materials produced in Portugal plus the direct costs of processing operations performed in Portugal therefore amounted to more than 35 percent of the appraised value of the imported sewing machine needles, duty-free treatment was applied.

The United States Customs Service disagrees with the court's determination that the process whereby sewing machine needles were produced from the swaged needle blanks constituted a substantial transformation into new and different articles of commerce. The parties to the case stipulated that in the form of swaged needle blanks, the articles were already dedicated for use solely as sewing machine needles with a predetermined blade diameter, and that in the majority of cases, a particular type of swaged needle blank became only a single particular type of needle. Slip op. at 16. Thus, the articles already possessed their inherent character and use as swaged needle blanks; they did not acquire those qualities as a result of the simple refinement made to them once they were in blank form. Therefore, no substantial transformation occurred, so the value of the swaged needle blanks should not have been includable in the value of the materials produced in Portugal for purposes of meeting the 35 percent value-content requirement of the Generalized System of Preferences.

Accordingly, the *Torrington* decision shall be applied only in those instances in which the factual situation conforms to the one on which the decision is based.

JOHN P. SIMPSON,
for Commissioner of Customs.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-2473)

UNION MANUFACTURING CO., INC., APPELLANT-RESPONDENT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE-PETITIONER

Paul T. Meiklejohn and *John M. Calimafde*, Hopgood, Calimafde, Kabil, Blaustein & Judlowe, of New York, New York, represented appellant.

William E. Perry, *Lyn Schlitt* and *Michael P. Mabile*, Office of the General Counsel, United States International Trade Commission, of Washington, D.C., represented appellees.

Appealed from: United States International Trade Commission.

(Appeal No. 85-2473)

UNION MANUFACTURING CO., INC., APPELLANT-RESPONDENT, *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE-PETITIONER, on motion to dismiss

Before MARKEY, *Chief Judge*, NEWMAN and BISSELL, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

ORDER

The motion of the United States International Trade Commission (ITC) to dismiss this appeal for lack of jurisdiction is denied.

BACKGROUND

Union Manufacturing Co. (Union) asserts that it has for five years been seeking relief from the importation from Korea of confusingly similar and often-defective copies of its vacuum bottles. On October 15, 1981 the ITC, pursuant to 19 U.S.C. § 1337, instituted an investigation based on a complaint filed by Union. Twelve Korean firms, including Han Baek Trading Co., Ltd. (Han Baek), were named as respondents to the investigation. Investigation No. 37-TA-108, *Certain Vacuum Bottles and Components Thereof*, 45 Fed. Reg. 53,543 (1981).

On August 3, 1982 the Commission's administrative law judge (ALJ) issued a recommended determination that the named respondents had violated section 337 of the Tariff Act of 1930. This determination was based on findings of common law trademark infringement and false designation of origin in connection with the importation into and sale within the United States of the vacuum bottles, the effect or tendency of which was to destroy or substantially injure an efficiently and economically operated United States industry.

The ITC rejected the ALJ's recommended determination in a Notice of Termination published on October 29, 1982, *In re Certain Vacuum Bottles and Components Thereof,* 219 USPQ 637 (U.S. Int'l Trade Comm'n 1982), on the basis that Union had not proven by survey evidence that its vacuum bottle design had acquired a secondary meaning. Union filed a Petition for Reconsideration on November 11, 1982, and a Motion for Relief from the ITC's Order on March 23, 1983, both of which were denied by the Commission on May 24, 1983.

Based on new evidence of consumer confusion showing, *inter alia,* that more than eighty additional imported vacuum bottles were mistakenly returned to Union because they were defective, Union subsequently requested a new investigation. The ITC denied Union's request on February 9, 1984, stating that "eighty returned vacuum bottles is at most evidence that 80 people associate the design of the vacuum bottle with Union", and not sufficient proof of secondary meaning.

On learning of the first ITC action, Union filed suit in October 1982 against Han Baek in the Southern District of New York, alleging false designation of origin and trademark infringement pursuant to section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). On June 7, 1984, a jury found for Union on the false designation of origin claim and for Han Baek on the trademark infringement claim. *Union Mfg. Co., Inc.* v. *Han Baek Trading Co.,* 224 USPQ 228 (S.D.N.Y. 1984). On July 10, 1984 the district court entered judgment enjoining Han Baek from importing the offending vacuum bottles into the United States and further ordered Han Baek to recall all infringing bottles sold during the preceding year. (Union advises that Han Baek did not comply with this order or with an order of contempt.)

Han Baek appealed to the U.S. Court of Appeals for the Second Circuit. On April 4, 1985 the Second Circuit vacated the district court's judgment on the false designation of origin claim, on the ground that the jury had been improperly instructed. *Union Mfg. Co., Inc.* v. *Han Baek Trading Co., Ltd.,* 763 F.2d 42 (corrected opinion), 226 USPQ 12 (uncorrected opinion) (2d Cir. 1985).

The Second Circuit also held that ITC decisions in trademark and unfair competition cases are to be accorded *res judicata* effect, although that effect would be applied only prospectively to Union.

Id. at 44-46, 226 USPQ at 13-15. The Second Circuit observed that Union had not appealed the adverse ITC decisions at the time they were made, and suggested that Union appeal the ITC decisions to this court, stating in its corrected opinion that:

> [S]ince at the time of that [ITC] judgment there was no statutory time limit on appeals from ITC determinations, *SSIH Equipment S.A.* v. *United States International Trade Commission*, 673 F.2d 1387, 1390-91 (C.C.P.A. 1982), Union might still be able to obtain review in the Federal Circuit unless that Court concludes either that a recently enacted statute of limitations applies to bar an appeal at this time, or that an appeal is barred by laches * * *. Under these circumstances, we will direct the District Court to stay further proceedings for thirty days to afford Union an oportunity to pursue an appeal of the ITC decision to the Federal Circuit, and, if an appeal is promptly sought, until the appeal is decided. If Union fails to seek review in the Federal Circuit within thirty days or if the Federal Circuit adjudicates the appeal on its merits, the District Court shall dismiss the complaint. If, on the other hand, the appeal, though taken within thirty days of this decision, is not adjudicated on its merits, then the District Court shall vacate the stay and retry the case.

Id. at 46 (footnote omitted).

Union duly filed the suggested appeal in this court within thirty days of the Second Circuit decision. The ITC now moves to dismiss the appeal as untimely, relying on 19 U.S.C. § 1337(c) 1984)[1] which provides in relevant part:

> Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of Title 5.

The ITC contends that the Commission determination was final on either October 29, 1982 or May 24, 1983, and that Union is barred by the sixty day statutory time limit.

Union argues in opposition to the motion that this statutory time limit was not enacted until 1984 and does not have retroactive effect. Union asserts that it should not be deprived of its appellate rights when the statute itself is silent on the point, and that the interest of justice requires that doubt be resolved in favor of permitting it to appeal. Union argues that its appeal is in accordance with the decision of the Second Circuit, that it had no reason to appeal earlier, and that acceptance of the appeal would implement the request of the Second Circuit and facilitate resolution of this long-standing matter.

---

[1] Technical Amendments to the Federal Courts Improvement Act of 1982, Pub. L. No. 98-620, § 413, 98 Stat. 3335, 3362 (1984).

ANALYSIS

I

By the Customs Court Act of 1980 Congress deleted the sixty day time limit for appeals from final determinations of the ITC.[2] In *SSIH Equipment S.A.* v. *U.S. Int'l Trade Comm'n,* 673 F.2d 1387, 1391, 213 USPQ 529, 532 (CCPA 1982), the Court of Customs and Patent Appeals held that the statute must be applied in accordance with its terms, and therefore that "there is no fixed time limit on appeals from final determinations of the Commission".

Thus no statutory time limit for appeals was in effect at the time of the ITC's denial of Union's requests for relief. The sixty day limit was added to 19 U.S.C. § 1337(c) by amendment enacted on November 11, 1984. At that date Union had received a favorable jury verdict in the district court, and Han Baek's appeal to the Second Circuit was pending.

The statute is silent on the intended effect of the amendment on unappealed ITC decisions issued prior to November 11, 1984, and it is silent as to its effective date. The legislative history sheds no light on this question, although it plainly states Congress' desire to reinsert "the original 60 day time-period for taking an appeal from a determination of the International Trade Commission". H.R. Rep. No. 98-619, 98th Cong., 2d Sess. 1, 4, *reprinted in* 1984 U.S. Code Cong. & Ad. News 5708, 5796.

The ITC argues that Union's right to appeal the ITC's determinations was extinguished no later than sixty days after November 11, 1984. It argues that under the principle of *Sohn* v. *Waterson,* 84 U.S. (17 Wall.) 596, 600 (1873), the limitation for previously accrued actions runs from the effective date of the later-enacted statute. Although the statute here is silent as to its effective date, the ITC argues that it is the date of enactment.

The *Sohn* rule has often been followed, as a modification of the general rule that statutes that imposed limits where none had existed should be construed only prospectively, unless the statutory language is specifically to the contrary or if there is a necessary implication to contrary effect. *Harvey* v. *Tyler,* 69 U.S. (2 Wall.) 328, 347 (1864).

Subsequent decisions of the Supreme Court have made clear that neither rule need be mechanically applied. The Court has frequently affirmed the power of the legislature to pass statutes of limitations for periods less than those prescribed at the time a cause of action arose, *see, e.g., Koshkonong* v. *Burton,* 104 U.S. 668, 675 (1881), but the Court has consistently emphasized that any shortened time period must be

> subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by

[2] Customs Court Act of 1980, Pub. L. No. 96-417, § 604, 94 Stat. 1727, 1744 (1980).

> the new law for the commencement of an action before the bar takes effect.

In *In re Brown,* 135 U.S. 701, 707 (1890), the Court elaborated upon the requirement that the shortened time period be "reasonable", noting:

> What would be reasonable in one class of cases would be entirely unreasonable in another.
>
> It is necessary, therefore, to look at the nature and circumstances of the case before us, and of the class of cases to which it belongs.

Again in *Wilson* v. *Iseminger,* 185 U.S. 55, 63 (1902), the Court stated that the time allowed cannot be "manifestly so insufficient that the statute becomes a denial of justice". *See also Terry* v. *Anderson,* 95 U.S. 628, 633 (1877) ("the question is one of reasonableness" and "for what is reasonable in a particular case depends upon its particular facts").

The ITC asserts that our decision is controlled by *Bradley* v. *School Board of Richmond,* 416 U.S. 696, 715 (1974), that held "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect". *Bradley* did not involve the retroactive application of a statute of limitations but rather the applicability of a new attorneys fee statute enacted while a case was pending before the Court of Appeals.

The Court was careful to state that its decision in *Bradley* did not "purport[] to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary", and that exceptions " 'had been made to prevent manifest injustice,' citing *Greene* v. *United States,* 376 U.S. 149 (1964)". *Id.* at 715, 716 (footnote omitted). When the statute is silent, the courts may determine the reasonableness of applying new statutes of limitations to the specific circumstances involved. In the case before us the statute is silent as to both existing appeal rights and effective date. In this statutory silence, we are not required to adopt an inflexible interpretation that extinguishes all preexisting opportunities for appeal, whatever the circumstances.

We interpret the silence of Congress as intending that a just transition shall ensue. In implementation of the tradition of enabling judicial review when feasible, we hold that Union's procedure was not unreasonable under the circumstances, and that its appeal is not barred by the statute.

We therefore consider whether Union's appeal is barred by laches. As dicussed *supra,* Union was proceeding with a jury trial before the United States district court. In reliance on the statute then in effect and reinforced by the decision in *SSIH,* Union was subject to no statutory time limit within which to appeal the ITC's 1982 and 1983 determinations. In February 1984 the ITC denied

Union's request for a new investigation, and in June 1984 the jury found in Union's favor on its section 43(a) claim; Han Baek was enjoined and held in contempt. When the 60-day limit was enacted on November 11, 1984, and on the date 60 days thereafter that the ITC says was Union's last chance to appeal, the Second Circuit had not decided the appeal from the jury verdict.

The Second Circuit recognized the possibility that this court would accept Union's appeal as timely. The ITC has not argued that it was prejudiced by Union's delay in filing this appeal. *See Leinoff* v. *Louis Milona & Sons, Inc.*, 726 F.2d 734, 741, 220 USPQ 845, 850 (Fed. Cir. 1984). In view of all the circumstances, we conclude that this action is not barred by laches.

II

The ITC agrees that its October 29, 1982 and May 24, 1983 adverse decisions are final determinations. The ITC argues, however, that the February 9, 1984 decision is not a final determination under subsection (d), (e), or (f) of section 1337 and therefore is not appealable pursuant to § 1337(c). The ITC moves dismissal of that portion of the appeal.

We deny this motion, without prejudice to its renewal at argument on the merits. From the limited record before us, it appears that the facts are closely related. We think it premature to bar any requisite review of ancillary material. *Refractarios Monterrey, S.A.* v. *Ferro Corp.*, 606 F.2d 966, 970 n.10, 203 USPQ 568, 572 n.10 (CCPA 1979), *cert. denied*, 445 U.S. 943, 205 USPQ 488 (1980). *See also American Telephone and Telegraph Co.* v. *U.S. Int'l Trade Comm'n*, 626 F.2d 841, 842, 206 USPQ 222, 223 (CCPA 1980) ("court will consider evidentiary matters associated with statutory final determinations"). In *SSIH*, 673 F.2d at 1389-90, 213 USPQ at 530-32, the CCPA held that the denial of a motion to reopen the record to consider new evidence is appealable. To the extent that the denial of a reinvestigation is related to the prior final determination on appeal, it is premature for us to decide whether the interests of justice and of economy of litigation are served if the February 9, 1984 ITC decision is insulated from all scrutiny.

Accordingly, IT IS ORDERED:

(1) Petitioner's motion to dismiss this appeal as untimely is denied.

(2) Petitioner's motion to dismiss that portion of the appeal concerning the February 9, 1984 decision of the ITC is denied without prejudice.

(3) Appellant's brief is due 60 days from the date of its receipt of this Order.

DATED: December 17, 1985.
For the Court:

PAULINE NEWMAN,
Circuit Judge.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 85-129)

VICTOR A. CAVAZOS, A/C CONSTRUCTIONES PROTEXA, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-11-01600

Before: RE, *Chief Judge.*

Memorandum Opinion and Order

[Defendant's motion to dismiss granted; action dismissed.]

(Decided December 27, 1985)

Stein Shostak Shostak & O'Hara (Marjorie M. Shostak), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Veronica A. Perry*), for the defendant.

RE, *Chief Judge*: In this action, the plaintiff, Victor A. Cavazos, challenges the refusal of the Customs Service to reliquidate certain tractors and parts entered at the port of Laredo, Texas. The Customs Service classified the merchandise as "[t]ractors * * * whether or not equipped with power take-offs, winches, or pulleys, and parts of such tractors: other," under item 692.3522, TSUS. Plaintiff contests this classification, and contends that the merchandise is entitled to be entered duty-free under item 800.0035, TSUS, as "[p]roducts of the United States when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad."

Pursuant to Rule 12(b)(5) of the Rules of this Court, the defendant has moved to dismiss the action for failure to state a claim upon which relief may be granted. Plaintiff opposes the motion, and asks that the matter be heard on the merits.

Since plaintiff has failed to state a claim upon which relief may be granted, the action is dismissed.

On August 8, 1980, plaintiff, the importer of record, received at the port of Laredo, Texas, a shipment of merchandise, which was described on the customs invoices as "tractors and parts thereof."

On the consumption entry form, plaintiff sought duty-free treatment of the tractors and parts under item 800.0035 as "American goods returned." The Customs Service did not grant duty-free treatment, and classified the merchandise under item 692.3522, TSUS, as tractors and parts thereof, and liquidated the entry on December 29, 1980.

On February 17, 1981, plaintiff timely filed a protest of the classification. The protest was denied by the Customs Service on March 30, 1981. Thereafter, in a letter received by the District Director of Customs on June 4, 1981, plaintiff requested reliquidation of the merchandise as "American goods returned." In support of this request, plaintiff submitted two manufacturer's affidavits, which declared that the cylinder brackets of the tractors were manufactured in the United States. The District Director returned this letter because plaintiff had not specified under which section of law or regulation the relief was being requested. Plaintiff resubmitted the affidavits on June 26, 1981, and requested reliquidation "under 520(c) of the Customs Regulations." On April 6, 1982, Customs denied plaintiff's request, and plaintiff thereafter filed this action.

The plaintiff contends that Customs made a mistake of fact that is correctable under section 520(c)(1) of the Tariff Act of 1930, 19 U.S.C. § 1520(c)(1) (1982).

Section 514 of the Tariff Act of 1930, 19 U.S.C. § 1514 (1982 & West Supp. 1985), sets forth the proper procedure for an importer to protest the classification when the importer believes that the Customs Service has misinterpreted the applicable law, and has improperly classified the imported merchandise. In addition, Customs may reliquidate an entry to correct a mistake of fact, clerical error, or other inadvertence which has caused an error in liquidation. Tariff Act of 1930 § 520(c), 19 U.S.C. § 1520(c). Section 520(c) provides, in part:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, * * * reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction.

19 U.S.C. § 1520(c)(1) (1982).

For the purposes of section 520(c), a mistake of fact has been defined as "a mistake which takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist." *C.J. Tower & Sons* v. *United States*, 68 Cust.

Ct. 17, 22, C.D. 4327, 336 F. Supp. 1395, 1399 (1972) *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974).

In this case, plaintiff alleges that "duty was assessed on the merchandise * * * because of a mistake of fact, i.e., the Customs officials believed that the merchandise did not consist of products of the United States returned after having been exported, without having been advanced in value or improved in condition." Plaintiff's conception of mistake of fact, however, is without basis in law, and cannot support this action.

It is well established that a determination by the Customs Service that merchandise is covered by a certain provision of the TSUS is a conclusion of law. *See, e.g., Mattel, Inc.* v. *United States*, 72 Cust. Ct. 257, 262, C.D. 4547, 377 F. Supp. 955, 960 (1974); *Fibrous Glass Products* v. *United States*, 63 Cust. Ct. 62, 65, C.D. 3874 (1969), *appeal dismissed*, 57 CCPA 141 (1970). Therefore, an erroneous classification of imported merchandise is not remediable as a mistake of fact under section 520(c). *Mattel, Inc., supra*, 72 Cust. Ct. at 262, 377 F. Supp. at 960. The courts have consistently held that section 520(c)(1) may only be used to correct mistakes of fact or inadvertence, and may not be used to rectify allegedly incorrect interpretations of law. *Computime, Inc.* v. *United States*, 9 CIT ——, Slip Op. 85-115, at 5 (Nov. 1, 1985); *see also, Hambro Automotive Corp.* v. *United States*, 66 CCPA 113, 120, C.A.D. 1231, 603 F.2d 850, 855 (1979); *PPG Industries, Inc.* v. *United States*, 7 CIT 118, Slip Op. 84-27, at 9 (Mar. 28, 1984). Plaintiff seeks to challenge the classification of the imported merchandise. This, however, is an issue of law not remediable by section 520(c). "Section 520(c)(1) is 'not an alternative to the normal liquidation-protest method of obtaining review,' but rather affords 'limited relief' where an unnoticed or unintentional error has been committed." *Computime, Inc.* v. *United States, supra*, Slip Op. 85-115, at 6 (quoting *C.J. Tower & Sons* v. *United States*, 68 Cust. Ct. 17, 21, C.D. 4327, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974)).

In this case, plaintiff has not shown that any mistake of fact was made in the classification of its merchandise. The question presented in this case is clearly a legal question. The question is whether the imported merchandise can properly be classified as American goods returned. This question was raised by plaintiff's original section 514 protest which challenged the classification of the merchandise. *See* 19 U.S.C. § 1514(a)(2) (1982 & West Supp. 1985).

Plaintiff had requested duty-free treatment on the consumption entry form. The record, however, shows that, on the form, it is noted that plaintiff had not supplied the appropriate documents to support his claim. Thus, it is clear that the appropriate customs officer made a legal determination as to the classification of the merchandise on the basis of the facts presented, and in light of plaintiff's claimed classification. Moreover, the record shows that plain-

tiff contested this legal conclusion in plaintiff's original protest, and that the protest was denied by Customs.

Plaintiff, however, has not challenged the denial of his original protest. Instead, plaintiff has sought to utilize section 520(c) to challenge the classification. This is an obvious attempt to use a section 520(c) procedure as a substitute for a challenge to the classification of the merchandise pursuant to section 514(a)(2). On the facts presented, it is clear that plaintiff's allegation of a mistake of fact is, in reality, a challenge to the legal conclusion of the Customs Service.

It is the determination of the Court that plaintiff has not stated a claim upon which relief can be granted under section 520(c). Plaintiff has not pursued the appropriate statutory remedy to challenge the allegedly incorrect classification of the imported merchandise. Accordingly, defendant's motion to dismiss is granted, and the action is dismissed.

ABSTRACTED PROTEST DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
P85/263	DiCarlo, J. December 16, 1985	Grover Piston Ring Co.	84-4-00602	Item 681.39 (680.90) 9.5%, 9%, 8.6%, 8.1%, 7.6%, 7.1% or 6.7%	Item 660.85 4.5%, 4.4%, 4.2%, 4.1%, 4%, 3.8% or 3.7%	Agreed statement of facts	Milwaukee Nine types of imported parts
P85/264	DiCarol, J. December 19, 1985	J.C. Penney Purchasing Corp.	84-5-00622	Merchandise classified as an entirety	Item 737.15 13.9% (motor vehicles) Item A685.60 Free of duty pursuant to GSP (transmitters)	Judgment on the pleadings	New York Model motor vehicle and transmitter

Appeals to the U.S. Court of Appeals for the Federal Circuit

Mast Industries, Inc. *v.* United States, No. 85-9-01243 (CIT Oct. 31, 1985), *appeal docketed,* No. 86-676 (Fed. Cir. Nov. 21, 1985).

Jeannette Sheet Glass Corp. *v.* United States, No. 83-5-00729 (CIT Sept. 11, 1985), *appeal docketed,* No. 86-700 (Fed. Cir. Nov. 29, 1985).

Todd Shipyards Corp. *v.* United States, 9 CIT —, Slip Op. 85-97 (Sept. 20, 1985), *appeal docketed,* No. 86-692 (Fed. Cir. Nov. 26, 1985).

Cabot Corp. *v.* United States, 9 CIT —, Slip Op. 85-102 (Oct. 4, 1985), *appeal docketed,* No. 86-729 (Fed. Cir. Dec. 9, 1985).

Sunburst Farms, Inc. *v.* United States, 9 CIT —, Slip Op. 85-107 (Oct. 10, 1985), *appeal docketed,* No. 86-749 (Fed. Cir. Dec. 16, 1985).

Pagoda Trading Co. *v.* United States, 9 CIT —, Slip Op. 85-87 (Aug. 27, 1985), *appeal docketed,* No. 86-750 (Fed. Cir. Dec. 18, 1985).

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Decisions of the United States Court of International Trade

(Slip Op. 85-130)

ALHAMBRA FOUNDRY, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND SOUTH BAY FOUNDRY, ET AL., INTERVENORS

Court No. 83-4-00500

Before Carman, *Judge.*

MEMORANDUM OPINION AND ORDER

[Plaintiffs' motion for judgment upon the agency record granted in part and denied in part.]

(Decided December 30, 1985)

Simonelli & Hall (*Michael H. Hall* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer* on the motion) for the defendant.

Brownstein, Zeidman & Schomer (*David Amerine* and *Irwin Altschuler* on the motion) for the intervenor.

CARMAN, *Judge:* In this action plaintiffs challenge a final affirmative countervailing duty determination of the Department of Commerce, International Trade Administration (ITA) regarding ironmetal construction castings from Mexico. *see* 48 Fed. Reg. 8834 (1983). Defendant and defendant-intervenors oppose the motion and claim that the final determination, issued pursuant to 19 U.S.C. § 1303 (1982), is supported by substantial evidence upon the administrative record.

BACKGROUND

Subsequent to plaintiffs' petition alleging that numerous governmental programs conferred bounties or grants upon the ironmetal construction castings industry in Mexico, the ITA made an affirmative preliminary determination and stated that it was investigating the alleged subsidization practices from January 1 to September 30, 1982. 47 Fed. Reg. 56377 (1982). In issuing the preliminary determination published on December 16, 1982, the ITA was required to use the "best information available" in accordance with 19 U.S.C. § 1677e, since the ITA had not yet received responses to its counter-

vailing duty questionnaire from the Mexican government. On the basis of this information, presumedly much of it obtained from petitioners (*see* Record at 136, letter from plaintiffs), the ITA estimated the net bounty or grant to equal 40.53 percent *ad valorem*.

In the final determination reached February 17, 1983, the ITA determined the net bounty or grant to be 2.85 percent *ad valorem*. The verification report, however, was not placed in the record until March 8, 1983. Upon plaintiffs' motion for reconsideration of its motion to strike the verification report from the record and defendant's cross-motion for remand in order to allow all parties to provide the ITA with comments on the report and accompanying exhibits, the Court, on July 2, 1984, granted the cross-motion for remand. The ITA filed its remand results on September 11, 1984, and concluded that no changes in the final determination were warranted.

The final determination stated the following programs constituted countervailable subsidies:

(1) FOMEX [1] pre-export and export financing loans at preferential interest rates;
(2) FONEI [2] long-term financing at preferential interest rates;
(3) FOGAIN [3] priority industry/regionally targeted financing at preferential interest rates;
(4) State tax incentives; and
(5) Import duty reductions and exemptions (although the ITA found that the production facilities used in the manufacture of the subject product did not appear to have been imported).

The ITA determined that CEPROFI [4] tax credits conferred bounties or grants, but had not been granted for the production of merchandise subject to the investigation, and that the CEDI [5] program, also providing countervailable tax certificates, had been suspended.

The following programs were determined not to confer bounties or grants:

(1) Government control of Mexican iron and steel industries;
(2) Dual level currency exchange;
(3) Free zone and in-bond assembly programs; and
(4) COMESEC Mexican credit insurance at preferential rates.

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[1] FOMEX (Fund for the Promotion of Exports of Mexican Manufactured Products) is a government trust which provides low-interest loans to Mexican companies to promote the manufacture and sale of exported products. 48 Fed. Reg. at 8834.

[2] FONEI (Fund for Industrial Development) is a specialized financial development fund, administered by the Bank of Mexico, which grants long-term credit at below-market rates for the creation, expansion or modernization of enterprises and to foster industrial decentralization. 48 Fed. Reg. at 8835.

[3] FOGAIN (Fund for the Guarantee of Development of Medium and Small Industry) provides financing at interest rates below prevailing commercial rates based upon whether a small or medium business has a designated priority status or based upon its geographical location. 48 Fed. Reg. at 8835.

[4] CEPROFI (Certificates of Fiscal Promotion) are nontransferrable tax certificates used to promote the goals of NIDP. These tax credits are provided to Mexican companies for locating in certain regions, investing in certain infant industries, generating jobs, investing in new plants and equipment, and purchasing Mexican capital goods. 48 Fed. Reg. at 8836.

[5] CEDI (Certificado de Devolucion del Impuesto), suspended by the Mexican Government in August 1982, was also a tax rebate. The certificates were direct export subsidies with their value equal to a percentage of the value of qualifying exports. 48 Fed. Reg. at 8836.

Finally, the ITA determined that the following programs were not used by the iron-metal construction castings industry:

(1) Government-financed facilities;
(2) Mexican Institute for Foreign Trade (IMCE) promotional benefits;
(3) Trust for Industrial Parks, Cities, and Commercial Centers (FIDEIN) benefits;
(4) National Preinvestment Fund for Studies and Parks (FONEP) benefits;
(5) Favorable tax treatment;
(6) Discounts on Industrial Energy and Basic petrochemicals; and
(7) FOMIN [6] preferential financing.

Plaintiffs in this action now make the following challenges, as the Court discerns them, to the final determination of the ITA:

(1) the ITA failed to explain in its determination how it arrived at the benchmark interest rates used in calculating FOMEX and FONEI benefits;
(2) the ITA failed to properly determine the subsidy amounts from FONEI and FOGAIN financing;
(3) the ITA failed to fully investigate the extent of receipt of state tax exemptions, or free or low-priced land incentives;
(4) the ITA failed to properly calculate the benefit of a state tax exemption received;
(5) the ITA failed to investigate import duty reductions and exemptions for equipment purchased prior to the investigation;
(6) the determination that the receipt of a CEPROFI tax credit was connected only to merchandise not the subject of the investigation is unsupported by substantial evidence;
(7) the ITA's determination that the dual level currency exchange does not confer a bounty or grant is unsupported by substantial evidence;
(8) the ITA failed to investigate whether FOMEX loan guarantees conferred bounties or grants;
(9) the ITA's determination that none of the firms received IMCE benefits is unsupported by substantial evidence;
(10) the ITA failed to investigate benefits from FIDEIN industrial park programs;
(11) the ITA failed to investigate benefits provided by National Financeria, S.A.;
(12) the ITA's determination that the Mexican construction castings industry did not receive discounts on basic petrochemicals or industrial energy supplies is unsupported by substantial evidence;
(13) the ITA failed to investigage whether foreign debt restructuring constituted a bounty or grant;

[6] FOMIN (Fondo National de Fomento Industrial) operates as a trust fund and provides funding to companies through stock acquisition or the provision of convertible loans at rates below those of commercial lending institutions. 48 Fed. Reg. at 9837.

(14) the ITA failed to set forth in its determination the exchange rates used to calculate the net benefit received by the Mexican construction castings industry; and

(15) the verification report submitted subsequent to the final determination should not be included as part of the administrative record.

OPINION

Judicial review of a final countervailing duty determination is provided under 19 U.S.C. § 1516a(b)(1)(B) (1982), which requires the court to hold the determination unlawful if it is found "to be unsupported by substantial evidence upon the record, or otherwise not in accordance with law." The standard of review has been well explicated in many judicial decisions, *see Carlisle Tire and Rubber Co.* v. *United States*, 9 CIT ———, Slip Op. 85-110 (October 24, 1985), but is essentially a limited review of the agency determination, insuring that agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole. However, the court is not placed in the position of having to weigh the evidence. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966). With these considerations in mind, the Court concludes that twelve of the determinations and conclusions contested by plaintiffs in this action are supported by substantial evidence upon the record. In those instances where the Court is not able to affirm the administrative determinations, it is primarily because information in the record and the briefing is not sufficiently clear to enable the Court to meaningfully review the issues or to determine what actually transpired during the investigation. These three issues—challenge two to the calculation of FONEI and FOGAIN benefits, challenge four to the calculation of the state tax benefit, and challenge fourteen to the failure to set forth exchange rates—must therefore be remanded to the ITA.

1. *Commercial Interest Rates*

In calculating the benefits from the Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX), the ITA used as a benchmark for the commercial rate of interest the national average commercial rate for comparable short-term peso or dollar-denominated loans during the first nine months of 1982 as determined from information supplied by the Department of the Treasury. 48 Fed. Reg. at 8835. The source of Treasury's information was in turn the Bank of Mexico's publication *Economic Indicators*. Administrative Record at 474-76. For the Guarantee and Development Fund for Medium and Small Industries (FOGAIN), the ITA used as their benchmark the national average commercial interest rate for comparable peso-denominated loans in 1981 as provided by the Department of the Treasury, 48 Fed. Reg. at 8835-36. For the Fund for Industrial Development (FONEI), the ITA used the 1977 average commercial rate for peso-denominated loans as

obtained from the Mexican government's *Diario Official*. *Id.* at 8835. Plaintiffs' contention that the determinations of benchmark interest rates must be explained is therefore unfounded. It is presumed that the Treasury Department acted with regularity in obtaining interest rate data. It was therefore reasonable for the ITA to rely on this information, as well as that provided by official publications of the Mexican government, as "the best information otherwise available" in determining its benchmark interest rates for purposes of this investigation. *See* 19 U.S.C. § 1677e (1982).

2. *Calculation of FONEI and FOGAIN Benefits*

Plaintiffs contend that the methodology used by the ITA in calculating these benefits failed to take into account all of the costs which would be incurred in obtaining commercial loans in Mexico. First, maintain plaintiffs, the ITA's methodology of comparing payment streams of hypothetical commercial loans using the benchmark interest rates with the payment streams of the subsidized loans disregarded the Mexican practice with respect to both commercial loans and subsidized loans of requiring the payment of interest at the beginning of loan periods. *See* Administrative Record at 146, 602, 576, 1116. According to plaintiffs, "[t]he result is reduction in the calculated benefit, resulting from treating each benefit as occurring one year too late in the loan period. The effect is to decrease the total grant equivalent, since each benefit is discounted for an extra year at the benchmark rate in the benefit calculation." Plaintiffs' brief at 19–20.

Plaintiffs, citing Administrative Record at 682–96, 576, allege that the ITA failed to account for 3-month holidays from the repayment of principle of certain FOGAIN loans, and further citing Administrative Record at 146, 602, that the payment of commissions and maintenance of compensating balances for commercial loans were not taken into account.

In response to these contentions, defendant argues simply that "[t]he ITA's methodology does not have to be the most reasonable in order to be upheld by this Court nor need it be the methodology that this Court would have selected had it been the decisionmaker. *Asahi Chemical Industry Co.* v. *United States*, 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982)." Defendant's Brief at 18. While the Court agrees that the ITA in its discretion may choose one methodology or another in calculating the benefits of bounties or grants, any methodology employed must reasonably accurately reflect factual information in the administrative record. It does not readily appear from the record or the briefs that the ITA took into account in the calculation of FONEI and FOGAIN benefits the payment of "up-front" interest, 3-month holidays from the payment of principle on FOGAIN loans, and the payment of commissions and maintenance of compensating balances for commercial loans. Accordingly, the Court must remand these issues to the ITA to determine

whether this additional information in the record as pointed out by plaintiffs has any significant impact upon the ITA's determination.

3. *State Tax Exemptions or Free or Low-Priced Land Incentives*

The Mexican government's reponse to the questionnaire indicated that none of the companies investigated received state tax exemptions. Administrative Record at 101-102, 256. During the verification, however, the ITA found that one of the foundries did benefit from a partial exemption of a state tax because it produced products exclusively for export. In light of this finding, as well as other evidence in the record that other of the firms also produced only for export, plaintiffs argue that the ITA's finding that only one of the firms received state tax exemptions is not supported by substantial evidence upon the record.

Although the Court should not weigh the evidence, "the Court must consider the record as a whole" and consider "evidence on the record which detracts from the substantiality of the evidence relied on by the agency in making its determination." *Carlisle Tire & Rubber Co.* v. *United States*, 9 CIT ———, Slip Op. 85-110, at 8 (October 24, 1985). Viewing the record as a whole, the Court is convinced that there is sufficient "evidence as a reasonable mind might accept as adequate to support [the] conclusion" that only one firm received state tax exemptions for exportation. *See Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229 (1938). Onsite verification at three other firms did not disclose receipt of state tax benefits. It appears that at least one of these firms also produced only for export. *See* Administrative Record at 259. The ITA's determination is therefore sustained.

Concerning land at reduced prices, plaintiffs have not met their burden of pointing to any evidence in the record detracting from the ITA's conclusion that none of the firms investigated received this benefit.

4. *Calculation of State Tax Benefit*

Plaintiffs also challenge the ITA's calculations of the state tax benefit as received by the one firm by pointing out that if the ITA's calculations are correct, wages paid by the firm over the investigative period amounted to less than .09 percent of total sales. Defendant avoids this argument, countering only that plaintiffs have failed "to demonstrate in a concrete fashion that the net amount of the benefit has in fact been undervalued." Defendant's Brief at 22. Intervenors state that the ITA's verification report explains the method of calculation in detail and as well sets forth the records used to support the calculation. The ITA's explanation consists entirely of the following:

> We examined a schedule showing how much Fundicion Tijuana would have had to pay for 1982 had it not received such an exemption (M-1). The total tax amount for the period, January 1, 1982 through September 30, 1982 came to 260.23035.

The "records," or schedule referred to, consist solely of a column of unintelligible figures. *See* Administrative Record at 1065. There is no indication of where the numbers came from, who prepared them, or even what they purport to represent. This issue must therefore be remanded to the ITA for further clarification of the methodology employed by the ITA in calculating the amount of the state tax benefit received.

5. *Import Duty Reductions and Exemptions*

Plaintiffs contend that the ITA did not investigate import duty reductions and exemptions received for equipment imported prior to the 1982 investigative period. Although the ITA did find that *de minimus* benefits had been conferred under this program for certain tools imported from the United States, defendant claims that the verification report shows that none of the machinery or parts imported prior to 1982 was purchased from the United States. Since the record indicates that the ITA did inquire into the issue and plaintiffs have not overcome the government's presumption of correctness, the ITA's finding that only *de minimus* benefits from import duty reductions and exemptions is supported by substantial evidence on the record.

6. *Certificate of Fiscal Promotion (CEPROFI)*

The ITA determined that only one of the companies subject of the investigation received a CEPROFI tax credit, but for the manufacture of a product other than the iron-metal municipal construction castings under investigation and for a related increase in company employment. 48 Fed. Reg. at 8836. Plaintiffs contend that to the extent that the increase in employment was due to the production of municipal castings, the tax credit related to the employment increase is countervailable. The Court finds, however, that the ITA's finding that the employment increase was related to the production of a product other than the castings under investigation is a reasonable inference from the record, which indicates that municipal castings were a small part of the company's production and that the production of such castings was stopped in 1981, while the CEPROFI credit was granted for an increase in employment in 1980, 1981 and 1982. Administrative Record at 608 and 610. Accordingly, the Court finds that the ITA determination concerning CEPROFI benefits is supported by substantial evidence and is in accordance with law.

7. *Currency Exchange Rates*

Plaintiffs argue that the ITA improperly considered the exchange rate program that became operational after the period of the investigation while ignoring the program that was in effect at the time of the investigation. The dual level exchange control system alleged by plaintiffs to be countervailable was itself not enacted until September 6, 1982, shortly before the close of the January 1 to September 30, 1982 period under investigation. The pro-

gram actually analyzed by the ITA, however, was substantially modified, as announced in the *Diario Official* on December 13, 1982. This revised program would therefore apparently be the only one relevant to entries of the merchandise under investigation made after the publication of the ITA's affirmative preliminary determination on December 16, 1982. *See* Plaintiffs' brief at 26-27. The Court accepts as reasonable the ITA's consideration of the most current currency exchange program, which was in effect prior to the publication of the countervailing duty order on March 2, 1983, and the termination of the investigation. *See* C.F.R. § 355.6(b)(3).

8. *FOMEX Loan Guarantees*

Plaintiffs contend that the ITA did not investigate the FOMEX loan guarantee program. The ITA did, however, investigate the overall FOMEX program an make a determination as to which firms received *any* FOMEX benefits. *See* Administrative Record at 589-91. Intervenors additionally point out that the FOMEX credit insurance program is operated by COMESEC. Intervenor's Brief at 38. The ITA explicitly determined that COMESEC Mexican credit insurance at preferential rates did not confer a bounty or grant. 48 Fed. Reg. at 8837.

9. *Mexican Institute for Foreign Trade Benefits (IMCE)*

IMCE promotes Mexican foreign trade and coordinates efforts stimulating foreign trade, apparently through a variety of means including general advertising and promotion of Mexican products in international markets, as well as the provision of information and assistance directly to manufacturers, merchants, distributors and exporters. Administrative Record at 620. The ITA has verified "that none of the companies exporting the merchandise under investigation used any of the services offered by the IMCE." 48 Fed. Reg. at 8837. Plaintiffs nevertheless contend that the ITA failed to adequately investigate and determine what subsidy benefits may be conferred upon the iron-metal construction castings industry from general advertising and promotion. *See e.g.,* Administrative Record at 278-84 (promotional questionnaire, firm list, catalog and advertisement apparently distributed by IMCE). Although the ITA could have perhaps done more in looking into this aspect, the Court finds the ITA's reliance on the questionnaire response and verifications at IMCE and the firms, which indicated that none of the firms had received IMCE benefits, was reasonable.

10. *Full Investigation of Industrial Park Programs*

Based on the preliminary determination that several programs required additional information, *see* Administrative Record at 177, plaintiffs allege that the ITA made no further effort to acquire the needed information. Among the programs are land at reduced cost and state tax incentives (dealt with *supra* p. 9-10), FOMEX loan

guarantees (dealt with *supra* p. 13), benefits provided by National Financiere, S.A., and benefits of industrial park programs.

The ITA's finding regarding industrial parks is supported by substantial evidence. The verification report clearly shows that none of the companies investigated are located in industrial parks and therefore do not receive benefits under the Trust for Industrial Parks, Cities and Commercial Centers (FIDEIN). *See* Administrative Record at 595.

11. *Full Investigation of National Financeria*

Plaintiffs allege that the ITA failed to investigate and make determinations regarding programs administered by National Financeria. The ITA made explicit determinations regarding FIDEIN and FONEP, both programs administered by the National Financeria. *See* 48 Fed. Reg. at 8837, *see also* Administrative Record at 598. The Court finds that the ITA's actions and determinations in this regard to be supported by substantial evidence and in accord with the law.

12. *Industrial Energy Discounts*

The ITA's determination, *See* 48 Fed. Reg. at 8837, that Mexican producers of iron construction castings did not receive discounts on basic petrochemicals or industrial energy supplies is sustained. The determination is supported by the Mexican government's questionnaire response, Administrative Record at 103, 256, Administrative Record at 598-99, and on-site review of electric bills for each company verified. Administrative Record at 599.

13. *Failure to Investigate Foreign Debt Restructuring*

Plaintiffs allege that the ITA failed to make any investigation or determination regarding certain programs brought to the attention of the ITA during the investigation, as would be required by 19 U.S.C. § 1677d. Defendant appears not to have responded to this issue at all in its brief, while intervenors argue essentially that since the ITA should have made a negative determination regarding these programs, the failure to amend the notice of investigation to include these programs constitutes harmless error. Intervenors assert further that there is a lack of any suggestion in the verification that the foreign debt repayment schedule was altered in any way. Given that plaintiffs have not pointed to any evidence in the record supporting their claim other than their own conclusory statements made during the administrative proceeding, the Court affirms the ITA in not investigating and making a determination regarding this issue.

14. *Exchange Rates*

Plaintiffs challenge the ITA determination for failing to set forth the exchange rates used by the ITA in calculating the net benefit received by the Mexican iron castings exporters. Presumably plaintiffs are concerned with whether the exchange rates employed re-

sulted in an undervaluation of the bounty or grant conferred. Defendant answers this contention in a footnote stating that the ITA, pursuant to 31 U.S.C. § 5151(c), uses exchange rates published by the Secretary of the Treasury. Defendant's Brief at 16, n. 5. Alternatively, intervenors allege that the exchange rates used were set by the Mexican government and cites the Administrative Record at 499–503. The Court is unable to discern from the record and the briefs what exchange rates the ITA in fact used in this case. Accordingly, the Court must order a remand to determine what exchange rates were used and if they were in accordance with law.

15. *Verification Report*

Plaintiffs again challenge the conclusion of the verification report as part of the administrative record. Although the verification report was placed with the record subsequent to the final determination, the report consists of information and exhibits compiled prior to the final determination. Plaintiffs, had the opportunity to comment on the verification report during the remand to the ITA. As the report does not appear to be a *post hoc* rationalization of the final determination, *see e.g., Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419–20 (1971), but rather a compilation of material gathered during the administrative proceeding, the verification report is properly part of the administrative record within the meaning of 19 U.S.C. § 1516a(b)(2)(A) (1982).

CONCLUSION

In order to determine whether all of the ITA's determinations are supported by substantial evidence upon the agency record, the Court requires further clarification and determination regarding the following challenges:

(2) the calculation of FONEI and FOGAIN benefits,
(4) the calculation of the benefit of the state tax exemption received, and
(14) the exchange rates used by the ITA in calculating the net benefit used.

With respect to plaintiffs' other challenges in this case, the Court finds that the ITA determinations are supported by substantial evidence upon the record. Plaintiffs' motion for judgment upon the agency record is therefore granted in part and denied in part, and the case is remanded for further action consistent with this opinion.

(Slip Op. 85-131)

BALTIMORE SECURITY WAREHOUSE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-11-01690

Before CARMAN, *Judge*

MEMORANDUM OPINION

[Plaintiff's motions for preliminary injunction and for review upon the agency record denied; Defendant's motion for summary judgment granted.]

(Decided December 13, 1985)

Allen, Thieblot & Alexander (J. Edward Martin, on the motion) for the plaintiff. *Richard K. Willard,* Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Susan Handler-Menahem* on the motion) for the defendant.

CARMAN, *Judge:* Plaintiff, Baltimore Security Warehouse Company, moved for a preliminary injunction restraining the United States Customs Service (Customs) from revoking plaintiff's bonded warehouse status, and for review of Customs' final determination revoking such status.[1] Defendant United States cross-moved for summary judgment. On December 13, 1985, the Court heard argument. Ruling from the bench, the Court denied plaintiff's motion and granted defendant's motion for summary judgment. This opinion follows that order.

BACKGROUND

On February 9, 1983, Customs directed plaintiff to show cause pursuant to 19 C.F.R. § 19.3(e) (1982) (now 19 C.F.R. § 19.3(f)) why its bonded warehouse status should not be revoked. The notice stated the following grounds for revocation:

> As a result of a U.S. Customs Service Investigation, it was found that you did not adequately safeguard merchandise in your warehouse and that there was a high degree of pilferage at Baltimore Security Warehouse, Inc., particularly with regard to crystal glassware imported by Import Associates. It was also found that the merchandise and paperwork regarding your account with Import Associates were so poorly handled that the importer could not match items with the proper warehouse entry or importation.

Pursuant to 19 C.F.R. § 19.3(e), Customs could revoke the bonded status of a warehouse for a variety of reasons, including:

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[1] In its complaint filed with this court, plaintiff requested the relief, *inter alia,* of an injunction. In its brief, plaintiff argued that the Custom's determination be overturned. The Court understood plaintiff to move for a preliminary injunction pursuant to Rule 65(a) and for judgment upon the agency record pursuant to Rule 56.1. Upon consent of both parties, the Court ordered the motions consolidated under Rule 65(a)(2).

(3) The warehouse proprietor or an officer of a corporation which has been granted the right to operate a bonded warehouse is convicted of or has committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling, or a theft-connected crime;

(4) The warehouse proprietor does not provide secured facilities or properly safeguard merchandise within the bonded warehouse.

Plaintiff requested a hearing on the issue of revocation, which was held on April 13, 14 and 18, 1983. Both parties filed post hearing memoranda. On October 5, 1983, the hearing officer made her recommendation that plaintiff's bonded warehouse status be revoked, which she forwarded to the Regional Commissioner of Customs for the Northeast Region (Commissioner). By letter dated November 18, 1985, the Commissioner informed plaintiff that its bonded warehouse status was revoked, effective ten days after receipt of the letter.[2]

By complaint dated November 29, 1985, plaintiff asked this court for a temporary restraining order enjoining Customs from revoking its bonded warehouse status. The court, per Senior Judge Newman, issued a temporary restraining order on December 2, 1985, pursuant to Rule 65(b). The order was to expire on December 12, 1985.

This case was assigned to me on December 3, 1985. I ordered that the motion for preliminary injunction be combined with the action on the merits, pursuant to Rule 65(a)(2), and ordered that the temporary restraining order be extended to December 19, 1985, pursuant to Rule 65(b), with consent of the parties, in order to provide for the oral argument to be held on December 13, 1985.

OPINION

Plaintiff maintained that the Commissioner's determination revoking its bonded warehouse status should be overturned on a variety of grounds: 1) Customs did not have jurisdiction over the subject matter of this action, 2) the agency proceedings were procedurally defective, 3) improper evidence was admitted at the administrative hearing, 4) the agency findings were not supported by substantial evidence in the record, and 5) the agency action was barred by the equitable doctrine of laches.

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[2] The text of the letter was as follows:

This is to inform you that I have decided to revoke the bonded warehouse status of Baltimore Security Warehouse, pursuant to my authority in 19 CFR 19.3(f). I am sending this decision to you because you are the legal representative of Baltimore Security Warehouse and ask you to notify the appropriate parties.

A hearing on this matter was held on April 13, 14 and 18, 1983, in Baltimore, Maryland. My decision is based on the recommendation of the hearing officer that the bonded status of Baltimore Security Warehouse be revoked and the evidence presented at that hearing which indicates violations of section 19.3(e)(3) and (4) of title 19 of the Code of Federal Regulations. These sections provide that the bonded status of a warehouse may be revoked if an officer of a warehouse has committed acts which would consititute a felony, or a misdemeanor involving theft, or if the warehouse proprietor does not provide secured facilities or properly safeguard merchandise within the bonded warehouse. The allegations based on these sections have been amply proved at the hearing.

This decision takes effect 10 days after receipt of this notice.

1. *Jurisdiction*

In its complaint plaintiff averred that Customs did not have jurisdiction because the property involved was not bonded and Customs had jurisdiction only over bonded property.[3] Plaintiff did not press this argument in its brief. Customs has authority under 19 U.S.C. § 1556 (1982) to promulgate rules and regulations for establishing bonded warehouses. 19 C.F.R. § 19.3(e), promulgated pursuant to that authority, provides that bonded warehouse status may be revoked if Customs finds that the proprietor or corporate officer has been convicted of, or has committed acts constituting specified crimes. The section does not require that these convictions or acts have any relation to bonded merchandise. Customs acted within the scope of its statutory authority as it was not exercising any power over particular property, but rather its power to establish bonded warehouses under 19 U.S.C. § 1555 (1982).

2. *Procedural Defects*

Plaintiff claimed that the agency proceedings were defective in several ways. Plaintiff first contended that the Commissioner's determination did not include findings of fact or reasons for the revocation, as required by the regulations. The regulations provide that "[T]he Regional Commissioner shall thereafter render his decision in writing, stating his reasons therefor." 19 C.F.R. § 19.3(e). The Commissioner's letter stated that plaintiff's bonded warehouse status was being revoked because plaintiff had violated 19 C.F.R. §§ 19.3(e)(3) and (4), and the allegations based on these sections had been "amply proved at the hearing." The reason for the revocation could not be more clear. Moreover, the letter referred to proofs at the hearing and also to the findings of the hearing officer. This was adequate to inform plaintiff of the findings upon which the determination was based. Plaintiff next claimed that the recommendation of the hearing officer did not include findings of fact. On the contrary, the recommendation includes numerous factual findings, which formed the basis of the recommendation.[4] Plaintiff urged that the hearing officer did not independently assess the evidence on the record because her findings of fact incorporated the proposed findings of fact submitted by counsel for Customs. The adoption of proposed findings is a not uncommon judicial practice and, standing alone, does not indicate that the adjudicator did not independently assess the evidence.

Plaintiff next claimed that the findings contained in the recommendation were improper because the hearing officer did not

[3] At the agency level, plaintiff made a motion to dismiss for lack of jurisdiction and because the agency was not following the Administrative Procedures Act § 554(d) (5 U.S.C. § 554(d) (1982)). In its complaint, plaintiff asked the court to review the agency's denial of that motion, but pursued only the issue of jurisdiction. The Court notes that plaintiff showed no violation of § 554(d).

[4] For example, the hearing officer found that merchandise was seized from Smith Sales, that the merchandise had been imported by Import Associates and stored in bond at plaintiff's warehouse, and that plaintiff had sold the merchandise to parties who testified at the hearing. These are not conclusory statements, as plaintiff suggests, but rather basic findings of fact.

impose upon Customs the burden of proving its case beyond a reasonable doubt. One of the grounds for revoking plaintiff's bonded warehouse status was the finding that plaintiff had

> committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling or a theft connected crime

19 C.F.R. § 19.3(e). The proceeding below was a civil and not a criminal proceeding, and the reasonable doubt standard does not apply. The hearing officer was persuaded that the plaintiff committed the acts complained of, and that is sufficient. On review, this Court will sustain that determination so long as it is supported by substantial evidence on the record. *See generally American Spring Wire Corp.* v. *United States*, 8 CIT 20, 590 F. Supp. 1273 (1984), *aff'd* 760 F.2d 249 (1985).

Plaintiff next complained that it did not receive a copy of the hearing officer's recommendation until after the revocation determination had issued and plaintiff had brought its case to this court. Plaintiff pointed to no statute or regulation, however, requiring Customs to furnish it with a copy of the recommendation. The official record contained the recommendation and plaintiff could have received it at any time by simply requesting a copy. Moreover, plaintiff has not shown that it was in any way prejudiced because it did not receive a copy.

Plaintiff's final procedural complaint was that the Commissioner did not make his determination on the full record. Plaintiff reached this conclusion from statements made by counsel for defendant, during a teleconference on December 6, 1985, that exhibits from the hearing had been sent to Washington, D.C. and then on to New York. The Commissioner issued his determination from Boston. Such a statement, without more, is inadequate to show that the Commissioner did not consider the complete record.

3. *Evidence at the Hearing*

At the administrative hearing, plaintiff objected to the introduction of hearsay evidence. Although plaintiff did not press this issue in its brief to the court, its complaint does not mention evidentiary objections made at the administrative hearing. Section 557(d) of the Administrative Procedure Act (5 U.S.C. § 557(d)) provides that:

> any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly prejudicial evidence.

Administrative adjudicatory proceedings are not governed by the formalized strict Federal Rules of Evidence but by the Administrative Procedure Act. Hearsay evidence is admissible in such proceedings.

Plaintiff also argued at length in its brief that certain evidence admitted at the hearing was seized from premises known as Smith Sales, in violation of the fourth amendment to the United States

Constitution. A party lacks standing to assert a fourth amendment violation where it was not on the premises at the time of the search, alleges no proprietary or possessory interest in the premises, or is not accused of a possessory crime. *Brown* v. *United States* 411 U.S. 223, 229 (1973). Since none of these situations existed, plaintiff had no standing to request suppression of the evidence.

4. *Substantial Evidence*

Plaintiff asserted that certain factual findings of the hearing officer were in error. This Court must uphold agency action unless it is unsupported by substantial evidence in the record. *See* 5 U.S.C. § 706(2)(E) (1982). At the hearing, Customs introduced substantial evidence that plaintiff had committed the acts complained of. Plaintiff also introduced evidence tending to exculpate it, and offered alternative theories to explain evidence introduced by Customs. It is not for the Court, however, to weigh the conflicting evidence. It is sufficient that there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *American Spring Wire,* 8 CIT 20, Slip Op. 84-83 (July 11, 1984) (quoting *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951)). Although plaintiff clearly was not satisfied by the findings of the hearing officer, since there was relevant evidence from which reasonable inferences could be drawn to support the conclusion determined by the hearing officer, the determination of the hearing officer must be permitted to stand.

5. *Laches*

Plaintiff's final ground for arguing that the agency action should be overturned was that Customs was barred by the equitable doctrine of laches. To establish the defense of laches, a party must show both unreasonable delay and some prejudice caused by the delay. *Costello* v. *United States,* 365 U.S. 555 (1965). Customs held the hearing in April of 1983 but did not act to revoke plaintiff's bonded warehouse status until November of 1985. Whether or not the delay was unreasonable, plaintiff has failed to show that it was prejudiced. Plaintiff can hardly claim prejudice when the delay allowed it to keep its bonded warehouse status during that time.

CONCLUSION

Plaintiff failed to show that the agency action was procedurally defective or that the determination was not supported by substantial evidence upon the record. Because of the Court's disposition of the case on its merits, the Court also denied plaintiff's motion for a preliminary injunction. Plaintiff's motions have been denied, the Court granted defendant's motion for summary judgment and dismissed the case.

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U.S. Customs Service

Treasury Decisions

(T.D. 86-8)

Petitioners' Desire To Contest Decision Denying Domestic Interested Party Petition Requesting Reclassification of Certain Fuel Grade Ethanol

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of petitioners' desire to contest decision on domestic interested party petition.

SUMMARY: This document advises the public of the desire of several domestic interested parties to contest Customs decision denying their petition requesting the reclassification of certain imported fuel grade ethanol. Customs has determined that the ethanol imported from several Caribbean Basin countries may qualify for duty-free entry under the Caribbean Basin Economic Recovery Act. The petitioners contend that the ethanol is incorrectly classified and they have advised Customs of their intention to pursue this matter through appropriate court proceedings.

DATE: January 22, 1986.

FOR FURTHER INFORMATION CONTACT: Harold Singer, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

Background

On January 29, 1985, a petition was filed with Customs under section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of several domestic interested parties dissatisfied with Customs determination that certain fuel grade ethanol imported from Carribbean Basin countries may qualify for duty-free entry under the Caribbean Basin Economic Recovery Act (CBERA; 19 U.S.C. 2701). The product at issue, ethyl alcohol (ethanol) imported for use as a fuel, is classified under item 901.50, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), at a rate of duty of 60¢ per gallon. (This 60¢ per gallon duty is in addition to a 3% ad valorem duty on ethanol for nonbeverage purposes from item 427.88, TSUS.)

However, some ethanol may enter the U.S. free of duty since Customs has ruled that the transformation of beverage grade ethanol from a non-beneficiary country to motor fuel ethanol in a beneficiary country through azeotropic distillation is sufficient to make the motor fuel a product of the beneficiary country for purposes of the CBERA.

The domestic interested parties advanced two basic arguments in their petition. First, it was argued that fuel grade ethanol is not a new or different article of commerce from beverage grade ethanol as the only significant difference in the composition of the two is their water content. It was also contended that the azeotropic method of distillation, which involves adding benzene or some other chemical to 190 proof ethanol and then heating the mixture so that the benzene will vaporize and carry away most or all of the water, is not a substantial manufacturing process.

A notice of receipt of the petition was published in the Federal Register on April 11, 1985 (50 FR 14250), advising the public of the petitioners' contentions and requesting comments on the petition. Of the many comments received in response to the notice, numerous commenters chose to discuss policy issues concerning the Caribbean Basin Initiative. However, it is Customs view that there is only one controlling issue in this case; whether azeotropic distillation of 190 proof ethanol to 199+ proof ethanol is a substantial transformation.

Discussion of Comments

The arguments that azeotropic distillation is not a substantial processing operation are that (1) dehydration is merely the opposite of dilution and dilution is clearly not considered a sufficient operation to entitle an article to duty-free treatment pursuant to § 10.195, Customs Regulations (19 CFR 10.195); (2) azeotropic distillation is just a simple boiling and cooling procedure; (3) the process does not require many workers; (4) the incremental capital, energy and labor requirements are miniscule when compared with the total cost of converting agricultural feedstock to ethanol, and (5) there is no significant distinction between proof enrichment from 194–199+ and from 190–199+, and Customs has ruled that enrichment from 194–199+ would not be sufficient to entitle the ethanol to duty-free treatment.

It is Customs view that if removal of water were to be considered *per se* an operation not sufficient to entitle an article to duty-free treatment under the CBI, it could have been listed in the statute or regulations as easily as dilution was listed. Further, the addition of water to a product is generally a much more simple process than removing water.

Azeotropic distillation is more than a simple boiling and cooling procedure. The process involves complex equipment, sensitive instruments and trained personnel. In the particular operation chal-

lenged in this petition, the equipment includes a dehydration column over 150 feet high and 7 feet in diameter, over 60 stainless steel trays, each with nearly 100 valves, plus weirs and downcomers, all manufactured to exacting standards. The Entrainer Recovery Column is 90 feet tall, 3 feet in diameter with nearly 60 stainless steel valve trays of its own. There are reboilers, heat exchangers, condensers, reflux tanks, decanters, surge tanks, vents, pumps, meters, structure and mechanical systems required to maintain these columns.

In *Uniroyal, Inc.* v. *United States*, 542 F Supp. 1026, 3 CIT 220, *aff'd* 702 F2d 1022 (Fed Cir. 1983), the court stressed that factors such as cost and skill can be considered in determining whether a substantial transformation has occurred. In this case, the personnel must be trained to correctly monitor the azeotropic distillation process, and there has been an ample capital investment.

According to one comment, the drying process, *per se*, is not complex. Any complexity associated with the ternary distillation and directly associated process steps is in the design of the equipment and control apparatus. It is our view that the technical nature of the design of the equipment and the skill required of the workers to operate and monitor the system is of sufficient complexity to take the operation out of the simple combining, packaging or mere dilution categorization. While the number of workers involved in any specific operation is a factor to be considered in determining whether a substantial processing operation has occurred, it is not a controlling factor. In this particular case, we believe that the amount of local employment involved in the operation would not deter us from finding substantial processing.

We do not agree with the argument that the conversion of 190 proof ethanol to absolute ethanol is a minor step in the manufacture of ethanol from grain and therefore cannot be a substantial transformation. Obviously, the relative cost of any one step in an overall process will decrease as the number of steps increases. Further, each operation must be examined on its own as to whether it is a substantial transformation.

Finally, Customs holding in a General Headnote 3(a) case (19 U.S.C. 1202) that there is not a substantial transformation when ethanol of 194 proof is brought up to 199+ proof through azeotropic distillation was based on the fact that an entire azeotropic distillation operation was not occurring in the insular possession. Customs looks at all operations on a case-by-case basis in determining whether substantial transformation occurs. In the particular case where an operation was proposed to make ethanol anhydrous from a level of 194 proof, it was Customs view that since a partial azeotropic distillation operation had already occurred, merely finishing the azeotropic distillation operation in the insular possession would not be sufficient to make the 199+ proof ethanol a product of that

insular possession. In this instance an entire azeotropic distillation operation is occuring in the beneficiary country.

Among the arguments set forth as to why 199+ proof ethanol is not a new and different article of commerce than ethanol of up to 190 proof are: (1) There is no chemical change between the 190 proof and 199+ proof alcohol—the only difference is that water is removed; (2) there is no clear distinction between hydrous and anhydrous ethanol for many industrial uses; and (3) hydrous ethanol is used in Brazil as motor fuel.

It is Customs view that the extra 5 percent water that is missing from the anhydrous ethanol which causes the difference in specification is significant enough to make the anhydrous a new or different article of commerce. It is the absence of water that makes 200 proof ethanol suitable for particular uses, while it is the presence of water that makes 190 proof ethanol unsuitable for those same uses. Also, 190 and 200 proof ethanol have different freezing points, boiling points, densities, viscosities, vapor pressures and flash points.

Further evidence that 190 proof and 200 proof ethanol are different articles is the price differential between the two. For the past year, the *Chemical Marketing Reporter* has stated that the price of tax-free absolute ethanol is 12 cents per gallon higher than that of 190 proof tax-free ethanol. There is a price difference of about 8 percent. A price difference of about 5 percent is to be expected since the anhydrous product contains 5 percent more alcohol, but a price difference of 8 percent reflects, in part, the additional dehydration steps involved.

Regarding the claim that 190 proof ethanol is used as motor fuel, the Brazilian government built a fleet of motor vehicles that used 190 proof ethanol as a defense against rising oil prices, but those vehicles and others like them were specially designed for that use. The modifications needed to enable the average car in the U.S. to use 190 proof ethanol would be more than minor and such vehicles are not commercially available in the U.S.

In the U.S., gasohol can have a maximum of 10 percent anhydrous ethanol according to EPA regulations (see 47 FR 14596, April 5, 1982). Only absolute ethanol can be blended with gasoline and technical references examined by Customs indicated that for ethanol to be blended with gasoline, to make gasohol, the entire fuel delivery system from refinery to tank trucks to underground tanks in filling stations, must be dry. Water, even a small amount, will "split" the blend, causing the blend to separate into an aqueous phase and a hydrocarbon phase. Accordingly, it is Customs view that anhydrous ethanol has a use in the U.S., for blending to make gasohol, that hydrous ethanol will not serve. While hydrous and anhydrous ethanol may both serve some industrial uses, our research reveals that anhydrous ethanol even when used for industrial purposes is used generally for purposes where water cannot be

tolerated, such as in certain manufacturing processes and for certain solvents.

Decision on Petition and Notice of Petitioners' Desire To Contest

After careful analysis of the petition, supplemental submissions, and all comments received, Customs has decided to continue to consider the azeotropic distillation of up to 190 proof ethanol to 199+ proof ethanol in a beneficiary country of the Caribbean Basin Initiative a substantial transformation of the ethanol making the 199+ proof ethanol a new and different article of commerce entitled to duty-free entry. The petitioners were informed by letter dated November 19, 1985 (CLA-2 CO:R:CV:V 553849 HS), through their counsel, that Customs is of the opinion that the current classification is correct and their petition is therefore denied.

In response to Customs decision to deny the petition, on November 19, 1985, the petitioners filed notice of their intention to contest the decision in accordance with § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.23 Customs Regulations (19 CFR 175.23).

Customs has reconsidered the matter in light of the petitioners' letter, but remains of the opinion that its November 19, 1985, decision is correct. That decision will stand in the absence of a contrary judgment rendered by the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit.

Authority

This notice is published under the authority of § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.24, Customs Regulations (19 CFR 175.24).

Drafting Information

The principal author of this document was John E. Doyle, Office Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

John P. Simpson
(For William von Raab,
Commissioner of Customs).

Approved: January 7, 1986.
Francis A. Keating II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, January 22, 1986 (51 FR 2990)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

Proposed Customs Regulations Amendment Relating to the Customs Field Organization in the New Orleans District

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by establishing a new Customs port of entry, on a 2-year trial basis, to be known as Shreveport-Bossier City, in the New Orleans, Louisiana, Customs district. The change is being proposed as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

DATE: Comments must be received on or before March 24, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

The Caddo-Bossier Port Commission filed an application with Customs requesting the establishment of a new Customs port of entry at Shreveport, Louisiana, and Bossier City, Louisiana. A review of that application has confirmed that the proposed port meets the minimum Customs criteria for establishing ports of entry. Cargo processing activities will be carried out utilizing modern electronic data transfer equipment compatible with Customs systems.

Customs ports of entry are places (seaports, airports, or land border ports) designated by the Secretary of the Treasury where

Customs officers or employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of Customs and related laws. Staffing at ports of entry may range from one to several hundred employees, depending on the volume of business. However, most new ports of entry are staffed by at least a port director, one or more inspectors, and a secretary.

The Secretary of the Treasury is advised by the Commissioner of Customs in matters affecting the establishment, abolishment, or other change in ports of entry. Customs ports of entry are established under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

The limits of the proposed port of entry of Shreveport-Bossier City will be the city limits of Shreveport and Bossier City. The basis upon which Customs is recommending establishing a port of entry at Shreveport-Bossier City, on a 2-year trial basis, is the proposed port's commitment to handle a sufficient amount of imported merchandise to meet minimum port of entry workload standards. These standards were published as a notice in the Federal Register on March 9, 1982 (47 FR 10137). At the end of the 2-year period, the practicability of maintaining a port of entry at Shreveport-Bossier City will be reevaluated in light of the actual Customs workload.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

Because this proposal relates to the organization of Customs, it is not a regulation or rule subject to E.O. 12291.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this proposal because it will

not have a significant economic impact on a substantial number of small entities.

Customs routinely establishes and expands Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although the proposal may have a limited effect upon some small entities in the Shreveport-Bossier City area, it is not expected to be significant because establishing and expanding port limits at Customs ports of entry in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Lists of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

Proposed Amendment to the Regulations

If the proposed change is adopted, the list of Customs regions, districts, and ports of entry in § 101.3, Customs Regulations (19 CFR 101.3), will be amended accordingly.

Authority

This amendment is proposed under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949-1953 Comp. Ch. II), and pursuant to authority provided by Treasury Order No. 101-5 (47 FR 2449).

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: December 19, 1985.
David D. Queen,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, January 22, 1986 (51 FR 2897)]

United States Court of International Trade

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Decisions of the United States Court of International Trade

(Slip Op. 86-1)

OLD REPUBLIC INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-6-00801

Before DICARLO, *Judge.*

Defendant moves to dismiss action by surety challenging Customs classification for lack of jurisdiction, claiming that the protest was not timely filed.

Held: Plaintiff filed its protest within 90 days of the mailing of a notice of demand for payment against a bond and its action is timely. A previous letter from Customs did not constitute notice of demand for payment since it lacked information available to Customs which would provide a surety sufficient means of ascertaining the bond against which demand for payment was made.

[Defendant's motion to dismiss for lack of jurisdiction is denied.]

(Decided January 2, 1986)

Sandler & Travis, P.A. (*Gilbert Lee Sandler* and *Randall E. Baad*), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Kenneth N. Wolf*), for the defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff, a surety, brings this action challenging the United States Customs Service's (Customs) classification of merchandise invoiced as "LPG equipment for cars" under item 711.78, Tariff Schedules of the United States (TSUS). Defendant moves to dismiss the action for lack of jurisdiction claiming that the protest was not timely filed. The motion is denied.

On September 10, 1980, the merchandise entered the United States under a single entry consumption entry bond. The entry was liquidated, and a bill for duties sent to the importer was not paid.

On November 5, 1981, Customs mailed to plaintiff a letter which in part states:

> Enclosed herewith is a listing of 484 bills due to the United States Customs Service totaling $1,166,344.81 owed by principals for whom you are surety and which are due and payable immediately. Formal demands were made on the principals involved but the bills remain unpaid. Under the terms of your bond you are an original promisor and debtor with each of your principals.
>
> This is a formal demand upon you for immediate payment of the amounts noted on the enclosures hereto:

Attached to the letter was a computer printout listing 484 bills. The listing for the bill in question set forth the bill number, the billing date, the port of entry and the amount due. No information concerning the bill was set forth in the columns on the printout designated "Delinquent Debtor Name and Address" and "Entry No." [1]

On January 29, 1982 Customs sent another letter to plaintiff, saying in part:

> Attached is a list of 5 bills amounting to $21,777.48 for which we are enclosing copies of the applicable entries and bonds.
>
> Full payment of $21,777.48 must be made within thirty (30) days from the date of this notice. Failure to satisfy this formal demand may result in a recommendation to the Secretary of the Treasury that you no longer be authorized to act as surety on Customs Bonds.

The list attached to the January 29, 1982 letter provided the name of the importer for each of the five listed bills. The enclosed copy of the single entry bond for the transaction in question contained the importer's name as well as the entry number.

On February 12, 1982, plaintiff filed a protest challenging the classification of the merchandise, and on December 3, 1982, the protest was denied as untimely. On June 1, 1983, plaintiff brought this action contesting the denial of the protest.

Defendant alleges that, under 19 U.S.C. § 1514(c), plaintiff had 90 days from the November 5, 1981 mailing in which to file a protest; the letter of January 29, 1982 was a follow-up demand that did not cause the jurisdictional period to run anew; and the action must be dismissed because the February 12, 1982 protest was filed more than 90 days after November 5, 1981.

Plaintiff argues that the action is timely because the November 5, 1981 letter provided insufficient information to notify it that demand was being made on the applicable bond; a sufficient demand was not mailed until January 29, 1982; and the February 12, 1982 protest is timely because it was filed within 90 days of January 29, 1982.

---

[1] The copy of the printout attached as Exhibit C to the Memorandum in Support of Defendant's Motion to Dismiss contains additional handwritten information. At oral argument, defendant's counsel advised the Court that such information did not appear on the printout at the time of the November 5, 1981 mailing.

The issue before the Court is whether the November 5, 1981 letter was a sufficient notice of demand for payment against the applicable bond.

A decision by Customs regarding the classification of merchandise and the rate and amount of duty chargeable is final and conclusive unless a protest is timely filed. 19 U.S.C. § 1514 (a). The Court does not have jurisdiction over any action where a protest was filed later than the time provided by statute. *San Francisco Newspaper Printing Co.* v. *United States*, 9 CIT ——, 620 F. Supp. 738 (1985); *Texas Mex Brick & Import Co.* v. *United States*, 72 Cust. Ct. 291, C.R.D. 74-2, 371 F. Supp. 579 (1974). Section 1514(c)(1)(A) provides that protests may be filed by "importers or consignees shown on the entry papers, or their sureties." The section further provides:

> A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond. If another party has not filed a timely protest, the surety's protest shall certify that it is not being filed collusively to extend another authorized person's time to protest as specified in this subsection.

19 U.S.C. § 1514(c)(2). Neither the statute nor the regulations specify what information must be provided to a surety in the notice of demand in order to commence the running of the 90-day period in which a protest may be filed. *See* 19 U.S.C. § 1514(c)(2); 19 C.F.R. § 174.12(e)(3) (1985).

Plaintiff argues that a notice which does not enable a surety to determine the transaction for which a protest may be filed is deficient. It contends that the printout attached to the November 5, 1981 letter, which listed 484 bills, did not give plaintiff "notice of demand for payment against its bond" under section 1514, because it did not identify the entry, importer or bond applicable to the bill in question. Defendant disagrees, arguing that even though the November 5, 1981 letter and printout did not identify the importer's name, the entry number or the bond for the bill in question, the notice of demand was nonetheless sufficient. It contends that section 1514 only requires that the notice set forth a monetary demand.[2]

Defendant states that a surety must obtain on its own the information necessary to identify the protestable transaction, and that if plaintiff requested information from Customs concerning any of the 484 bills listed on the computer printout, Customs would have identified for plaintiff the corresponding importer, entry number or

[2] Defendant cites several cases in support of its contention that a bald demand for payment is sufficient in the absence of a requirement that a demand be particularized. The cases are inapposite as none deals with a situation where the recipient was potentially liable to the demanding party on numerous bonds or accounts. *See, e.g., In re Marin Motor Oil, Inc.*, 740 F.2d 220 (3d Cir. 1984) (timeliness of demand for reclamation under bankruptcy laws); *Miller* v. *Davis*, 34 A. 265, 88 Me. 454 (Sup. Jud. Ct. 1896) (demand for payment of taxes).

bond. Defendant argues that if Customs did not respond to such an inquiry in a timely manner, "the Government would conceivably agree or the Court could find that a toll may operate during the 'unavailability' of the requested information."[3]

Defendant also argues that a surety could monitor CUSTOMS BULLETIN notices of liquidation or require its principals to notify it when an entry covered by a bond is liquidated. By filing its protests within 90 days of liquidation or reliquidation under section 1514, a surety could protect its interests without waiting to receive notice of demand for payment.

Defendant's reasoning would deny effect to Congress' amendment of section 1514 in 1979.[4] To protect the rights of sureties, Congress specifically provided that sureties receive actual notice of a principal's failure to pay. Congress also recognized that sureties should not have to rely solely upon their defaulting principals for information concerning protestable transactions:

> It is also clear under present law that sureties have had difficulty in fulfilling the prerequisites to suit in the Customs Court due to the frequent failures of the sureties to receive notice of the failure of the importer to pay the duties until after the time for filing a protest has expired. Section 1001(b)(3)(E) would remedy this problem by permitting a surety to file a protest in its own name and by extending the time within which it may file a protest so long as it certifies that it is not filing the protest simply because the importer allowed his time to file a protest to expire without filing a protest.

S. Rep. No. 249, 96th Cong., 1st Sess. 254 (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 640.

Defendant essentially admits that it would be impossible for plaintiff to ascertain without Customs assistance, the entry number, bond or importer's name applicable to a bill which is identified on a computer printout only by a bill number assigned by Customs. A surety would have less time to prepare its protest than that contemplated by the statute if the bond on which demand is being made could not be ascertained until some time after the demand letter from Customs is received. The statute plainly states that the 90-day limitations period shall run "from the date of *mailing* notice of demand for payment * * *." 19 U.S.C. § 1514(c) (1982) (emphasis added). A letter to a surety which does not constitute notice of demand for payment cannot be cured upon Customs provision of supplemental information by alternative means, without reducing the time provided for the preparation of a protest by a surety.

Defendant's contention that the government could agree to toll the limitations period during the unavailability of information requested by a surety is misplaced. Customs does not have the power

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[3] Defendant's Supplemental Memorandum in Support of Motion to Dismiss, at 7.
[4] Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(b)(3)(E), 93 Stat. 144, 305 (1979).

to enlarge the jurisdiction of the court. *San Francisco Newspaper Printing Co.* v. *United States,* 9 CIT ——, 620 F. Supp. 738 (1985). "A time limitation that is a jurisdictional prerequisite is not subject to waiver of estoppel." *Id.* at 5; *see Zipes* v. *Trans World Airlines, Inc.,* 455 U.S. 385, 392-93 (1982); *United States* v. *Reliable Chemical Co.,* 66 CCPA 123, 128, C.A.D. 1232, 605 F.2d 1179, 1184 (1979).

If a demand for payment lacks information available to Customs which would provide a surety sufficient means of ascertaining the bond on which demand for payment is being made, such a demand does not constitute notice of demand for payment against a bond. Since the November 5, 1981 letter and accompanying printout did not contain any information from which plaintiff could ascertain that a demand was being made on the bond in question, it did not constitute notice of demand for payment against plaintiff's bond.

The Court holds that the mailing of the November 5, 1981 letter did not start the running of the 90 days in which plaintiff was required to file a protest, and that sufficient notice of demand for payment was not mailed until January 29, 1982. The protest filed on February 12, 1982 was timely.

Defendant's motion is denied. So ordered.

(Slip Op. 86-2)

DAN-DEE IMPORTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-5-00582

[Judgment for plaintiff.]

(Decided January 3, 1986)

Weltz, Stedina & Posner (*Herbert T. Posner*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office and *Judith M. Barzilay,* Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court for decision following trial. The issue before the court is whether the merchandise at issue should be classified for tariff purposes as dolls under item 737.22 of the Tariff Schedules of the United States (TSUS), under item 737.95, TSUS, as toys, not specifically provided for, under item 270.25, TSUS, as books, not specifically provided for, or under item 737.52, TSUS, as toy books.

The merchandise in question was imported from Taiwan during 1978 and 1979, and consists of stuffed cloth figures, each of which represents one of several children's fairy tales or stories.[1] Each

[1] A detailed description of the item is contained in the court's opinion on plaintiff's motion for summary judgment. *Dan-Dee Imports* v. *United States,* 7 CIT 241, Slip Op. 84-49 at 3-4 (April 30, 1984).

figure has a human or animal face and a general human shape.[2] Each figure bears three or four apron-like flaps which are raised to show a new face and to reveal a new "page" of words of a children's story on a background depiction of "clothing." Thus, as the flaps are raised a new character appears.

Plaintiff's basic argument is that the merchandise in question is more than a doll and cannot be classified under the *eo nomine* TSUS item for dolls. Defendant argues that the merchandise is essentially a doll, that the flap/pages are incidental to the merchandise and do not destroy its essential nature as a doll. It is well settled that "where an article is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—" it cannot be classified within that *eo nomine* provision. *Robert Bosch Corp.* v. *United States*, 63 Cust. Ct. 96, 103-04, C.D. 3881 (1969).

In order to determine whether the merchandise was more than a doll, the court heard testimony on the marketing and use of the figures.[3] Defendant's witnesses were not persuasive on the issue of whether the merchandise was used, sold or purchased as a doll. Mrs. Susan Crowley, a toy store owner, said nothing which was inconsistent with a conclusion that the flap/pages are a vital feature of the merchandise. Mrs. Crowley's account of her observations and marketing techniques was somewhat sketchy and her testimony regarding observation of a five-year-old with the merchandise was consistent with plaintiff's view that the merchandise is more than a doll. Likewise, the testimony of Mrs. Susan Abelson, an owner of one of the figures and a mother, did not outweigh that provided by plaintiff's witnesses. Mrs. Abelson testified that her daughter treated the figure as a doll, but Mrs. Abelson's daughter received the figure when she was two or three years old. Had she received it when she was older or had she been shown to use it differently, she may have treated it as a book or as a more complex toy than a doll. On the other hand, plaintiff's witnesses were clear and convincing in their testimony that essentially the merchandise is marketed and used as an educational toy.

Overall, the testimony at trial revealed that the merchandise may be used as some dolls are used, that is, "mothered" and held. The testimony also revealed that the merchandise is used to amuse or teach children in more complex ways. The item can be read and has other characteristics of a short children's book. It has the equivalent of cloth pages which contain the essential elements of a story. The flap/pages describe, in printed words, the characters and the plot of familiar children's tales. Perhaps the item would appeal to very young children whether or not it contained the words of a

[2] The court notes that contrary to its previous opinion, every figure does not bear a totally human representation. One figure depicts three pigs and one wolf in anthropomorphic form. The court's ruling, however, does not rest on the non-human feature of some of the figures.

[3] Use may be considered in making a decision as to whether an *eo nomine* provision applies. *United States* v. *Quon Quon Co.*, 46 CCPA 70, 72-73, C.A.D. 699 (1959).

story, but the testimony made clear that older children, and the adults who purchase the item for children, view the flap/pages and their contents as more than an incidental feature of the item.

As in other cases, there is a major selling feature which makes the merchandise in the case at bar more than a doll. *House of Ideas, Inc.* v. *United States,* 2 CIT 68 (1981), (papier-mâché clown bank); *Janex Corp.* v. *United States,* 80 Cust. Ct. 146, C.D. 4748 (1978) (plastic Raggedy Ann/Andy with enclosed light); *Cragston Corp.* v. *United States,* 51 CCPA 27, C.A.D. 832 (1963) (wind-up baby with walker). As the evidence revealed, the "book" aspect is fundamental to the merchandising of this article. This outweighs the fact that the article was labeled a "Tell-A-Story Doll" or a "Storybook Doll." The merchandise is in fact sold and used as more than a doll.

As to plaintiff's claimed classifications, the item does not appear to fit item 737.52, TSUS, "Toy books, including coloring books and books the only reading matter in which consists of letters, numerals or descriptive words." The actual printed words exceed the limitations of item 732.52, TSUS. See *A.C.G. Export Import* v. *United States,* 66 Cust. Ct. 128, C.D. 4181 (1971).

It is clear from the case of *Russ Berrie* v. *United States,* 76 Cust. Ct. 218, 223, C.D. 4659 (1976) (papier-mâché figures with attached message), the "dolls" may include items which are not solely for a child's amusement. Toys, on the other hand, must be used chiefly to amuse children. *Fred Bronner Corp.* v. *United States,* 57 Cust. Ct. 428, 435, C.D. 2832 (1966). Although there was a great deal of testimony about the book-like features of the merchandise, not one witness gave testimony that obviates the conclusion that the major intended use of the merchandise is the amusement of children. As with other educational toys, it is purchased, in part, to foster mental development, but the primary purpose of the article is amusement.

The merchandise is also not a book as that object is commonly understood. Its toy or doll-like features make it something other than or more than a book.

The court concludes, based on all the evidence, that the item at issue must be classified under item 737.95, TSUS, as toys, not specifically provided for. Thus, in this case, not only has the presumption of correctness attaching to the government's classification been overcome, but plaintiff has established a different classification by a preponderance of the evidence.

(Slip Op. 86-3)

UNITED STATES, PLAINTIFF *v.* ONE RED LAMBORGHINI (VIN ZA190000ELA12133), AND ONE BLACK LAMBORGHINI (VIN ZA190000ELA12144), DEFENDANTS

Court No. 85-10-01393

Before DICARLO, *Judge.*

Plaintiff brings action *in rem* under 19 U.S.C. § 1592(c)(5) (1982) seeking forfeiture of vehicles seized by Customs as improperly entered.

Held: 19 U.S.C. § 1592 does not provide a cause of action for forfeiture *in rem.* The action is dismissed.

(Decided January 6, 1986)

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*J. Kevin Horgan*) for plaintiff.

Stein Shostak Shostak & O'Hara (*Robert Glenn White*) for *amicus curiae* Brigitte Kritschker.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff brings this *in rem* action under section 592(c)(5) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592(c)(5) (1982), seeking forfeiture of two vehicles seized by the United States Customs Service (Customs) as improperly entered into the United States. Plaintiff sought a warrant for the arrest of the vehicles pursuant to 28 U.S.C. § 2461(b) (1982).[1] The Court did not sign the arrest warrant and requested, *sua sponte,* that plaintiff submit a memorandum setting forth the legal basis for its action.[2] The Court holds that section 592 does not provide a cause of action for forfeiture *in rem.* The action is dismissed.

BACKGROUND

On September 4 and 7, 1984, Brigitte Kritschker, a citizen of the Federal Republic of Germany, entered one Lamborghini Jalpa automobile at Jacksonville, Florida, and Los Angeles, California, respectively, under item 812.30, Tariff Schedules of the United

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[1] 28 U.S.C. § 2461(b) provides in part:

> Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress * * * forfeiture may be enforced by a proceeding by libel which shall conform as near as may be possible to proceedings in admiralty.

Rule C (3) of the Supplemental Rules for Certain Admiralty and Maritime Claims provides that an *in rem* action by the United States for forfeiture for federal statutory violation proceeds by issuance of an arrest warrant by the clerk for seizure of the property.

In *United States* v. *Gold Mountain Coffee, Ltd.,* 8 CIT 247, 597 F. Supp. 510, 515, *reh'g denied,* 8 CIT 336, Slip Op. 84-135 (Dec. 17, 1984), the Court held that since the clerk of this Court may not make the determinations required by section 592(c)(5), property subject to forfeiture under that provision cannot become subject to the process of the Court by action of the clerk, but only by action of the Court. Thus, in this action, the arrest warrant was forwarded to the Court.

[2] The Court requested that plaintiff brief the legal basis for its action since (1) there was no previous judicial determination whether section 592 provides for an *in rem* action for forfeiture and (2) under Rule C (6) of the Supplemental Rules no claimant would come forward until after publication of notice of the arrest of the vehicles.

States (TSUS).[3] According to Ms. Kritschker, she returned to the Federal Republic of Germany on September 11, 1984. On or about September 20, 1984, Customs agents seized both vehicles at Fort Worth, Texas.

On October 16, 1984, Customs issued a pre-penalty notice and notice of seizure to Ms. Kritschker pursuant to section 592(c)(5). On January 9, 1985, Ms. Kritschker responded to the pre-penalty notice, requesting administrative relief from the *in personam* penalty and from the seizure of the two vehicles. On March 6, 1985, Customs issued a penalty notice to Ms. Kritschker, alleging fraudulent violations of section 592. Ms. Kritschker responded to the penalty notice with a petition for mitigation, pursuant to 19 U.S.C. § 1618 (1982) on April 3, 1985, requesting that if the vehicles were not released by Customs within 21 days, the seizure be referred to the appropriate government attorneys for commencement of judicial forfeiture proceedings.

On May 10, 1985, Ms. Kritschker brought an action requesting that the Court order Customs to release the vehicles or refer the matter to the Department of Justice to "initiate proceedings on the seizure." *Kritschker* v. *Greenleaf,* No. 85–5–00657 (CIT).[4] On June 10, 1985, the United States counterclaimed in *Kritschker* for civil penalty for fraudulent violation of section 592.

On September 19, 1985, the Court granted plaintiff's motion in *Kritschker* to dismiss the counterclaim as untimely. The Court held: (1) the United States may not bring an action under section 592 against an importer who has pending a petition for mitigation or remission under 19 U.S.C. § 1618 before a final determination is provided to the importer pursuant to section 592(b)(2); (2) Ms. Kritschker's petition had not been denied; and (3) Ms. Kritschker had neither withdrawn her petition nor waived her rights to a determination by bringing her action.[5]

---

[3] Item 812.30, TSUS covers:

> articles imported by or for the account of any person arriving in the United States who is not a returning resident thereof:
>
> * * * * * * *
>
> Automobiles * * * imported in connection with the arrival of such person and to be used in the United States only for the transportation of such person, his family and guests, and such incidental carriage of articles as may be appropriate to his personal use * * *.

[4] The complaint alleged three causes of action. The first claimed violation of 19 U.S.C. §§ 1602-1604 (1982), which require Customs officials to report seizures immediately to appropriate authorities, including the United States Attorney for the district in which the violation occurred, and the United States Attorney General to "forthwith * * * cause the proper proceedings to be commenced and prosecuted, without delay," unless such proceedings are not warranted. 19 U.S.C. § 1604. The second cause of action alleged plaintiff was denied use of her property without due process under the Fifth Amendment to the Constitution. The third cause of action sought review of defendants' actions under the Administrative Procedure Act, 5 U.S.C. § 702 (1982).

[5] On October 9, 1985, the Court denied plaintiff's motion for judgment on the pleadings in *Kritschker,* and offered plaintiff an expedited trial date. Plaintiff in *Kritschker* then made an oral motion to voluntarily dismiss the action without prejudice. On October 21, 1985, plaintiff indicated that it would not seek action on its motion until disposition of this action.

On October 17, 1985, Customs issued its determination on Ms. Kritschker's supplemental petition. Customs said it had reasonable cause to seize the vehicles under section 592, and determined that Ms. Kritschker's false statements to Customs were the result of fraud. Notice of Customs determination was mailed to Ms. Kritschker's counsel October 30, 1985. Ms. Kritschker had until December 16, 1985 to respond. She did not respond.

On December 19, 1985, the United States moved to amend its answer in *Kritschker* to include a counterclaim for civil penalties for fraudulent violation of section 592. That motion is pending.

On October 4, 1985, the United States brought this action *in rem* under section 592 against the vehicles.

DISCUSSION

The question presented by plaintiff's action is whether Congress has provided for forfeiture actions *in rem* under section 592.

"In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " *Mills Music, Inc.* v. *Snyder*, ———, U.S. ———, 105 S.Ct. 638, 645 (1985), quoting *Park'n Fly* v. *Dollar Park and Fly, Inc.*, ——— U.S. ———, 105 S.Ct., 658, 662 (1985). Section 592 states in part:

> (a) Prohibition
>
> (1) General Rule
>
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any person to violate subparagraph (A).
>
> * * * * * * *
>
> (c) Maximum penalties
>
> (1) Fraud
>
> A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.
>
> * * * * * * *
>
> (5) Seizure
>
> If the Secretary has reasonble cause to believe that a person has violated the provisions of subsection (a) of this section and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States, then such *merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law.* Within a reasonable time after any such seizure is made, the Secretary shall issue to the person concerned a written statement containing the reasons for the seizure. After seizure of merchandise under this subsection, the Secretary may, in the case of restricted merchandise, and shall, in the case of

> any other merchandise (other than prohibited merchandise), return such merchandise upon the deposit of security not to exceed the maximum monetary penalty which may be assessed under subsection (c) of this section.

(Emphasis added.)

Section 592 was extensively revised in 1978.[6] The Senate and the conference report said that

> The penalty for violation of section 592 would be changed from an in rem penalty, forfeiture of the merchandise, to an in personam penalty, a monetary liability of the importer. However, seizure of the merchandise would be permitted if the Secretary of the Treasury has "reasonable cause to believe" the importer is insolvent, outside U S. jurisdiction, or that seizure is "necessary" to protect the revenue or prevent the importation of restricted goods. The seized merchandise would, in general, be forfeited to the United States only if the monetary penalty is not paid.

S. Rep. No. 95–778, 95th Cong., 2d Sess. 19, *reprinted in,* 1978 U.S. Code Cong. & Ad. News 2211, 2230; Conf. Rep. No. 95–1517, 95th Cong., 2d Sess. 10, *reprinted in,* 1978 U.S. Code Cong. & Ad. News 2249, 2252.

Simply stated, the 1978 revisions to section 592 terminated the *in rem* action under that provision. There is nothing in the language or legislative history of the current section 592 that indicates that Congress intended that provision to provide an *in rem* cause of action for forfeiture of merchandise.

Plaintiff argues that the statement in the legislative history quoted above that "seized merchandise would, *in general,* be forfeited to the United States only if the monetary penalty is not paid" (emphasis added) leaves open the possibility that merchandise might be forfeited in some circumstances other than for nonpayment of monetary penalty.

But the question posed by plaintiff's action is whether section 592 provides for *in rem* actions, not whether forfeiture is only permitted where the monetary penalty is unsatisfied.[7] The Court does not find the language cited by plaintiff "a clearly expressed legislative intention to the contrary" of the language of the statute providing only for an *in personam* action. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980).

Plaintiff says that it is compelled to seek a prompt judicial determination of the propriety of the seizure and detention of the vehi-

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[6] *See* Customs Procedure Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 110, 92 Stat. 888 (1978). Under prior law, the only penalty that could be assessed in a section 592 action was forfeiture of the merchandise involved or a penalty equal to the domestic value of the merchandise. Under current law, the amount of any penalty is to be determined *de novo* by the Court. 19 U.S.C. § 1592 (e). *See United States* v. *F.A.G. Bearings, Ltd.,* 8 CIT 294, 598 F. Supp. 401 (1984); Note, *Anachronism Laid to Rest: Customs Reform Act Accomplishes Long Overdue Reform of Section 592 of the Tariff Act of 1930,* 10 Law and Pol'y in Int'l Bus. 1305, 1314 (1978).

[7] The answer to this question remains unclear. In *United States* v. *Tabor,* 9 CIT ——, 608 F.Supp. 658, 665 (1985), the Court dismissed a claim for forfeiture in an action also seeking civil penalties. The Court held that in the forfeiture language of section 592(c)(5) "Congress appears to have provided a particular, but nonexclusive, manner for satisfaction of a judgment." 608 F.Supp. at 665.

cles or risk losing its only security for payment of the penalty on due process grounds or by the depreciation of the vehicles during the pendency of the administrative proceedings.[8] Plaintiff acknowledges that it is required to seek a post-seizure judicial determination of the legality of the seizure and detention within a reasonable time after seizure, *see United States* v. *$8,850,* 461 U.S. 555 (1983), and says that section 592 must be construed to permit some judicial approval of the seizure during the pendency of the administrative *in personam* proceedings.

There may be, as the United States argued in *Kritschker,* a statute under which *in rem* proceedings for forfeiture of merchandise is permitted. *See* 18 U.S.C. § 545 (1982). However, jurisdiction over such actions is provided in the district courts. 28 U.S.C. § 1355 (1982).[9] Jurisdiction over actions under section 592 is exclusive in this Court. 28 U.S.C. § 1355. *See United States* v. *Gold Mountain Coffee, Ltd.,* 8 CIT 247, 597 F. Supp. 510, 515, *reh'g denied,* 8 CIT 336, Slip Op. 84-135 (Dec. 17, 1984); *United States* v. *Tabor,* 9 CIT ——, 608 F. Supp. 658, 665 (1985).

The Court understands the desirability of adjudicating all claims arising out of an import transaction in one forum. But, "[t]he relevant question is not whether, as an abstract matter, the rule advocated by petitioner accords with good policy. The question we must consider is whether the policy petitioners favor is that which Congress effectuated * * *. Courts are not authorized to rewrite a statute because they might deem [it] susceptible of improvement." *Badaracco* v. *Commissioner,* —— U.S. ——, 104 S.Ct. 756, 765 (1984).

In rem actions under section 592 may be desirable for the reasons advanced by plaintiff. But section 592 is, on this point, plain and unambiguous; it does not provide for *in rem* actions.

The action is dismissed. Judgment will be entered accordingly.

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[8] To afford due process to potential claimants, plaintiff asks the Court to "approve" the detention of the vehicles. Memorandum in Support of the United States' Claim for Forfeiture, at 7. To avoid depreciation of the vehicles, plaintiff says that it will deposit the proceeds of their sale in an escrow account from which the civil penalty will be satisfied. *Id.*, at 16.

[9] 28 U.S.C. § 1355 (1982) provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

28 U.S.C. § 1582(a) (1982) provides for jurisdiction in this Court of any action brought by the United States under section 592.

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Treasury Decisions

(T.D. 86-9)

Approval of William C. Brann II To Gauge Imported Petroleum and Petroleum Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), William C. Brann II of 4423 18th Street, Bacliff, Texas 77518, applied to Customs for approval to gauge imported petroleum and petroleum products. It has been determined that Mr. Brann meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of William C. Brann II to gauge imported petroleum and petroleum products in all Customs Districts is approved.

EFFECTIVE DATE: January 27, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: January 27, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 86-10)

Approval of United Surveyors of Chemicals, Inc. To Gauge Imported Petroleum and Petroleum Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), United Surveyors of Chemicals, Inc., of 7501 Bayway Drive, Baytown, Texas 77520, applied to Customs for approval to

gauge imported petroleum and petroleum products. It has been determined that United Surveyors of Chemicals meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of United Surveyors of Chemicals, Inc., to gauge imported petroleum and petroleum products in the Customs Districts of Houston, Port Arthur, and Laredo, Texas, and New Orleans, Louisiana, is approved.

EFFECTIVE DATE: January 23, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-2446).

Dated: January 27, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 86-11)

Recordation of Trade Name: "SUPREME IMPORT EXPORT CO., INC."

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Recordation.

SUMMARY: On March 14, 1985, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "SUPREME IMPORT EXPORT CO., INC." was published in the Federal Register (50 FR 10341). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in opposition to the recordation and received not later than May 31, 1985.

Supreme International Corporation commented in opposition to the recordation of the trade name citing concern that because "SUPREME IMPORT EXPORT CO., INC." is confusingly similar to Supreme International Corporation it might be restrained from participating in import transactions under their established name.

SUPREME IMPORT EXPORT CO., INC. has indicated that it has no objection to goods arriving in the United States for Supreme International Corporation. Therefore, goods bearing the name "Supreme International Corporation" shall not be seized or detained as confusingly similar to "SUPREME IMPORT EXPORT CO., INC."

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "SUPREME IMPORT EXPORT CO., INC." is recorded as the trade name used by Supreme Import Export Co., Inc., a corporation organized under the laws of the State of New York, located at 900 Broadway, New York, New York

10003. The trade name is used in connection with the following merchandise manufactured in Hong Kong, Korea, Japan, Taiwan and the Philippines; playing cards; cigarette lighters; cellophane tape; toothbrushes; padlocks; cassette tapes; pens; batteries; cameras and curling irons.

EFFECTIVE DATE: January 31, 1986.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: January 24, 1986.

EDWARD T. ROSSE,
Acting Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, January 31, 1986 (51 FR 4065)]

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19 CFR Part 6 (T.D. 86-12)

Amendments to the Customs Regulations Concerning Access to Customs Security Areas

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations.

SUMMARY: This document amends the Customs Regulations on an interim basis to require the use and display of a Customs approved identification strip or seal on existing identification cards worn by employees at airports accommodating international air commerce. Uniformed Federal, State, and local enforcement personnel are excepted from the requirement. The additional identification would be required for all non-exempt persons located at, operating out of, or employed by, affected airports, who request access to Customs security areas in order to perform functions associated with their employment. The amendment also requires that an authorized official of the employer attest, in writing, that a background check of employment history and references has been conducted on their affected employees.

EFFECTIVE DATE: March 5, 1986.

COMMENTS

The amendments contained in this document are being published on an interim basis in order to put into action as quickly as possible a standard policy regarding the Customs role in airport security in light of the ever-growing terrorist threat. However, written comments received before (60 days from the date of publication) will be

considered in determining whether any changes to the interim regulations are required before a final rule is published.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Charles P. Bartoldus, Office of Inspection and Control (202-566-2140). Legal Aspects: Ellen McClain, Office of the Chief Counsel (202-566-2482), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Various provisions of the Tariff Act of 1930, as amended (19 U.S.C. 1202 *et. seq.*), which are made applicable to aircraft by 19 U.S.C. 1644, 49 U.S.C. App. 1509, and § 6.10, Customs Regulations (19 CFR 6.10), provide the statutory authority for Customs officers to control the entry and clearance of aircraft arriving in the U.S. from foreign countries and the inspection of the crew, passengers, baggage, stores, and cargo carried aboard those aircraft. Section 1109 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1509), authorizes the Secretary of Transportation to designate airports as ports of entry for civil air navigation. Section 582, Tariff Act of 1930, as amended (19 U.S.C. 1582), authorizes the Secretary of the Treasury to prescribe regulations for the detention and search of persons and baggage. These regulations are set forth in Parts 6 and 162, Customs Regulations (19 CFR Parts 6 and 162). Implicit in the search and inspection authority and the right to designate airports is the right to maintain a controlled and secure Customs area which facilitates and insures the integrity of the authorized search and inspection.

Customs finds it necessary to improve integrity and security in authorized inspection areas, due in large measure to the recent sharp increases in threats to airport security posed by terrorist organizations. The current regulations in 19 CFR Part 6 are inadequate for controlling access to the Customs security areas to the extent necessary. The arrival of an aircraft from abroad necessitates the services of numerous persons representing various specialties, such as ground crews, refueling personnel, baggage handlers, and food service personnel, among others. While all of these persons may have legitimate business associated with the arrival of an international flight, Customs needs a method by which access to the aircraft and inspection areas will be restricted, as well as some assurance that the service personnel themselves have been found trustworthy by their employers. While the Federal Aviation Administration has general responsibility for security at airports, Cus-

toms has determined that it is necessary to amend 19 CFR Part 6 to provide Customs with the needed authority and procedures to achieve these goals at the areas under the Customs jurisdiction. The purpose of this amendment is to establish an identification system for all employees whose duties require access to Customs security areas at airports handling international air commerce, with the exception of uniformed Federal, State, and local enforcement personnel. Because of recent terrorist incidents at foreign airports, threats of violence at U.S. airports, and in an effort to improve the security of these areas by restricting access to authorized employees, Customs will require that employees apply for a Customs approved identification strip or seal to be affixed to existing identification cards once an authorized official of the employer attests that background checks of employment history have been conducted. Customs will issue the identification strip or seal, once satisfied that the issuance of the additional identification will neither endanger the revenue nor threaten the security of the entire security area (which may include the arriving airplane, ramp area, and Customs baggage and passenger inspection facilities).

The requirement for a background investigation of employees will only be required with regard to employees hired after November 1, 1984. For all employees hired before that date, the authorized official of the employer need only attest to the fact that the employee was employed before November 1, 1984.

Further, the amendments provide identification of a "Customs security area" within which the previously described procedures will be enforced. This area may include the deplaning and ramp areas, as defined by the district director of Customs, as well as the baggage and passenger inspection areas. These areas will be posted once designated. In airports with areas dedicated only to international arrivals, the posted area will be restricted at all times. In airports in which international and domestic flights share arrival facilities, the restriction times will be posted to the extent they are identifiable.

COMMENTS

Before adopting the interim regulations as a final rule, Customs will give consideration to any written comments (preferably in triplicate) timely submitted to the Commissioner. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR § 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington D.C. 20229.

INAPPLICABILITY OF NOTICE PROVISIONS

Recent terrorist attacks against European airports and American citizens have pointed out a need to develop adequate and immediate plans for handling high-risk arrivals of aircraft. Customs is responsible for the protection of arriving passengers, airport personnel, and federal employees while in the Customs security area.

Therefore, in light of the threat to public safety, it has been determined that, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are contrary to the public interest.

E.O. 12291 AND REGULATORY FLEXIBILITY ACT

Because the amendment does not meet the criteria for a "major rule" within the meaning of § 1(b) of E.O. 12291, Customs has not prepared a regulatory impact analysis.

Because of the need to expedite the issuance of this regulation, Customs has not yet been able to determine if the regulation will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601–612). However, Customs will continue to review this matter and will consider any comments submitted on this aspect of the project before issuing a final rule.

PAPERWORK REDUCTION ACT

The interim regulations are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). Accordingly, an application for approval of the interim regulations has been submitted to the Office of Management and Budget.

LIST OF SUBJECTS IN 19 CFR PART 6

Air carriers, Air transportation, Aircraft, Airports.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENTS TO THE REGULATIONS

Part 6, Customs Regulations (19 CFR Part 6), is amended as set forth below:

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624, 1644, 49 U.S.C. App. 1474, 1509.

2. Part 6 is amended by adding a new § 6.12a, to read as follows:

§ 6.12a Access to Customs Security Areas.

(a) For the purposes of this section, the term "Customs security area" means the federal inspection services area (as provided for by § 6.12(e) of this Part), designated for processing passengers, crew, their baggage and effects arriving from foreign countries, as well as the aircraft deplaning and ramp areas and other restricted areas designated by the district director of Customs. These areas will be posted as restricted to the extent possible, and are established for the purpose of prohibiting unauthorized entries or contact with persons or objects.

(b) With the exception of uniformed Federal, State, and local enforcement personnel, all persons located at, operating out of, or employed by any airport accommodating international air commerce, or its tenants or contractors, including air carriers, who have unescorted access to the Customs security areas must openly display or produce upon demand, a Customs approved identification card, or strip or seal to be issued and affixed by Customs to existing airport identification cards. The approved identification card, strip or seal, shall be in the possession of the person in whose name it is issued at all times when he is in the Customs security areas. An approved identification card, strip or seal shall not be issued to any person whose employment, if necessitating access to the Customs security areas will, in the judgment of the district director, endanger the revenue or the security of the areas. Grounds for denial of access shall include, but are not limited to:

(1) Any cause which would justify suspension or revocation of the identification card under the provisions of paragraph (h) of this section;

(2) Evidence of a pending or past investigation which establishes criminal, or dishonest conduct, or a verified record of such conduct.

The district director shall give written notification to any person whose application for access to the Customs security area is denied, fully stating the reasons for such denial. The applicant shall have the opportunity to rebut the denial of his application in writing.

(c) An application for an approved identification strip or seal as required by this section, shall be filed by the applicant with the district director on Customs Form 3078. For employees hired on or after November 1, 1984, an authorized official of the employer shall attest in writing that a background check has been conducted on the applicant, to the extent allowable by law, including, at a minimum, references and employment history, to the extent necessary to verify representations made by the applicant relating to employment in the preceeding five (5) years. For employees hired before November 1, 1984, the authorized official of the employer need only attest to the fact that the employee was hired before that date. The authorized official of the employer shall attest that to the best of its knowledge, the applicant meets the conditions necessary to con-

duct duties in the Customs security area. Records of background investigations must be available for verification by Customs for a period of one year following cessation of employment.

(d) An employee may apply, in writing, for a new application under certain circumstances. In such instances, the approved identification shall be promptly submitted by the employee to the district director. The circumstances justifying the issuance of a new authorization strip or seal are as follows:

(1) A change is employee name;
(2) A change in employee address;
(3) A change in the name or ownership of his employing company; or
(4) A change in employer or airport authority identification card format.

(e) The identification strip or seal shall be removed by the district director when for security reasons it is necessary to change the nature of the identification.

(f) The loss or theft of an identification card, with strip or seal affixed, shall be promptly reported by the holder to the district director, and may be replaced as provided in paragraph (d) of this section.

(g) If an approved identification card is presented by a person other than the one to whom it was issued, such identification strip or seal shall be forthwith removed and destroyed.

(h) An authorized seal or strip may be removed and the district director may revoke or suspend access to the Customs security area for any of the following reasons:

(1) Such approved identification card was obtained through fraud or the misstatement of a material fact;

(2) The holder of such approved identification card is convicted of a felony, or convicted of a misdemeanor involving theft, smuggling, or any theft-connected crime;

(3) The holder permits the approved identification card to be used by any other person, or refuses to openly display or produce it upon the proper demand of a Customs officer;

(4) The continuation of privileges would, in the judgment of the district director, endanger the revenue or security of the area;

(5) The holder refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation; or

(6) The holder no longer requires access to the Customs security area for an exteneded period of time. If such a holder returns to duties in the Customs security area within 1 year, a Customs Form 3078 as required by paragraph (c) of this section need not be submitted.

(i) The district director shall suspend or revoke access to the Customs security area by serving notice of the proposed action in writing upon the holder of an approved identification card and a copy of such notice to the holder's employer. Such notice shall be in the

form of a statement specifically setting forth the grounds for revocation or suspension of the privilege and shall be final and conclusive upon the holder unless he shall file with the district director a written notice of appeal within 10 days following receipt of the notice of revocation or suspension. The notice of appeal shall be filed, in duplicate, and shall set forth the response of the holder to the statement of the district director. The holder, in his notice of appeal, may request a hearing.

(j) The following procedures will govern the conduct of a hearing requested under paragraph (i) of this section:

(1) *Notification of and time of hearing.* If a hearing is requested, it shall be held before a hearing officer designated by the Commissioner of Customs or his designee within 30 days following application thereof. The holder shall be notified of the time and place of hearing at least 5 days prior thereto.

(2) *Conduct of hearing.* The holder may be represented by counsel at the revocation or suspension hearing. All evidence and testimony of witnesses in such proceeding, including substantiation of charges and the answer thereto, shall be presented with both parties having the right of cross-examination. A stenographic record of the proceedings shall be made and a copy furnished to the holder. At the conclusion of such proceedings or review of a written appeal, the hearing officer or the district director, as the case may be, shall forthwith transmit all papers and the stenographic record of the hearing, if held, to the Commissioner of Customs or his designee, together with his recommendation for final action.

(3) *Additional arguments.* Following a hearing and within 10 calendar days after delivery of a copy of the stenographic record, the holder may submit to the Commissioner of Customs or his designee, in writing, additional views and arguments on the basis of such record.

(4) *Failure to appear.* If neither the holder nor his attorney appear for a scheduled hearing, the hearing officer shall conclude the hearing and transmit all papers with his recommendation to the Commissioner of Customs or his designee.

(k) The Commissioner or his designee shall render his decision, in writing, stating his reasons therefor, with respect to the action proposed by the hearing officer or the district director. Such decision shall be transmitted to the district director and served by him on the holder.

(l) When an approved identification is required under paragraph (b) of this section, and the district director determines that the application for the identification cannot be administratively processed in a reasonable period of time, any employer may, upon written request, have a temporary approval issued by the district director to his employee if he can show to the satisfaction of the district director that a hardship to his business would result pending issuance of an approved identification.

(1) The temporary identification shall be valid for a period of 60 days. The district director may renew the temporary identification for additional 30-day periods if he determines that the circumstances under which the temporary identification was originally issued continue to exist. The temporary identification strip or seal shall be removed and destroyed by the district director when the permanent approved identification is issued or the privileges granted thereby are withdrawn.

(2) The provisions of this paragraph shall also apply to temporary employees and official visitors requiring access to the Customs security area. In the case of temporary employees, the identification shall be valid for a period of 30 days. In the case of official visitors, the temporary identification strip or seal shall be valid for the day of issuance only, and shall be affixed to a temporary card issued by the district director. Temporary employee and official visitor identifications are renewable for periods equal to their original period of validity.

(3) The temporary identification strip or seal may be removed from any employee or official visitor identification card at any time if, in the judgment of the district director, continuation of the privileges granted thereby would endanger the revenue or if the holder of the temporary identification refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: January 27, 1986.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, February 3, 1986 (51 FR 4161)]

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19 CFR Part 10

(T.D. 86-13)

Customs Regulations Amendment Relating to Marking Requirements for Cargo Containers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to relieve the owners or operators of certain cargo containers from countries subject to column 1 of the Tariff Schedules of the United States (TSUS), from the burden of affixing certain identifying

markings to them. It has been determined that the containers already display the identity of their owner/operator as well as serial numbers which make individual container identification possible. Further, whether of foreign or domestic manufacture, once exported, these containers are entitled to readmission without compliance with the regulatory marking requirements. Accordingly, the markings required will be limited to those unique identifying marks which already appear on the containers.

EFFECTIVE DATE: March 5, 1986.

FOR FURTHER INFORMATION CONTACT: Donald H. Reusch, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to General Headnote 6, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), containers or holders for imported merchandise, if imported empty; and the usual or ordinary types of shipping or transportation containers or holders, if imported containing or holding articles; and if designed for, or capable of reuse; are subject to tariff treatment as imported articles and as such are subject to duty upon each importation, unless specifically exempted. Lift vans and other shipping containers of the large ocean-going type are provided for in item 640.30, TSUS, currently dutiable at the rate of 1.3 percent ad valorem, if imported from countries subject to column 1 of the tariff schedules.

By § 143 of Pub. L. 97-446 (96 Stat. 2342) dated January 12, 1983, Congress temporarily suspended duty on certain of the large ocean-going freight containers imported from column 1 countries, which would be otherwise dutiable under item 640.30, TSUS. Specifically, a new item 911.80 was added to the TSUS which provided for the duty-free entry until December 31, 1986, of containers specially designed and equipped to facilitate the carriage of goods by one or more modes of transport without intermediate reloading. In order to qualify for duty-free treatment under item 911.80, TSUS, a container must have a gross mass rating of at least 40,000 pounds. The legislative history to Pub. L. 97-446 indicates that the subject freight containers will become permanently free of duty on January 1, 1987. (See Presidential Proclamation No. 4707, of December 11, 1979, published in the Federal Register on December 13, 1979 (44 FR 72348)).

Regardless of whether dutiable, containers entering the customs territory of the United States are subject to certain requirements concerning the presence of identifying markings. The marking requirements for imported containers are set forth in § 10.41b, Cus-

toms Regulations (19 CFR 10.41b), which provides for the release from Customs custody without payment of duty of serially numbered substantial holders or outer containers. Those containers qualifying for treatment under item 911.80, TSUS, are presently subject to the requirements of § 10.41b.

Section 10.41b includes requirements for all types of substantial holders and outer containers for which duty-free entry is sought under one of the three provisos of item 808.00, TSUS. The first proviso in item 808.00, TSUS, permits duty-free entry for substantial holders and containers which are products of the U.S. The second proviso includes foreign-made containers and holders which have been previously imported with duty, if any, having been once paid. The third proviso covers holders and containers which have been specified by the Secretary of the Treasury as instruments of international traffic, including their repair components and accessories and equipment. These amendments only apply to the first and second proviso. They do not pertain to containers or holders entered under the third proviso, as instruments of international traffic. Section 10.41b requires that containers and holders of all descriptions imported under item 808.00, TSUS, display the designation "808.00 (TSUS)", the district and port code numbers for the Customs port of entry, the Customs entry number as well as the last two digits of the fiscal year in which duty was paid, the name of the owner, and the owner-assigned serial number. The purpose of these requirements is to enable Customs to determine that duty, if applicable, has previously been paid at the time of first entry.

In regard to the 40,000 pound rated containers which were the subject of Pub. L. 97-446, it is noted that they already bear the identity of the owner or operator, as well as the owner/operator-assigned serial number. Whether foreign-made or of U.S.-manufacture, the containers, once exported, are entitled to be brought back into the U.S. without entry, and duty-free upon compliance with the marking provisions of of § 10.41b. Furthermore, a large number of the subject containers are in use and owing to their existing markings and their size, they are readily distinguishable from other containers and holders to which the marking requirements apply.

In view of the circumstances peculiar to containers which were the subject to Pub. L. 97-446, it has been determined that the generally applicable marking requirements prescribed in § 10.41b(c), Customs Regulations (19 CFR 10.41b(c)), serve no useful purpose, and the subject containers should be relieved of compliance with this burdensome requirement. Accordingly, § 10.41(b) is being amended to reflect this determination.

Inapplicability of Public Notice Requirements

Because this amendment merely implements a statutory requirement, relieves a regulatory burden, and involves a matter in which

the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and an opportunity for public comment are not necessary.

Regulatory Flexibility Act

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. et seq.), or any other statute.

Executive Order 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a major impact analysis is not required.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 10

Customs duties and inspection, Imports, Packaging and containers.

Amendments to the Regulations

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10, Customs Regulations (19 CFR Part 10), continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1623, 1624.

2. Section 10.41b is revised by amending paragraph (c) to read as follows:

§ 10.41b Clearance of serially numbered substantial holders or outer containers.

* * * * * * *

(c)(1) In the case of serially numbered holders or containers of foreign manufacture, other than those provided for in paragraph (c)(2) of this section, for which free clearance under the second provision in item 808.00, Tariff Schedules of the United States (19 U.S.C. 1202), is claimed, the owner shall place thereon the following markings:

(i) 808.00.

(ii) The district and port code numbers of the port of entry, the entry number, and the last two digits of the fiscal year of entry covering the importation of the holders and containers on which duty was paid.

(iii) The name of the owner, either positioned as indicated in the example below, or elsewhere conspicuously shown on the holder or container.

(iv) The serial number assigned by the owner, which shall be one of consecutive numbers and not to be duplicated. For example: 808.00 * * * 10-1-366-63 * * * Zenda * * * 2468.

(2) In the case of substantial holders or containers of either U.S. or foreign manufacture, specially designed and equipped to facilitate the carriage of goods by one or more modes of transport without intermediate reloading, each having a gross mass rating of at least 40,000 pounds, for which duty-free entry is requested under either the first or the second proviso in item 808.00, Tariff Schedules of the United States (19 U.S.C. 1202), is claimed, only the following clear, conspicuous and durable markings are required to be on the container:

(i) The identity of the owner or operator of the container.

(ii) The serial number assigned by the owner or operator of the container, which shall be one of consecutive numbers and shall not be duplicated.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: January 14, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 3, 1986 (51 FR 4163)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

Proposed Customs Regulations Amendment Relating to a Change in the Customs Service Field Organization—Brunswick, Georgia

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; solicitation of comments.

SUMMARY: This document proposes to amend the Customs Regulations to change the Customs field organization by extending the geographical limits of the port of entry at Brunswick, Georgia. Currently, Customs officers at the port service many locations which are outside the Brunswick city limits, those limits having been the unofficial port limits. This proposed expansion will better serve the public by including several locations routinely requiring Customs service within the official port limits.

DATE: Comments must be received on or before April 4, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs proposes to amend § 101.3, Customs Regulations (19 CFR 101.3), by extending and officially defining the geographical limits of the port of entry of Brunswick, Georgia, located in the Savannah, Georgia, Customs District in the Southeast Region.

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Currently, there is no official definition of the Brunswick port limits. The Brunswick city limits have been serving as the port limits. However, Customs officers at the port routinely service many locations which are outside the city limits, and an additional out-of-port terminal facility recently began operation. Therefore, this proposed change would expand the Brunswick port limits to include those several locations now receiving service.

The proposed expanded port limits are as follows: Beginning from the intersection of the boundary between the counties of Camden and Glynn and tht Atlantic Ocean, and proceeding in a northwesterly direction along the Little Satilla River to U.S. Highway Interstate 95; then in a northeasterly direction along U.S. Highway Interstate 95 to the boundary between McIntosh and Glynn Counties; then in a easterly direction along the Altahama River to the Atlantic Ocean; then in a southerly direction along the Atlantic coastline to the place of beginning.

If the proposed change is adopted, the list of Customs regions, districts, and ports of entry in § 101.3(b) Customs Regulations, will be amended accordingly.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This change is proposed under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by E.O. No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II) and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Imports, Organization.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this proposal. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the

U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some entities in the Brunswick, Georgia, area, it is not expected to be significant because the extension of the limits of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisions of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment, if adopted, will not have a significant economic impact on a substantial number of small entities.

EXECUTIVE ORDER 12291

Because the proposed amendment relates to the Customs field organization, pursuant to § 1(a)(3) of E.O. 12291 this proposal is not subject to that E.O.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: January 14, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 3, 1986 (51 FR 4172)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-2707)

Motion

ARMSTRONG RUBBER CO., ET AL., PLAINTIFF/APPELLEES *v.* UNITED STATES, DEFENDANT/APPELLANT *v.* HANKOOK TIRE MFG. CO., ET AL., DEFENDANT/APPELLEE

Lyn M. Schlitt, General Counsel, *Michael P. Mabile*, Assistant General Counsel and *Catherine R. Field*, United States International Trade Commission, of Washington, D.C., represented appellant.

Frederick L. Ikenson, of Washington, D.C., represented appellees.

Thomas B. Wilner, *William D. Rogers*, *Robert E. Hertzstein*, *Sukhan Kim*, *Stephen E. Becker*, *Alan O. Sykes* and *Duane K. Thompson*, Arnold & Porter, of Washington, D.C., represented intervenors Hankook Tire Mfg. Co., Ltd., et al.

Gail T. Cumins, *Peter O. Suchman* and *Ned H. Marhsak*, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, represented Amicus Curiae, American Association of Exporters and Importers.

Appealed from: United States Court of International Trade.

Judge WATSON.

(Appeal No. 85-2707)

Motion

ARMSTRONG RUBBER CO., ET AL., PLAINTIFF/APPELLEES *v.* UNITED STATES, DEFENDANT/APPELLANT *v.* HANKOOK TIRE MFG. CO., ET AL., DEFENDANT/APPELLEE

Before MARKEY, *Chief Judge*, BALDWIN and BISSELL, *Circuit Judges*.

ORDER

The court has before it certain motions of Hankook Tire Mfg. Co., Ltd., Hankook Tire American Corp., Kumho & Co., Inc., Kumho U.S.A., Inc., Hyosung. Corp., and Hyosung America, Inc. (jointly, movants), to intervene in this appeal from an August 8, 1985 decision of the Court of International Trade (CIT). Movants

were formal intervenors in the CIT proceedings on the side of appellant, the U.S. International Trade Commission (ITC), by virtue of their participation in the ITC antidumping proceedings under review, and their status as interested parties pursuant to 19 U.S.C. § 1677(9)(A).

The court has also received the December 19, 1985 motion of appellees Armstrong Rubber Co. and the B.F. Goodrich Company (Armstrong et al.) to dismiss the appeal for lack of jurisdiction.

On August 15, 1985, the ITC filed its notice of appeal with this court. On August 19, 1985, the appellees, Armstrong et al., filed a motion for alteration of judgment under the purported authority of USCIT R. 59(e). That motion was denied by the CIT on September 18, 1985.

Armstrong et al. has argued that the filing of the USCIT 59(e) motion nullified the ITC's August 15, 1985 notice of appeal, and that the ITC's failure to file a subsequent notice of appeal from the September 18, 1985 order of the CIT has rendered this appeal untimely. The ITC and movants have requested an enlargement of time, until January 13, 1986, to respond to this motion. The request for an enlargement of time to respond to the motion is granted.

Movants have also requested intervention into this appeal. Movants, however, did not file a notice of appeal in the CIT, relying instead upon paragraph 9(a) of this court's procedural handbook as the basis for their participation in this appeal. Movants argue that paragraph 9(a) grants them the position of appellants simply by the filing of a notice of appearance and that this status was allegedly confirmed in oral conversation with members of the clerk's staff.

Regarding the movant's motions to intervene, paragraph 9(a) of the court's procedural handbook states:

> A party who appears as an intervenor in a lower court proceeding shall be considered a party to the appeal upon the filing of a notice of appearance.

Further, the handbook carries the express qualification:

> This handbook does not amend, modify, or substitute for any of the court's rules. Appeals are governed by the Federal Rules of Appellate Procedure (FRAP) with modifications and additions by Local Rules (CAFC) dictated by the nature of the court's jurisdiction.

FRAP 3 specifically directs that an appeal permitted as of right *shall* be taken by filing a notice of appeal with the clerk of the court from which the appeal is taken within the time allowed by FRAP 4. Further, that rule specifically requires each party seeking to act independently to overturn or modify a judgment to file a notice of appeal. The general rule that the filing of the notice of appeal is mandatory and jurisdictional (*United States* v. *Robinson*, 361 U.S. 220, 224 (1960)) extends to all appeals. *Jackson Jordan, Inc.* v. *Plasser Amer. Corp.*, 725 F.2d 1373, 1376 (Fed. Cir. 1984).

Thus, movants' reliance upon Paragraph 9(a) of the handbook in this case is unjustified. By filing a notice of appearance, movants have the right to participate as a party in the appeal. However, having failed to file a notice of appeal, movants' motion to participate in this appeal as appellants must be denied. Thus, the brief and response to the motion to dismiss proffered by movants is accepted in support of the position of the United States (appellant) and will be considered to that extent.*

Dated: January 14, 1986.

For the Court,

JEAN GALLOWAY BISSELL,
Circuit Judge.

*This treatment of movants is in accordance with Supreme Court rules on *appeals* to that court. See Supreme Court Rule 10.4.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Morgan Ford
James L. Watson
Gregory W. Carman
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Dominick L. DiCarlo
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Bernard Newman

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 85-132)

DONNA KELLEY, ET AL., PLAINTIFFS *v.* SECRETARY, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 85-03-00437

Opinion and Order

(Decided December 30, 1985)

Donna Kelley, pro se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Platte B. Moring III, Civil Division, United States Department of Justice, for defendant.*

RESTANI, *Judge*: Plaintiffs, former employees of the American Thread Company's (American Thread) plant in Tallapoosa, Georgia (Tallapoosa plant), challenge the Secretary of Labor's determination denying eligibility of former employees of the Tallapoosa plant to apply for trade adjustment assistance under section 223 of the Trade Act of 1974 (Act), 19 U.S.C. § 2273 (1982).[1] Certification for eligibility to apply for adjustment assistance requires an affirmative determination by the Secretary of Labor under the three-part test of section 222.[2] The Secretary of Labor determined that the nexus between increased imports and worker separations required by the third element of Section 222 was lacking and thus the workers in question were denied eligibility to apply for adjustment assistance.

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[1] One determination was issued covering petitions filed by employees of American Thread's Tallapoosa and Willimantic plants. 50 Fed. Reg. 569. Investigations of those petitions were conducted separately, in large part, and only the Tallapoosa determination is currently before the court.

[2] Section 222 provides:

> The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part if he determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales of production.
>
> For purposes of paragraph (3), the term "contributed importantly" means a cause which is important, but not necessarily more important than any other cause.

19 U.S.C. § 2272 (1982, & 1983 Supp. I).

This court has authority to review a decision of the Secretary of Labor denying a petition for eligibility to apply for adjustment assistance. 19 U.S.C. § 2395(a) (1982). The court is bound by findings of fact by the Secretary of Labor supported by substantial evidence. 19 U.S.C. § 2395(b) (1982). The issue before the court is, therefore, whether there is substantial evidence on the administrative record to support the Secretary's determination that there was lacking the requisite causal nexus between increased imports of "like or directly competitive articles" and worker separations.[3]

Before addressing this issue, however, the court must consider defendant's jurisdictional challenge. Workers may challenge the Secretary of Labor's final determination on a petition for adjustment assistance by filing an action with this court within sixty days after notice is given. 19 U.S.C. § 2395(a) (1982). 29 CFR § 90.19(a) (1984) provides that the notice referred to in 19 U.S.C. § 2395(a) is notice via publication in the Federal Register. Notice of denial of eligibility to apply for adjustment assistance was published in the Federal Register on January 4, 1985, and plaintiffs' summons and complaint were not deemed filed until March 28, 1985. Defendant argues that plaintiffs thereby failed to comply with the sixty day statute of limitations and that this court, therefore, lacks jurisdiction over plaintiffs' substantive cause of action. Normally, in accordance with regulations and under case law, the sixty day period would run from the time constructive notice is given; the date of the Federal Register publication. Section 2395(a), however, is not so specific in its definition of notice. The court concludes, therefore, that the statute requires a consideration of whether notice was proper in the context of other applicable statutes and regulations. Section 223 of the Act provides that the Secretary of Labor must act on a petition for trade adjustment assistance within sixty days after such petition is filed.[4] 19 U.S.C. § 2273(a) (1982). The Secretary of Labor's final determination was published in the Federal Register approximately four months after plaintiffs' petition was filed, far exceeding the sixty day statutory provision. Although failure to comply with this deadline does not make the Secretary of Labor's determination *ultra vires*, *Katunich* v. *Donovan*, 8 CIT —, 594 F. Supp. 744, 748–49 (1984), the court determines that certain consequences flow from a late determination. As previously recognized by this court,

> It is well settled that "essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him *and opportunity to meet it.*" *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976) (quoting Frankfurter, J., concurring in *Joint Anti-Facists Committee* v. *McGrath*, 341 U.S.

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[3] See subparagraph (3) of section 222 in footnote 2.

[4] Regulations governing these proceedings break down this 60 day period further; a recommendation by the Office of Trade Adjustment Assistance (OTAA) on a petition is due within 45 days after such petition is filed and a final determination by the Secretary of Labor is due 15 days thereafter. 29 C.F.R. §§ 90.15–90.16 (1984).

> 123, 171–72 (1951)) (emphasis added). It is also true that "because of the *ex parte* nature of the certification process, and the remedial purpose of the trade adjustment assistance program, the Secretary is obliged to conduct his investigation with the utmost regard for the petitioning workers." *Local 167, International Molders and Allied Workers' Union* v. *Marshall,* 643 F.2d 26, 31 (1st Cir. 1981).

Estate of William Finkel v. *Donovan,* 9 CIT —, Slip Op. 85–80 at 9–10 (July 31, 1985).

Particularly where, as here, a party is proceeding *pro se* before the Secretary of Labor, the court finds that the Secretary's failure to comply with the statutory time constraints regarding issuance of a final determination makes it inappropriate to hold that publication in the Federal Register places plaintiffs on constructive notice and thereby marks the beginning of the sixty day statute of limitations. Congress could not have intended a *pro se* party to constantly search the Federal Register for the final determination of the Secretary of Labor for months beyond the sixty days within which such determination is due under the statute. Under the circumstances of this case, actual notice should have been provided and constructive notice will not mark the running of the statute of limitations. In a somewhat similar situation the court noted, "[t]he cost and administrative burden of conveying the additional information is minimal when compared with the benefits reaped by the parties and the court in devoting their efforts to the merits of the case rather than to procedural issues." *Tyler* v. *Donovan,* 3 CIT 62, 66, 535 F. Supp. 691, 694 (1982).[5] Plaintiffs did not receive actual notice of the negative determination until February 18, 1985. By filing a summons and complaint on March 28, 1985, plaintiffs were well within the sixty day statute of limitations.[6]

As indicated, the court must review the Secretary's decision to determine if it is supported by substantial evidence. Substantial evidence is characterized as " 'more than a mere scintilla.' " *Dan Stipe* v. *U.S. Department of Labor,* 9 CIT —, Slip Op. 85–112 at 3 (October 25, 1985) (quoting *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938)). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* The Office of Trade Adjustment Assistance (OTAA), is charged with conducting investigations of petitions for adjustment assistance. 29 C.F.R. § 90.12 (1984). Although OTAA has a duty to inves-

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[5] Defendant's procedures may have been further defective in that notice of a negative determination must be given promptly to the "group of workers concerned." 29 C.F.R. § 90.34 (1984). Defendant claims that it provided such notice to American Thread's personnel manager on January 2, 1985. Not only was this notice sent to an office in a different state from the one in which the plant was located, but it can hardly be said to have been sent to the "group of workers concerned."

[6] In *Waschko* v. *Donovan,* 4 CIT 271 (1982), this court held that plaintiff, who filed its summons and complaint 61 days after the Secretary of Labor published his negative determination in the Federal Register, was time barred by the statute of limitations. *Waschko* is distinguishable from the case at bar, however, because the court in *Waschko* made an affirmative finding that the Secretary of Labor published the negative determination within the 60 day limit imposed by the statute. *Id.* at 272.

tigate, *Cherlin* v. *Donovan*, 7 CIT —, 585 F. Supp. 644, 647 (1984), "[t]he court must show 'substantial deference' to the methods chosen by Labor to execute its statutory responsibilities, 'only remanding a case if [the method] is so marred that [Labor's] finding is arbitrary or of such a nature that it could not be based on 'substantial evidence.'" *Dan Stipe*, Slip Op. 85–112 at 4 (quoting *United Glass & Ceramic Workers of North America* v. *Marshall*, 584 F.2d 398, 405 (D.C. Cir. 1978)).

In completing its investigation, OTAA conducted customer surveys based on sales information provided by American Thread. The surveys compared sales data from 1983 with 1982 and data from the first eight months of 1984, the year of the plant closing, with the same period in 1983. It is clear that OTAA may use surveys to establish whether there is the requisite nexus between increased import penetration and worker separations. *Dan Stipe*, Slip Op. 85–112 at 4; *Cherlin*, 585 F. Supp. at 647 (both citing *United Glass*, 584 F.2d at 405 and *Local 167, International Molders and Allied Workers Union* v. *Marshall*, 643 F.2d 26, 29–31 (1st Cir. 1981)).

OTAA surveyed five of the six companies that decreased their purchases of cotton and synthetic sewing thread from the Tallapoosa plant in 1983 as compared to 1982.[7] The one company not surveyed decreased its purchases by less than five percent of the total decline represented by the other five companies. Of these five companies, none reported purchases of imported cotton or synthetic thread during the 1982–83 period. In comparing the first eight months of 1984 with the same period in 1983, OTAA surveyed three of the six companies that decreased purchases from the Tallapoosa plant during that period. The three companies *not* surveyed decreased their purchases from the Tallapoosa plant by more than twice as much during this period as those companies that were surveyed, with one of the companies not surveyed accounting for almost two-thirds of the total decline of the six companies. No explanation was offered on the record for the failure to survey these three companies.[8] The failure to consider data from the company that accounted for the largest decline in orders during the 1983–84 period or to explain the absence of this data from the record determines that the methodolgy was not in accordance with law and, as such, cannot support a conclusion that the Secretary of Labor's determination is supported by substantial evidence.

Defendant relies heavily on OTAA's data for the 1982–83 period in arguing that the Secretary of Labor's determination is supported by substantial evidence. Defendant makes no mention, however, of the 1983–84 survey data. As noted, the worker separations took place in 1984. It is presumed, therefore, that, absent explanation

[7] Plaintiff's petition alleged that cotton and synthetic sewing thread was the article produced by the Tallapoosa plant, the sale or production of which was being hurt by increased imports.

[8] An "X" on the Tallapoosa plant customer list marked next to the company that decreased orders by the largest amount during the 1983–84 period may indicate that this company was surveyed. In any event, survey data from this company was omitted from the record without explanation.

for an alternative approach, 1984 is the base period for the investigation and that data for the 1983–84 period should be considered. *See Katunich*, 594 F. Supp. at 752. Thus, although the survey of the 1982–83 period appears to have been conducted in accordance with law, survey data of those earlier years is insufficient in itself to satisfy the substantial evidence standards. *See* id. Additional data compiled by OTAA shows that although there was not a dramatic change in production or sales at the Tallapoosa plant between 1982 and 1984, there was a significant decline in employment at the Tallapoosa plant, both in numbers of employees and in employee hours, in 1983 as compared to 1982 and during the first eight months of 1984 as compared to the same period in 1983. Further, OTAA states that imports of cotton and synthetic thread increased by 46.4 percent in 1983 over the 1982 level and by 75.5 percent during the first six months of 1984 compared with a similar period in 1983. Together, the lack of a complete survey and the lack of any identification of the cause of worker separations between 1982 and 1984 as something other than the large increase in imports, renders the decision unsupported by substantial evidence.[9]

Plaintiff challenges the scope of the investigation because OTAA and the Secretary of Labor failed to consider the impact of imports such as shoes and luggage on the sale of domestic cotton and synthetic thread or the impact of immigration on the United States labor force. The third element of section 222 requires that a substantial cause of the worker separations must be imported articles "like or directly competitive" with articles produced by the workers whose petition for adjustment assistance is being considered. 19 U.S.C. § 2272(3) (1982). Case law interpreting this provision establishes that to be "like or directly competitive" within the meaning of the statute, the imported articles must be " 'interchangeable with or substitutable for' the article under investigation." *Dan Stipe*, Slip Op. 85–112 at 5 (quoting *Holloway*, 585 F. Supp. at 1430, quoting *Machine Printers*, 595 F.2d at 862). Under this standard, plaintiffs' argument on the need to consider the impact of imported finished articles and of immigrant labor fails. *See also United Shoe Workers of America, AFL–CIO* v. *Bedell*, 506 F.2d 174, 186–87 (D.C. Cir. 1974) (shoe counters and shoes are not "like or directly competitive" under predecessor to section 222); *International Union, United Auto, Aerospace and Agricultural Implement Workers of America* v. *Donovan*, 8 CIT —, 592 F. Supp. 673, 679 (1984) (automotive wheels and automobiles are not "like or directly competitive"); *Gropper* v. *Donovan, CIT* —, 6569 F. Supp. 883, 887 (1983) (finished fabric and knit fabric garments are not "like or directly competitive").

[9] The record includes an explanation for the poor performance of U.S. industrial thread producers in 1982. There is no suggestion of a connection, nor is there substantial evidence on the record from which to infer such a link, however, between the problems of the industry in general in 1982 and the worker separations that occurred at the Tallapoosa plant in 1983 and 1984.

Finally, plaintiff contends that there was a lack of substantial evidence to support a determination on hand knitting yarn because no survey was conducted as to this article. As noted, however, plaintiffs' petition for adjustment assistance, listed only "cotton and synthetic sewing thread" as an article produced by the Tallapoosa plant, the sale or production of which was being hurt by increased imports. In addition, hand knitting yarn is not "like or directly competitive" with cotton and synthetic sewing thread. OTAA was thus justified in so limiting the scope of its investigation, thereby excluding hand knitting yarn from the survey of Tallapoosa plant customers.

The court concludes that this matter must be remanded to the Secretary of Labor for further development of the administrative record on the issue of whether increased imports of cotton and synthetic thread "contributed importantly" to worker separations at the Tallapoosa plant.

(Slip Op. 86-4)

VOLUME FOOTWEAR RETAILERS OF AMERICA, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 83-10-01500

Memorandum Opinion

[Plaintiff's motion for rehearing and vacatur of this Court's December 10, 1985 order granted.]

(Decided January 3, 1986)

Mudge, Rose, Guthrie, Alexander & Ferdon (*Donald B. Cameron, Jr.*, and *Teresa M. Polino, Esqs.*, on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrencis*, Esq., on the motion), for the defendant.

Collier, Shannon, Rill & Scott (*Lauren R. Howard, Michael R. Kershow and Jeffrey S. Beckington, Esqs.*, on the motion), for the intervenor.

CARMAN, *Judge:* This case was originally dismissed by the Clerk, United States Court of International Trade, on May 15, 1985 pursuant to a stipulation of dismissal. On October 28, 1985, the defendant moved for dissolution of the preliminary injunctions which the Court had originally ordered on November 9, 1983, and August 10, 1984. On December 10, 1985, the Court ordered the preliminary injunctions dissolved. Plaintiff then moved for rehearing and vacatur of the December 10 order.

On December 16, 1985, the Court ordered a stay of all liquidations previously covered by the preliminary injunctions until 5:00 p.m. on January 3, 1986, in order to allow for oral argument on January 3 at 10:00 a.m. Ruling from the bench, the Court granted the motion for rehearing and vacated its December 10 order.

Facts

In this consolidated action challenging the final results of an administrative review of a countervailing duty order on nonrubber footwear from Spain, plaintiff obtained two preliminary injunctions. The first, in Court No. 83-10-01500, restrained the United States Customs Service (Customs) from liquidating entries of nonrubber footwear from Spain occurring between certain dates and classifiable under certain provisions of the Tariff Schedules of the United States (TSUS). The injunction was issued on November 9, 1983, and stated that "[t]his preliminary injunction is in effect until otherwise ordered by this Court." The Court issued the second preliminary injunction in Court No. 84-8-01083, on August 10, 1984, which similarly restrained Customs from liquidating entries of nonrubber footwear from Spain. This injunction contained no provision for its termination.

On May 8, 1985, the parties signed a stipulation of dismissal, which was followed by the Clerk's order dismissing the case on May 15, 1985. Neither the stipulation of dismissal nor the order of dismissal referred to the outstanding injunctions. Defendant thus based its motion for dissolution of the preliminary injunctions on the failure of either the injunctions themselves, the stipulation, or the order to provide for the termination of the injunctions.

Opinion

The narrow issue briefed by the parties and before the Court at oral argument was whether the preliminary injunctions dissolved upon the dismissal of the case on May 15, 1985, or whether the injunctions remained in force until the Court's Order of December 10, 1985. All of the parties apparently agree that there was no reason for the injunctions to survive the dismissal of the action. Plaintiff, in whose interest the injunctions were originally granted, strenuously argued in both its opposition to defendant's motion for dissolution and its motion for rehearing that the injunctions terminated as a matter of law at the time of the dismissal. Defendant correspondingly stated the following in its motion for dissolution:

> Inasmuch as this consolidated action was dismissed voluntarily by plaintiff which obtained the injunctions, it is obvious that there is no reason why the injunctions should continue in effect and why entries covered by the injunctions should not be liquidated by the U.S. Customs Service as directed by the International Trade Administration of the Department of Commerce.

Defendant's Motion for Dissolution of Preliminary Injunction at 3. Intervenor, Footwear Industrial of America, Inc., explained further:

> Here, the party bound by the injunctions—the government—merely seeks an explicit order from this Court which would

> permit it to proceed with liquidation of entries of Spanish footwear in accordance with the results of its administrative review of the countervailing duty order on nonrubber footwear from Spain, an administrative determination which the VFRA [plaintiff] has elected not to challenge on the merits. The VFRA, the original movant for the preliminary injunctions, has indicated that it too has no desire for the injunctions to remain in force.

Intervenor's Memorandum in Support of Defendant's Motion for Dissolution of Preliminary Injunctions at 4.

In light of these assertions, the Court issued the order on December 10, 1985 dissolving the injunctions. The Court viewed the order as a *pro forma* act erasing any ambiguity that the preliminary injunctions continued in force.

At the time of the motion for dissolution, however, the defendant did not alert the Court to what plaintiff now alleges was defendant's motive for bringing the motion for dissolution and the potential effect of having the injunctions terminate on December 10 rather than on May 15. Section 1504(d), Title 19 U.S.C. (1982) may require that Customs liquidate entries within 90 days after a preliminary injunction suspending liquidation is lifted.[1] Whether this is so, or any result from such a conclusion, was not a question before the Court with either the motion for dissolution or the motion for rehearing. The Court nonetheless appreciates the potential importance of the termination date of the injunctions and therefore granted the plaintiff's motion for rehearing.

It is abundantly clear that a preliminary injunction dissolves when the case is dismissed or final judgment is entered. *See* 7-pt. 2 J. Moore, J. Lucas, K. Sinclair, *Moore's Federal Practice*, § 65.07 at 65–86 (2d. ed. 1985), *citing Coleman* v. *Hudson River Bridge Co.*, 6 F. Cas. 63, (C.C. N.D.N.Y. 1862) (No. 2,983) and *Sweeney* v. *Hanley*, 126 F. 97 (9th Cir. 1903). *See also Madison Square Garden Boxing, Inc.* v. *Shavers*, 562 F.2d 141, 144 (2d Cir. 1977); *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Comm'n*, 561 F.2d 349, 356 (D.C. Cir. 1977), *vacated on other grounds*, 434 U.S. 1030 (1978); *Heasley* v. *United States*, 312 F.2d 641, 648 (8th Cir. 1963); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953). It is true that special circumstances may warrant providing for the expiration of an injunction upon some event other than dismissal of the action or final judgment. In *Al Tech Speciality Steel Corp.* v. *United States*, 6 CIT 257, 575 F. Supp. 1285 (1983), for example, the court enjoined liquidation of certain entries and provided that "unless sooner modified or vacated for good cause shown this order shall expire *ex proprio vigore* thirty days

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[1] 19 U.S.C. § 1504(d) reads:

(d) Limitation.—Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer, his consignee, or agent, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

after publication in the Federal Register of notice of defendant's redetermination." 575 F. Supp. at 1287. The court was concerned with "preserving its jurisdiction and, concommitantly, plaintiffs' judicial review rights" regarding the substantive aspects of the case pending a remand and redetermination on certain issues in the case. *Id.* But in the case at bar, none of the parties has presented the slightest reason why the injunctions should have survived the dismissal of the action. In fact, counsel for defendant at the oral argument characterized its motion for dissolution of the preliminary injunctions as really being a motion for clarification of the May 15 order of dismissal. A motion for clarification may have been well taken. The motion for dissolution, on the other hand, clouded what was apparently the real issue and reason for the defendant's motion.

Given that all of the parties agree that the government should be free to liquidate the subject entries pursuant to the stipulation of dismissal and that the same circumstances existed at the time of the dismissal on May 15, 1985, the Court's order of December 10, 1985, dissolving the preliminary injunctions, was vacated. Absent any suggestion that any rights required protection after May 15, 1985, the preliminary injunctions are deemed to have expired on that date.

(Slip Op. 86-5)

NEC CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-7-00948

Before WATSON, *Judge.*

Memorandum Opinion and Order

(Decided January 10, 1986)

Tanaka Walders & Ritger (*Patrick F. O'Leary* on the brief), for the plaintiff.
Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrencis*), for the defendant.

WATSON, *Judge:* Plaintiff NEC Corporation has moved, pursuant to 28 U.S.C. § 2646 and Court of International Trade Rule 59(a), for rehearing and amendment of this court's judgment of November 19, 1985 dismissing this case. The motion was filed herein on December 6, 1985. Defendant filed a responsive memorandum on December 27, 1985, to which plaintiff filed a reply on January 6, 1986.

The court initially notes that on December 4, 1985, prior to the filing of this motion, plaintiff filed a notice of appeal to the Federal Circuit of the November 19, 1985 judgment. Hence, although plaintiff's motion for rehearing was filed within the thirty days permitted under Rule 59, a question remains whether plaintiff's prior notice of appeal deprives this court of jurisdiction to rule on the

motion. In discussing the application of Rule 59 of the Federal Rules of Civil Procedure, after which Rule 59 of this court was patterned, Professors Wright and Miller state:

> If notice of appeal is given, the subsequent filing of a motion for new trial, even if otherwise timely, is ineffective because jurisdiction of the case is no longer in the district court. The preferable procedure in that situation is to allow the motion to be filed in the district court. If the district court considers the motion favorably it then can ask that the case by remanded from the appellate court so that it may grant the motion.

11 Federal Practice and Procedure: Civil § 2821 (1973) (citations omitted). The court will follow the procedure outlined by Wright and Miller, and accordingly will consider the merits of plaintiff's motion for rehearing.

In the previous ruling, the court held that plaintiff's attempt to file the summons commencing this action by certified mail without affixing sufficient postage did not meet the requirements for date-of-mailing filing under Rule 5(g) of this court and thus was unsuccessful. Because plaintiff's subsequent attempt to file the summons was untimely, the action was dismissed for lack of jurisdiction. *See* Slip Op. 85–116. Plaintiff now seeks to introduce "newly discovered evidence" which allegedly demonstrates that the postage affixed to the envelope containing the summons was in fact sufficient. This so-called "new evidence" is the original certified mail receipt prepared by the secretary to plaintiff's counsel, a copy of which is attached as Appendix A to plaintiff's memorandum, filed December 6, 1985. Plaintiff acknowledges that it failed to pay the fee for the return receipt, but contends that this should not have prevented delivery of the summons to the clerk under applicable postal regulations. Plaintiff argues that the postage affixed to the envelope containing the summons satisfied the "proper postage" requirement of Rule 5(g).

For present purposes, the court may assume, without deciding, that the newly produced evidence, the original certified mail receipt, was previously unavailable to plaintiff's counsel even with due diligence, and that the "proper postage" requirement for date-of-mailing filing under Rule 5(g) does not include the return receipt fee. Even so, the minimum required postage, according to plaintiff's own calculations, would be $1.65—comprised of $.90 to cover the weight of the envelope and its contents, and a certified fee of $.75.

Plaintiff accurately describes the original certified mail receipt prepared by the secretary to plaintiff's counsel in footnote 3 of its memorandum, filed December 6, 1985, as follows:

> As indicated, the receipt shows $.90 to cover the postage and $.75 to cover the certified fee. The total shown on the receipt is $1.45 which represents a mathematical error.

The crucial question, therefore, is whether plaintiff's counsel affixed $1.65 to the envelope containing the summons or whether the total affixed was only $1.45 as shown on the receipt.

The court, in an effort to resolve this matter, has examined the cover to the original envelope. That envelope is contained in the court file because plaintiff's counsel used the same envelope for the subsequent successful certified mailing of the summons. The postage for the latter mailing was affixed by a printed stick-on label. A partial lifting of that label reveals that the postage for the original mailing was printed directly onto the envelope. The amount printed is unquestionably $1.45. Hence, the original affixed postage was $.20 less than the amount required under plaintiff's own calculations.

Accordingly, because the court has previously ruled that the failure to affix sufficient postage defeats date-of-mailing filing under Rule 5(g), it is

ORDERED that plaintiff's motion for rehearing and amendment of judgment is hereby denied.

(Slip Op. 86–6)

ASTA DESIGNS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–4–00483

Before CARMAN, *Judge.*

Memorandum Opinion and Order

[Plaintiff's motion for summary judgment denied.]

(Decided January 10, 1986)

Breneman, Georges, Hellwege & Yee (William D. Breneman, Esq., on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Veronica A. Perry,* on the motion), for the defendant.

CARMAN, *Judge:* The plaintiff, Asta Designs, Inc., has moved for summary judgment pursuant to Rule 56. Plaintiff asks the Court to find that its imported merchandise is properly classifiable under item 654.02 of the Tariff Schedules of the United States (TSUS), rather than under item 653.75 (TSUS). Because the case raises material issues of fact, the Court cannot say as a matter of law that plaintiff's merchandise is not classifiable under item 653.75 (TSUS). Plaintiff's motion is therefore denied.

Background

Plaintiff imports enameled cooking and kitchen ware, constructed of steel and covered with enamel. The pots and lids of the cook-

ing and kitchen ware in controversy [1] have gold-plated stainless steel rims. The United States Customs Service (Customs) classified these articles under item 653.75 (TSUS), which covers

> Articles not specially provided for of a type used for household, table, or kitchen use; toilet and sanitary wares; all the foregoing and parts thereof, of metal: . . .
> Articles, wares and parts, of base metal, coated or plated with precious metal: . . .
> Coated or plated with gold.

Plaintiff protested, arguing that the articles should instead be classified under item 654.02 (TSUS), which covers "[a]rticles not specially provided for, . . . of base metal: Enameled or glazed with vitreous glasses."

Opinion

Plaintiff's position is that the articles should not be classified under item 653.75 (TSUS) because the gold-plated stainless steel rims are "separate and separable" from the articles and, without the rims, no part of the articles is "coated or plated with goal." Plaintiff also argues that, in any event, stainless steel is not a "base metal" as defined in Schedule 6 of the (TSUS).

Defendant counters that stainless steel is clearly within the definition of base metal and that the rims are an integral part of the articles. If plaintiff maintains otherwise, according to defendant, then these are questions of fact to be resolved at trial. Defendant points out that an additional question of fact is whether the gold-plated rims constitute a more then insignificant or negligible element of the articles.

A motion for summary judgment may be granted only when no material issues of fact exist. *See Golding Bros.* v. *United States*, 6 CIT 118, Slip Op. 83–89 (1983); *S.S. Kresge* v. *United States*, 77 Cust. Ct. 154, C.R.D. 76–6 (1976). This case involves factual disputes between the parties that are material to resolving the central issue. Although the TSUS contains a definition of base metal which appears to encompass stainless steel, the TSUS is drafted in commercial, not scientific terms. *C. J. Tower & Sons* v. *United States*, 41 CCPA 195, 199, C.A.D. 550 (1954). Whether stainless steel is a base metal in commercial terms appears to be a question of fact.

Another question of fact is whether the gold-plated rims are separate and separable from the articles classified, as plaintiff insists, or are an integral part of the articles, as defendant asserts. If the rims are an integral part of the articles, then a further question of fact exists as to whether the rims are an insignificant and negligible part of the articles. *See Saji & Kariya Co.* v. *United States* 9 Ct. Cust. Appls. 78, 80–81, T.D. 37945 (1919) (silver-plated rim was sig-

[1] Plaintiff protested the classification of entry numbers 297978, 298063, 430024, 430119, 430235, 292397-5 (Court No. 82-4-00483), and number 80-26902 (Court No. 82-11-01582). The entries occurred in 1980 and 1981.

nificant part of vase, placing it in classification of silver-plated articles, even though only 10 percent of the external surface was so plated).

Because this case presents questions of fact which must be resolved at trial, plaintiff's motion for summary judgment is denied.

(Slip Op. 86–7)

UNITED STATES, PLAINTIFF *v.* AMERICAN MOTORISTS INSURANCE COMPANY; DEFENDANT AND THIRD PARTY PLAINTIFF *v.* THE BUCKEYE FIREWORKS MFG. CO., INC., ET AL, THIRD PARTY DEFENDANTS

Court No. 84-06-00860

Before DICARLO, *Judge.*

Plaintiff brings an action against a surety for collection of customs duties. Defendant-third party plaintiff moves for summary judgment dismissing action, and alternatively moves for summary judgment in its favor against third party defendants. Plaintiff cross-moves for summary judgment against defendant.

Held: Defendant is liable for customs duties under the terms of its bonds. When Customs has liquidated entries "no change," and the importer's checks for estimated duties are subsequently dishonored, the importer and surety whose bonds cover the entries are not released from any obligation to pay duties.

[Plaintiff's cross-motion for summary judgment is granted. Defendant's motion for summary judgment is denied in part.]

(Decided January 10, 1986)

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice (*Judith M. Barzilay*), for the plaintiff.

Russotti & Barrison (*Harvey Barrison*), for the defendant.

Memorandum Opinion and Order

DICARLO, *Judge:* This is an action pursuant to 28 U.S.C. § 1582(2) (1982) to collect customs duties from a surety on its bonds. Before the Court are defendant's motion for summary judgment dismissing the action, its alternative motion for summary judgment in its favor against the third party defendants, and plaintiff's cross-motion for summary judgment pursuant to Rule 56 of the Rules of this Court.

There is no dispute as to the relevant facts. On June 4, 1979, two consumption entry bonds were executed by Buckeye Fireworks and Novelty, Co., Inc. (importer) as principal, and by defendant as surety.

On June 14, 1979 and June 20, 1979, merchandise covered by the bonds entered the United States at the Port of Baltimore, Maryland. The United States Customs Service (Customs) received from the importer two checks in the amounts of $5,345.76 and $4,571.52 representing estimated duties on the entries. Customs deposited the checks on July 11, 1979 and July 16, 1979, and liquidated the entries without change on July 13, 1979 and July 19, 1979.

The checks were dishonored by the drawee bank on July 18, 1979 and July 24, 1979. On November 24, 1980, Customs notified defendant that the importer had not paid duties on the entries covered by the bonds. Customs was unsuccessful in collecting the amounts due from either the importer or the surety, and on June 21, 1984, an action was commenced against the surety to recover duties in the amount of $9,917.28 plus interest.

Defendant raises four affirmative defenses in its answer, first, that plaintiff fails to state a claim upon which relief can be granted. The Court disagrees, and finds the complaint sufficient as it alleges defendant to be a surety on bonds covering entries on which duties have not been paid in accordance with Rule 8 of the Rules of this Court.

Defendant's third affirmative defense is that plaintiff has failed to join an necessary parties the importer, one of its officers, and as affiliated company. This defense lacks merit since defendant would be jointly and severally liable under the terms of its bonds with respect to any duties which may be owed.

Defendants fourth affirmative defense is that Customs is barred from obtaining a judgment in this case on account of alleged violations of section 112 and 113 of the Accounting and Auditing Act of 1950, as amended, 31 U.S.C. § 3512 (1982). Defendant does not discuss the relevance of those provisions, which establish standards for systems of accounting and internal controls in executive agencies, and the Court holds that those provisions have no application to the facts and circumstances of this case.

Defendant's second affirmative defense sets forth the theory upon which it bases its motion for summary judgment. Defendant contends that (1) plaintiff liquidated the entries "no change;" (2) liquidation is the final computation or ascertainment of the duties accruing on an entry; (3) the entries were never reliquidated by plaintiffs; and (4) plaintiff is therefore barred from alleging nonpayment as a matter of law.

Defendant's theory, as augmented by defendant's brief, apparently is based upon the belief that when Customs has liquidated entries "no change" and the importer's checks for estimated duties are subsequently dishonored, the importer and the surety whose bonds cover the entries are released from and obligation to pay duties. Defendant concludes its theory with the proposition that "[i]n the absence of a reliquidation, the liquidation released the surety from any further obligation for duties."[1]

Defendant fails to appreciate the purpose of the liquidation and reliquidation procedures. Liquidation is "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (1985). By liquidating the entries "no change" Cus-

[1] Brief of American Motorists Insurance Company, Defendant and Third Party Plaintiff in Support of its Motion for Summary Judgment, at 5.

toms determined that duties on the entries had been estimated correctly.

Defendant offers no authority for the proposition that an importer and its surety are released from paying outstanding duties when Customs has liquidated the entries without change. It is clear, however, that an importer and its surety are liable for the payment of duties when checks tendered to Customs are subsequently dishonored.

> Customs officers may receive uncertified checks, United States notes, and circulating notes of national banking associations in payment of duties on imports, during such time and under such rules and regulations as the Secretary of the Treasury shall prescribe; but if a check so received is not paid the person by whom such check has been tendered shall remain liable for the payment of the duties and for all legal penalties and additions to the same extent as if such check had not been tendered.

19 U.S.C. § 1648 (1982); *see* 19 C.F.R. § 141.1(b) (1985).

Defendant's argument that Customs was required to reliquidate the entries when the checks were dishonored is also misplaced. Customs may reliquidate entries "to correct errors in appraisement, classification, or any other element entering into the liquidation or reliquidation . . . ." 19 C.F.R. § 173.3 (1985). This procedure, like liquidation, involves the computation of duties, and has nothing to do with the obligation of an importer or surety to pay the amount determined to be owed. Defendant, therefore, is not entitled to a judgment dismissing the action as a matter of law. The Court reserves decision on defendant's alternative motion for summary judgment with respect to its third party action.

Turning to the government's cross-motion for summary judgment, there is no dispute that defendant is surety on the bonds covering the entries and neither the importer nor defendant have paid duties on the entries. Under the terms of its bonds, defendant is jointly and severally liable for these duties. Plaintiff is therefore entitled to judgment as a matter of law.

Defendant's motion for summary judgment dismissing this action is denied. Plaintiff's cross-motion for summary judgment is granted. Judgment will be entered accordingly. So ordered.

(Slip Op. 86-8)

RBW, INC., PER C. J. TOWER & SONS OF BUFFALO INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-6-00825

Before CARMAN, *Judge.*

Memorandum Opinion

[Judgment for plaintiff.]

(Decided January 13, 1986)

Mandel and Grunfeld (*Steven P. Florsheim* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Barbara Epstein* on the motion) for the defendant.

CARMAN, *Judge:* This case, presented by the parties on stipulated facts in lieu of trial, involves the proper tariff classification of books of crossword puzzles, word games, and "search-a-word" puzzles. The United States Customs Service (Customs) classified the merchandise as puzzles under item 735.20 of the Tariff Schedules of the United States (TSUS), which reads:

> Puzzles; game, sport, gymnastic, athletic, or playground equipment; all the foregoing, and parts thereof, not specially provided for.

Plaintiff claims, however, that the merchandise is properly classified under item 270.25 as "books not specially provided for," which are duty-free. In the alternative, plaintiff seeks classification of its merchandise as "toy books" under item 737.52, also duty-free.

Stipulated Facts

The imported merchandise consists of a collection of puzzle sheets bound as books in paperback covers. The sheets include textual and pictorial matter. Some of the books. "Puzzlers Crosswords No. 1" through "Puzzlers Crosswords No. 12" contain rear pages with promotional text on both sides, and the "Treasury of Puzzles" also has a table of contents page. All of the imported articles have a front and rear cover and an inside title page with copyright text on the reverse side.

Plaintiff, a printing company, printed and bound the puzzles. Plaintiff then sold the books to publishers in the United States, who in turn sold the books to book distributors, other publishers, or directly to mass-market retailers such as K-mart and Zayre department stores. At the retail level, the merchandise is sold in book stores, drug and notion stores and general department stores. In those bookstores that display books by category, merchandise simi-

lar or identical to the subject merchandise is generally displayed in the "puzzle" section.

Defendant conceded in its answer that the merchandise does fit the description of books for tariff classification purposes, and that books are provided for under item 270.25, TSUS. Defendant has further conceded in the stipulated facts that one of the books subject of this action, which is entitled "The Super Activity, Puzzle and Game Book," is properly classified as a book under item 270.25 because it contains mostly pages of other activities with only some pages of puzzles.

Opinion

Defendant makes two arguments supporting Customs' classification of the merchandise as puzzles under item 735.20, TSUS. First, argues defendant, although the merchandise is described by the tariff provisions for both books and puzzles, the provision for puzzles more specifically describes the merchandise. Defendant alternatively contends that even if the merchandise is equally described by both provisions, item 735.20 for puzzles is still the proper classification because it calls for the highest original duty rate. Both of these contentions depend upon the premise that the merchandise qualifies as puzzles within the meaning of item 735.20. The Court finds, however, that the merchandise does not consist of puzzles for tariff classification purposes and is therefore properly classified under plaintiff's claimed classification of item 270.25 for books.

Plaintiff poses as its primary support for the conclusion that the imported merchandise does not fall within the ambit of item 735.20 the doctrine of *noscitur a sociis*. Meaning that "it is known from its associates," the doctrine is a tool for statutory construction that provides for deriving the meaning of a term from the meaning of other words with which the questioned term is associated. *Nightwriter Corp.* v. *United States*, 69 Cust. Ct. 191, 196–97, C.D. 4393 (1972). As item 735.20 provides for the classification not only of puzzles, but also for game, sport, gymnastic, athletic, or playground equipment, plaintiff argues that the requirement of manipulation associated with these enumerated items also applies to "puzzles." Essentially, continues plaintiff, item 735.20 puzzles include articles such as "jig-saw puzzles, 'teasers' such as bent pieces of plastic or wood objects requiring assembly, or disassembly or reformation." Plaintiff's Brief at 8.

Defendant contends that the doctrine of *noscitur, a sociis* may not be utilized in interpreting the *eo nomine* term "puzzles" because, like other rules of construction, *noscitur a sociis* is only applicable when the language of a statute is ambiguous. Defendant asserts that item 735.20 clearly and unambiguously provides for puzzles, without limitation to any particular type of puzzles. Defendant cites a dictionary definition of "puzzles," contends that crossword puzzles fall within this definition, and apparently be-

lieves that the dictionary definition is the common meaning of the term as was intended by Congress in the tariff designation for puzzles.

Defendant cites *Funk and Wagnall's New Standard Dictionary of the English Language* (1956) for the definition of puzzle as

> 1. [a] thing difficult to understand or solve; a thing or problem that perplexes; especially something purposely arranged so as to require time, patience and ingenuity to arrive at the solution of its intricacies; a problem, riddle . . .

The Court has additionally consulted *Webster's New International Dictionary* (2d ed. 1958), which offers the following definition:

> 2. Something which perplexes or embarrasses; a difficult problem or question; an enigma; hence, a toy, contrivance, question, or problem designed for testing ingenuity; as, a crossword *puzzle.*

Given the breadth of the definitions, as well as their abstract nature, the Court finds that the term puzzle as used in the context of tariff classification is ambiguous and that the Court may consider aids in construing the statute and disclosing legislative intent.

To begin, item 735.20 is a basket provision covering "all games and puzzles, including toy games and puzzles, and all sport, gymnastic, athletic, and playground equipment . . . not specially provided for elsewhere in the schedules." *Tariff Classification Study, Schedule 7* 287 (1960). The original language proposed called for the classification of "[g]ames and puzzles, including toy games and puzzles; sport, gymnastics, or athletic equipment n.s.p.f. [not specially provided for]," *id.* at 884, but was changed to clarify "that the item was intended to cover under the term 'games' all game equipment and parts of such equipment not specially provided for . . . and under the term 'gymnastic equipment' all playground equipment, not specially provided for such as swings, see-saws, and slides." *id.* at 287. Item 735.20 brought together articles which prior to the TSUS had been scattered throughout the tariff act and were often classified according to their material composition of chief value. *E.g., Tariff Act of 1930,* par. 397 (articles composed of various metals), par. 409 (articles of rattan, bamboo, osier or willow), par. 412 (manufactures of wood or bark), par. 1539(b) (manufactures of which synthetic resin is the chief binding agent). The Court has not been directed to any evidence showing the scope of the term "puzzles," but is persuaded that item 735.20 does generally cover manipulable articles and larger pieces of equipment made out of various materials. There appears to be no indication of congressional intent, on the other hand, to include publications of word-oriented puzzles under this provision.

A puzzle is often an abstract dilemma, which may be presented via a variety of media. It may be a mathematical or geometric

problem expressed in terms of geometrically shaped objects. Or, it may be communicated through written language. As an abstraction, the puzzle itself is not the imported article, but rather the medium which presents the puzzle. In the case before the Court, *books* containing crossword and search-a-word puzzles are the articles in question.

Defendant argues, nevertheless, that the content of the subject books are the controlling criteria for tariff classification purposes. For example, in *Bauer Alphabets, Inc.* v. *United States*, 54 Cust. Ct. 255, C.D. 2540 (1965), the court considered the contents of folders consisting of pages displaying type styles. Finding an absence of authorship and that the type was not intended to be read for its textual substance, the court disallowed plaintiff's claim for classification as printed matter of foreign authorship under paragraph 1410 of the Tariff Act of 1930. *id.* at 262. Similarly, in *Brooks Bros.* v. *United States*, 68 Cust. Ct. 91, C.D. 4342 (1972), the question was the proper classification of a diary that contained printed matter. The court held that the "primary design and function" of the article as a diary warranted its classification as a diary rather than as a book or other printed matter. *Id.* at 98.

Although the primary design and function of the subject merchandise appears to be for the presentation and solution of puzzles dealing with words, potential arbitrary distinctions may develop as a result of classifying crossword puzzle books as puzzles since books presenting problems or puzzles totally in the form of text would presumedly be classified as books. (For example, defendant has already stipulated that one of the imported books originally subject of this action is properly classified as a book because it contains "activity pages.") And although considerations of creativity and susceptibility of authorship no longer appear consequential, *compare* item 270.25, TSUS (1980) *with* par. 1410, Trade and Tariff Act of 1930, the Court notes that crossword puzzles are susceptible of authorship. Classification on the basis of textual considerations or layout would be entirely arbitrary criteria.

The stipulations of the parties further support the classification of plaintiff's imported merchandise as books under item 270.25. The merchandise is manufactured by a printing company and distributed exclusively through book channels. The merchandise is sold in book stores and other stores which sell books. While not determinative, such facts have "obvious probative value" and lead to the conclusion that the merchandise is properly classified as books. *See Montgomery Ward & Co.* v. *United States*, 62 Cust. Ct. 718, 724, C.D. 3853 (1969).

Plaintiff has additionally directed the Court to the *Standard Industrial Classification Manual* (1957), which, while not specifically mentioning crossword puzzles, makes the distinction between the miscellaneous manufacturing industry which produces products

such as games and puzzles (Group 394, Industry Number 3941) from the printing and publishing industry (Group 273, Industry Number 3941).[1] In light of the foregoing discussion regarding item 735.20 as the provision for various manufactures constituting games and puzzles and other athletic and playground equipment, the Court finds that plaintiff's books of word puzzles are more closely associated with the printing and publishing industry than with the industry producing games and puzzles.

Rejecting defendant's classification of the books as puzzles, the Court also rejects plaintiff's alternative claim that the imported books are properly classified as toy books under item 737.52.[2] A review of the statute as well as the case law indicates that toy books are "limited to such books as are without reading matter other than letters, numerals, or descriptive words." *A.C.G. Export Import* v. *United States*, 66 Cust. Ct. 128, 131, C.D. 4181 (quoting *B. Westermann Co. (Inc.)* v. *United States*, 17 CCPA 75, 77-78, T.D. 43,361 (1929)). Plaintiff's merchandise contains words that are not limited to mere descriptions of accompanying pictures and thus does not fall under the category of "toy books." *See id.*

Conclusion

The articles in controversy are clearly books within the meaning of item 270.25. Item 735.20, on the other hand, covers various manufactured articles constituting puzzles and games and athletic equipment. The Court determines that plaintiff has satisfied its burden of establishing that Customs' classification under this latter provision is incorrect. *See* 28 U.S.C. § 2639 (1982); *Jarvis Clark Co.* v. *United States*, 733 F.2d 873, 878, *reh'g denied* 739 F.2d 628 (Fed. Cir. 1984). Agreeing with plaintiff's first proposed alternative, the Court holds that books of printed word puzzles are properly classified under item 270.25, TSUS.

Dated: January 13, 1986, New York, N.Y.

GREGORY W. CARMAN,
Judge.

[1] The Standard Industrial Classification Manual has been relied upon as some indication of legislative intent since it was used by the Tariff Commission as a reference in preparing the tariff schedules. *See Associated Hobby Manufacturers, Inc.* v. *United States*, 65 Cust. Ct. 357, 360-61, C.D. 4103 (1970), aff'd, 59 CCPA 54, C.A.D. 1037, 452 F.2d 1405 (1972); *Tariff Classification Study. Submitting Report* 8 (1960).

[2] Item 737.52 states in full:

Toy books, including coloring books and books the only reading matter in which consists of letters, numerals, or descriptive words.

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

GREGORY W. CARMAN, *Judge*

RBW, INC., PER C. J. TOWER & SONS OF BUFFALO, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-6-00825

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED: Judgment is rendered for plaintiff. The Customs Service is directed to reclassify the subject merchandise under item 270.25 and make refunds as appropriate, together with any interest as provided by law.

Dated: New York, N.Y., this 13th day of January 1986.

GREGORY W. CARMAN,
Judge.

(Slip Op. 86-9)

GEORGE CHAPMAN, PLAINTIFF *v.* HON. RAYMOND J. DONOVAN, DEFENDANT

Court No. 85-1-00049

Before DICARLO, *Judge.*

Plaintiff, on behalf of employees at a Redwood City, California chemical plant, challenged a denial of certification of eligibility to apply for trade adjustment assistance benefits by the Secretary of Labor (Labor). On October 25, 1985, the Court held that Labor's determination that imports did not contribute importantly to the employees' separation was not supported by substantial evidence on the record and remanded the action. Labor has now issued a revised determination certifying the workers' eligibility.

Labor's revised determination certifying eligibility is supported by substantial evidence.

[The revised determination is affirmed.]

(Decided January 16, 1986)

George Chapman, pro se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff*), for defendant.

Memorandum Opinion and Order

DiCarlo, *Judge:* On October 25, 1985, the Court held that a final determination by the Secretary of Labor (Labor) that workers at the Duolite International, Inc. (Duolite) plant at Redwood City, California were ineligible for trade adjustment assistance under section 223 of the Trade Act of 1974 (the Act), 19 U.S.C. § 2273 (1982), was not supported by substantial evidence on the record. *Chapman* v. *Donovan*, 9 CIT —, Slip Op. 85–113 (October 25, 1985). Labor's determination was vacated and the action remanded.

Labor found that the workers were ineligible for assistance because an increase in imports did not contribute importantly to reduced production at the Redwood City plant and to the workers' separation from employment.[1]

The Court found the record did not support Labor's determination in two respects.

First, Labor based its determination in part on the negligible level of nationwide imports of "surface active agents" into the United States in 1982. But there was no indication whether "surface active agents" are "like or directly competitive," as required by 19 U.S.C. § 2272(3), to the ion exchange resins produced at the Redwood City plant, and, by considering only 1982 data on national imports of "surface active agents," Labor ignored a dramatic increase in ion exchange resin imports from a Duolite plant in France in the first five months of 1984.

Second, there was not substantial evidence in the record to support a conclusion that the workers were separated for a reason other than imports. Nothing in the record indicated where consumers of the products produced at the Redwood City plant turned for ion exchange resins after that plant reduced production.

On December 5, 1985, Labor filed with the Court a supplement to the administrative record. A "Revised Determination on Reconsideration" was published in the Federal Register on December 10, 1985. 50 Fed. Reg. 50356 (1985).

After further investigation Labor found that imports of ion exchange resins increased from an estimated five percent of domestic production in 1983 to seven percent in 1984, and continued to increase in the first six months of 1985. Rohm & Haas Company, which acquired Duolite's plants in Redwood City and France in May, 1984, increased company imports and supplied the same cus-

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[1] The notice of Labor's determination stated in part:

Petitioners allege that increased imports by Duolite contributed importantly to the separation of workers at the Redwood City plant. Imports from Duolite's facility in France increased substantially in January through May 1984 compared to the same period in 1983. However, production at Redwood City did not decline during this period.

In May 1984 Diamond Shamrock Corporation, Duolite's parent company, completed negotiations with a major international chemical manufacturer for the sale of Duolite's Redwood City plant and the Duolite plant located in France.

Subsequent to taking over the Redwood City facility, the new firm restructured the production schedule resulting in the separation of several workers in June 1984.

Imports of surface-active agents are negligible. Imports were less than two percent in relation to domestic production in 1982. Although 1983 domestic production figures are not yet available, trade and industry sources indicate that imports remained at less than two percent in relation to domestic production.

49 Fed. Reg. 49,733 (1984).

tomers previously supplied by Duolite. Rohm & Haas officials said that sales of imported products were more profitable than sales of domestic products because of the increased value of the dollar relative to European currencies.

Labor concluded that increased imports of articles like or directly competitive with ion exchange resins produced at the Redwood City plant contributed importantly to the separation of workers at that plant, and certified the eligibility of those workers to apply for adjustment assistance. The determination affected an estimated seventy workers.

The Court holds that the revised determination is supported by substantial evidence on the record, and is affirmed. Judgment will be entered accordingly. So ordered.

Dated: January 16, 1986, New York, N.Y.

DOMINICK L. DICARLO,
Judge.

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

DOMINICK L. DICARLO, *Judge*

GEORGE CHAPMAN, PLAINTIFF *v.* HON. RAYMOND J. DONOVAN, DEFENDANT

Court No. 85-1-00049

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: that the revised determination of the Secretary of Labor is affirmed, and it is further

ORDERED, ADJUDGED, AND DECREED: that this action be and hereby is dismissed.

Dated: January 16, 1986, New York, NY.

DOMINICK L. DICARLO,
Judge.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/1	DiCarlo, J. January 16, 1986	Joffroy Brokers, Inc.	80-3-00471	No allowance made under item 807.00 for the buttonholed components	Item 807.00 allowance made for appraised values of all U.S. fabricated components, including buttonholed components, assembled into such wearing apparel	U.S. v. Mast Industries Inc., 668 F.2d 501 (1981) and U.S. v. Oxford Industries, Inc., 668 F.2d 507 (1981)	San Ysidro, Calif. Wearing apparel assembled in Mexico incorporating U.S. components

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U.S. Court of Appeals for the Federal Circuit, Vol. 1, October 1982-October 1983. Supt. Docs. Stock No. 028-002-00043-2; Cost: $9 Domestic; $11.25 Foreign.

In addition, the following Customs-related publication is for sale: Special and Administrative Provisions, Titles III, IV, and VII of the Tariff Act of 1930, and Related Laws, as in Effect on September 1, 1985, prepared by the U.S. International Trade Commission.

Special and Administrative Provisions, Supt. Docs. Stock No. 049-000-00061-8; Cost: $16 domestic; $20 foreign.

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 86-14)

Revision of Criteria for Establishing Parts of Entry and Stations

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revised criteria.

SUMMARY: This notice is to advise the public that Customs has revised the criteria it uses in determining whether to grant requests for the establishment of Customs ports of entry and stations. The revision set forth in this document modifies and expands upon certain criteria which Customs has followed since 1982 in evaluating these requests. It reflects the increased minimum value for commercial entries and deletes any reference to informal entries. In addition, the revision requires a commitment by any applicant that is attempting to qualify for port or station status by satisfying the cargo workload standard (2500 consumption entries), to make optimal use of electronic data transfer capability to permit integration with Customs Automated Commercial System.

The revised criteria will permit Customs to obtain more efficient use of its personnel, facilities, and resources and provide improved service to carriers, importers, and the public.

EFFECTIVE DATE: February 5, 1986.

FOR FURTHER INFORMATION CONTACT: Richard C. Coleman, Office of Inspection, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

By T.D. 82-37, published in the Federal Register on March 9, 1982 (47 FR 10137), Customs set forth the criteria it uses in determining whether to grant requests for the establishment of Customs ports of entry and stations. Under the heading "Criteria" of T.D. 82-37, number (2)(b) states the following:

(2) The actual or potential Customs workload (minimum number of transactions per year), in the area must be: (b) 2,500 consumption entries (formal (over $250 in Customs value), informal (under $250 in Customs value));"

Since the publication of T.D. 82-37, Customs has implemented the Automated Commercial System (ACS) which provides a means for the electronic processing of entries of imported merchandise. ACS is a national teleprocessing system that encompasses approximately 2,000 programs and processes 250,000 transactions per day. ACS includes a number of interdependent modules and computer-to-computer interfaces with the private sector which, together, automatically process enforcement and statistical data spanning the full range of Customs processing for imported merchandise. Current ACS modules are Antidumping and Countervailing Duty, Automated Broker (Importer) Interface, Bonds, Collections and Revenue, Drawback, Entry Summary Processing, Fines, Penalties and Forfeitures, In-bond, Information Exchange, Liquidations, Manifests, Protests, Quota, Carrier and Port Authority Interfaces, Cargo and Entry Summary Selectivity, and Warehouse. It is anticipated that ACS will be fully operational in 1987. To take full advantage of the potential of ACS to expedite the entry of imported merchandise, in determining whether to grant requests for the establishment of Customs ports and stations, Customs will now require a commitment by the applicant port or station to make optimal use of electronic data transfer capability to permit integration with ACS.

In an unrelated matter, by § 206 of Pub. L. 98-573, the Trade and Tariff Act of 1984, Congress amended § 498(a)(1), Tariff Act of 1930 (19 U.S.C. 1498(a)(1)), by increasing the statutory limit for informal Customs entries from $250 to $1,250. After thorough consideration of the issue, Customs determined that, with the exception of specific exclusions, the informal limit for all articles would be set initially at $1,000, with the option to increase it to $1,250 in the future. This change was reflected in amendments to the Customs Regulations published as T.D. 85-123 in the Federal Register on July 23, 1985 (50 FR 29949). Accordingly, a further criteria revision reflects the increased minimum value of $1000 for commercial entries, instead of $250. In addition, all references to informal entries in the criteria are deleted since they are not a factor in determining potential cargo activity. As a result of these changes, number 2(b) under "Criteria" listed in T.D. 82-37, is revised to read as follows:

(b) 2,500 consumption entries (each valued over $1000). The applicant must commit to optimal use of electronic data input means to permit integration with any Customs system for electronic processing of entries.

These changes will permit Customs to obtain more efficient use of its personnel, facilities, and resources and provide improved service to carriers, importers, and the public.

All of the other criteria in T.D. 82-37 will continue to be used in evaluating requests for new service.

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: January 10, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 5, 1986 (51 FR 4559)]

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19 CFR Part 134

(T.D. 86-15)

Country of Origin Marking of Imported Pipe and Pipe Fittings of Iron or Steel

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of required alternative marking methods.

SUMMARY: In a notice previously published in the Federal Register, Customs acknowledged that certain pipe and pipe fittings of iron or steel, cannot be marked with the country of origin by any of the methods prescribed by § 207 of the Trade and Tariff Act of 1984, without rendering such articles unfit for the purpose for which they are intended or violating industry standards for such articles. The notice solicited public comments as to which pipe and pipe fittings of iron or steel cannot be marked by any of the prescribed methods. This document sets forth which articles may be exempted from the marking methods prescribed by § 207 and are eligible for marking by alternative methods.

EFFECTIVE DATE: February 5, 1986.

FOR FURTHER INFORMATION CONTACT: Steven I. Pinter, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 30, 1984, the President signed Pub. L. 98-573, the Trade and Tariff Act of 1984, which made numerous changes to the

Tariff Act of 1930. Section 207 of Pub. L. 98-573 amended § 304, Tariff Act of 1930 (19 U.S.C. 1304), requiring, without exception, that all imported pipe and pipe fittings of iron or steel be permanently marked to indicate the proper country of origin of the article by means of die stamping, cast-in-mold lettering, etching, or engraving.

Pursuant to 19 U.S.C. 1304, every article of foreign origin, or its container, imported into the U.S., shall be marked in a conspicuous place as legibly, indelibly, and permanently *as the nature of the article or its container will permit*, in such a manner as to indicate to an ultimate purchaser in the U.S. the English name of the country of origin of the article, unless specifically exempted. Part 134, Customs Regulations (19 CFR 134), sets forth the country or origin marking requirements of 19 U.S.C. 1304.

It was brought to Customs attention that certain pipe and pipe fittings of iron or steel cannot be marked by any of the four prescribed methods without rendering such articles unfit for the purpose for which they are intended or violating industry standards for such articles.

Under the laws of statutory construction, § 207 and 19 U.S.C. 1304, which it amends, should be read in *pari materia*, so that pipe and pipe fittings which by their nature will not permit marking by any of the four prescribed methods will not be barred from entering the U.S. Such a construction would allow for alternative methods of marking, such as stencilling or tagging in bundles. Accordingly, by a document published in the Federal Register on January 9, 1985 (50 FR 1064), Customs solicited public comments as to which pipe and pipe fittings of iron or steel cannot be marked by any of the means prescribed in § 207 without rendering such articles unfit for the purposes for which they were intended or violating industry standards for such articles.

Customs has already taken the position that the new marking requirements will apply to iron or steel pipes, tubes, and blanks therefor, as defined in Headnote 3(e), Schedule 6, Part 2, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), which covers tubular products, including hollow bars and hollow billets, of any cross-sectional configuration, by whatever process made, whether seamless, brazed, or welded, and whether with an open or lock seam or joint, of the kind classifiable under items 610.30-610.58, 688.30, TSUS. However, it does not include hollow drill steel of the kind defined in Headnote 3(e), Schedule 6, Subpart 2B, TSUS, and classifiable under items 607.05-607.09, TSUS. By a correction document published in the Federal Register on January 31, 1985 (50 FR 4524), Customs stated that the new marking requirements of § 207 will also apply to pipe and tube fittings of iron or steel (bends, branches, drains, reducers, etc.) of the kind classifiable under items 610.62-610.93, 688.32, TSUS, as well as those pipe and

tube fittings of iron or steel of the kind classifiable under items 606.71 and 606.73, TSUS.

Required Alternative Marking List

After reviewing the numerous comments received in response to the notice and the best technical information available, Customs has identified certain categories of articles which cannot be marked by any of the methods prescribed by § 207 without impairing the articles with respect to their intended use, or without violating applicable industry standards. The categories of articles so identified were listed and communicated in the form of a telex to Customs field offices on March 18, 1985, and subsequently amended by telexes dated April 15, 1985, and May 13, 1985. Copies of those telexes were made available to all interested parties. The purpose of this notice is to publish in a final and definitive format the categories which may be marked to indicate their country of origin by methods other than those prescribed by § 207.

Inasmuch as this notice is merely a restatement of existing requirements and contains no substantive changes in the previously adopted rules, and because the requirements of § 207 became effective on November 14, 1984, no delayed effective date is necessary.

Categories of Articles Exempted From § 207 Marking Requirements; Thin-Walled Pipes and Fittings

Carbon and low-alloy steel tubing or fittings with wall thicknesses less than .08 inch (this exception is provided because the statutory methods of marking would be illegible on the relatively rough surfaces of these articles).

High-alloy (nickel, chromium, molybdenum, or combinations thereof) articles which have wall thicknesses less than .08 inch and which the importer certifies (in writing to the district director) will actually be used in an application or environment in which marking by a statutory method would substantially diminish or destroy the utility of the articles.

Required alternative marking methods: paint stencilling, or tagging of bundles or containers.

Small-Diameter Pipes and Fittings

Fittings having nominal diameters of one-fourth inch or less.

Pipes having inner diameters of 1.9 inches or less.

Required alternative marking methods: paint stencilling, or tagging of bundles or containers.

Other Fittings

Fittings which meet American Petroleum Institute (API) specifications (or equivalent mill specifications) 5AC or higher, including 5AX and 5AQ.

High-alloy (nickel, chromium, molybdenum, or combinations thereof) fittings ordered to National Aeronautic and Space Administration (NASA) or military specifications which prohibit marking by any of the statutory methods.

Small galvanized iron fittings of the following types (dimensions stated are nominal diameters):

Elbows 90 degrees—one-eighth and one-fourth inch.
Elbows 45 degrees—one-eighth and one-fourth inch.
Street elbows 90 degrees—one-eighth and one-fourth inch.
Street elbows 45 degrees—one-eighth and one-fourth inch.
Tees—one-eighth and one-fourth inch.
Crosses—one-eighth and one-fourth inch.
Couplings (sockets)—one-eighth and one-fourth inch.
Locknuts—one-eighth, one-fourth, three-eighths, and one-half inch.
Bushings—one-fourth by one-eighth, three-eighths by one-eighth, three-eighths by one-fourth, one-half by one-eighth, one-half by one-fourth, one-half by three-eighths inch.
Unions—one-eighth, one-fourth, and three-eighths inch.
Caps—one-eighth, one-fourth, three-eighths, and one-half inch.
Plugs—one-eighth, one-fourth, three eighths, one-half, three-fourths, and one inch.
Reducing elbows—one-fourth by one-eighth inch.
Reducing tees—one-fourth by one-eighth inch.
Reducing coupling—one-fourth by one-eighth inch.
Spun iron fittings with a Brinell hardness number in excess of 500 (five hundred).

Required alternative marking methods: paint stencilling, or tagging of bundles or containers.

Oil Country Tubular Goods

Oil Country Tubular Goods (OCTG) which meet API specifications (or equivalent mill specifications) 5AC or higher, including 5AX and 5AQ.

Solution-annealed austenitic ferritic duplex stainless steel.

"Green" tubes which are two and seven-eighths inches or smaller in outer diameter, and which are certified by the importer (in writing to the district director) to be for redrawing.

Required alternative marking method: paint stencilling.

Line Pipe

High-test line pipe meeting API specifications (or equivalent mill specifications) 5L grades X-42 and higher.

Pipe meeting API specification (or equivalent mill specification) 5LU.

Required alternative marking methods: paint stencilling, or tagging of bundles or containers.

Mechanical Tubing

Mechanical tubing which meets American Society of Testing and Materials (ASTM) specification A-511, A-512, A-513, A-519, A-554, A-787, or A-789.

Any other such articles for which the importer certifies (in writing to the district director) that the tubing will actually be used in an application or environment in which marking by a statutory method would substantially diminish or destroy the utility of the tubing.

Required alternative marking method: paint stencilling.

Coated Pipe

Galvanized, plastic-coated, aluminized, galv-alum, porcelain enamel-coated, and vinyl-coated pipe.

Required alternative marking method: paint stencilling, or tagging of bundles or containers.

"Mother" Tubes

So-called "mother" tubes which are certified by the importer (in writing to the district director) to be for redrawing.

Required alternative marking method: paint stencilling.

Structural Pipe

Structural pipe which meets API specifications (or equivalent mill specifications) 2H and 2B.

Required alternative marking method: paint stencilling.

Pressure Tubing

Pressure tubing which meets ASTM specification A-161, A-178, A-179, A-192, A-199, A-200, A-209, A-210, A-213, A-214, A-226, A-249, A-250, A-333, A-334, A-423, A-557.

Tubing for which the importer certifies (in writing to the district director) that it is for actual use in an application or environment in which marking by one of the statutory methods would substantially diminish or destroy the utility of the tubing.

Required alternative marking method: paint stencilling.

Ornamental Pipes, Tubes, and Fittings

Ornamental pipes, tubes, and fittings of all types, having highly polished surfaces.

Required alternative marking methods: Each piece is separately marked with a durable tag or sticker securely affixed to the article, or is separately wrapped in a protective wrapping which clearly indicates the country of origin.

SPUN IRON PIPE

Spun iron pipe with a Brinnel hardness number of 500 or more. Required alternative marking methods: paint stencilling, or tagging of bundles or containers.

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: January 22, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 5, 1986 (51 FR 4559)]

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19 CFR Parts 18, 24, 112, 113, 141, 144, 146, 178, and 191

(T.D. 86-16)

Foreign Trade Zones; Specialized and General Provisions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document revises Customs Regulations relating to foreign trade zones to provide a new audit-inspection method of zone supervision by Customs. A foreign trade zone is a defined area, considered to be outside the Customs territory of the U.S., where certain lawful activities can be conducted with a minimum of formalities. A zone provides a site at or adjacent to a Customs port of entry where operations involving foreign merchandise can take place, which otherwise might have been done abroad for tariff and trade reasons. The revision sets forth the general provisions applicable to the administration of all zones and other specialized provisions applicable to subzones and zone sites. In addition, changes in the language of the regulations will clarify some provisions, eliminate inconsistencies, and conform the regulations to current administrative practices.

EFFECTIVE DATE: May 12, 1986.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: John Holl, (202-566-8151);

Inventory Control and Recordkeeping System Aspect: Marcus Sircus, (202-566-2812);

Inventory Control and Recordkeeping System Aspect: Marcus Sircus, (202-566-2812);

Appraisement and Valuation Aspect: Myles Flynn, (202-535-4134);

Liquidated Damages, Penalty and Suspension Aspect: William Lawlor, (202-566-5856);

Economic Aspect: Daniel Norman, (202-535-4138).

All of the above Customs personnel are located at: U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In 1934, Congress enacted the Foreign-Trade Zones Act to expedite and encourage foreign commerce. The Act created domestic foreign trade zones and was designed to stimulate international trade and create jobs in the U.S. At that time, zones were envisioned as storage, manipulation, and transshipment (exportation) centers. In 1950, an amendment to the Act was passed, authorizing manufacturing and exhibition inside zones. Foreign trade zones (zones) are areas within the U.S. (but outside the "Customs territory of the U.S.," as defined in § 101.1(e), Customs Regulations (19 CFR 101.1(e)), where foreign or domestic merchandise may be brought for manipulation, manufacture, assembly or other processing, or for storage or exhibition, provided that these operations are not otherwise prohibited by law. Foreign merchandise may be brought into a zone without being subject to the usual Customs entry procedures and payment of duty. Foreign or domestic merchandise may be exported or entered into the Customs territory from a zone. Quota restrictions do not normally apply to foreign merchandise in a zone. Merchandise moved to a zone for export may be considered exported upon its admission to a zone for purposes of excise tax rebates and drawback.

Zones are established under the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a-81u), and the general regulations and rules of procedure of the Foreign-Trade Zones Board (the Board), Department of Commerce (15 CFR Part 400). Part 146, Customs Regulations (19 CFR Part 146), governs the admission of merchandise into a zone; the manipulation, manufacture, destruction, or exhibition in a zone; the exportation of merchandise from a zone; and the transfer of merchandise from a zone into the Customs territory.

Typically, a foreign trade zone is a fenced-in area with a general warehouse type building or buildings and access to all modes of transportation. Space is available for leasing to firms for authorized zone activity. Some zones have industrial park characteristics or are located within such facilities and have lots on which zone users can construct their own facilities. Subzones are locations au-

is in the public interest but cannot be accommodated within an existing zone.

Between 1934 and 1970, just 12 zones were approved by the Board. At this time, there are 109 general purpose zones and 60 subzones. It has been estimated that the volume of business in zones has multiplied substantially from 1970 to the present with zones now handling about $4.8 billion worth of merchandise each year.

As can be appreciated from the foregoing, the number of zones and the operations conducted therein have increased tremendously in recent years. Historically, Customs has administered zones and their operations by the physical presence of Customs officers at the various zone locations. However, as time has passed, Customs staffing available to supervise zones has declined while zones have continued to proliferate. This has resulted in delays in the approval of activation of a given zone, and has presented problems for Customs in the exercise of effective control over some zone operations, especially subzone manufacturing activities. Therefore, Customs undertook an effort to devise a method to reduce Customs staffing requirements in zones and other areas (notably bonded warehouses) without endangering the revenue or law enforcement priorities, while also not hampering the growth of those areas and not impeding commerce.

The audit-inspection program approach to administration of those areas of Customs responsibility, which de-emphasizes the physical presence of a Customs officer to supervise each transaction, was successfully implemented in regard to the operation of bonded warehouses (see T.D. 82-204, published in the Federal Register on November 1, 1982 (47 FR 49355)). Audit-inspection is a method of supervision based on spot checks and audits of foreign trade zone activities as represented in records maintained by the zone operator. This method is substituted in lieu of physical on-site supervision by Customs when merchandise is admitted to, transferred from, or processed in the zone.

The principal advantage for Customs of audit-inspection is that it requires fewer Customs personnel to administer the zones. The principal advantages for the importing community are that (1) merchandise may be admitted, transferred, or processed without a Customs officer being present, allowing increased flexibility in zone operations, and (2) for most zones, the reimbursable cost paid to Customs is reduced. Audit-inspection is based on several procedures, which are essential for its proper functioning and success. These procedures are:

1. The determination by Customs of the identity and nature of the merchandise through examination before or upon admission to the zone so that the initial responsibility of the operator for the merchandise can be determined.

sion to the zone so that the initial responsibility of the operator for the merchandise can be determined.

2. The issuance of a prior permit by Customs to the zone operator for admission, transfer to the Customs territory, and processing in the zone.

3. The assumption by the zone operator of responsibility for the merchandise, maintaining records concerning the merchandise, and physical supervision of the zone. Quantities of merchandise received at the zone and transferred to the Customs territory are determined jointly by the zone operator and the carrier.

4. The performance by Customs of spot checks and audits to determine whether the zone operator is properly supervising the zone and maintaining records of the merchandise. The cost of the spot checks and audits is reimbursed to Customs through an annual fee charged the zone operator for this service.

5. The assessment of liquidated damages in an amount sufficient to ensure performance of the operator's duties and responsibilities under the rules and regulations needed for proper zone supervision and recordkeeping.

6. The temporary suspension by Customs of zone operations which do not comply with the rules and regulations.

It is noted that Customs initiated use of the audit-inspection method in August 1983, on the basis of voluntary agreements between Customs and zone operators. At present, 12 subzones and 6 general-purpose zones have entered into voluntary agreements to use the audit-inspection method to administer their operations. Customs has taken that limited experience under the zone audit-inspection method into account in preparing this revision.

To implement the audit-inspection method of supervision in foreign-trade zones, it is necessary to substantially revise Part 146, Customs Regulations (19 CFR Part 146), concerning the administration of foreign trade zones, and to revise to a much lesser extent, Parts 18, 24, 112, 113, 141, 144, 178 and 191, to conform them to changes made by the revision to Part 146. Accordingly, by notice published in the Federal Register on July 17, 1984 (49 FR 28855), an extensive revision of Part 146 and minor conforming revisions of Parts 18, 24, 112, 141, 144 and 191 were proposed. A detailed discussion of the proposed amendments to Part 146 can be found on pages 28856–28859 of the notice.

Interested parties were given until October 15, 1984, to submit written comments. However, by notice published in the Federal Register on September 11, 1984 (49 FR 35658), the comment period was extended to November 30, 1984, as an accommodation to the National Association of Foreign-Trade Zones. Approximately 150 comments were received in response to the notice. A discussion of the comments and our responses to the comments follow.

sions of the proposal. Many commenters question the reasonableness of the proposed fees, penalties and liquidated damages provisions. They also allege that the proposal is inconsistent with genrally accepted accounting principles and the Foreign-Trade Zones Act, and that it could impede the flow of commerce. Commenters further complained that the proposed regulations do not provide an orderly transition to the new audit-inspection system and that they were unduly complex and restrictive. Specific comments and our responses are as follows:

Comment: Under the proposed regulations, Customs would treat merchandise destined for a zone as imported and subject to examination prior to admission to the zone, unless a subzone or zone site qualifies under special procedures for exemption from the prior examination requirement. This treatment of zone-destined merchandise may impede or delay shipments.

Response: We disagree. Merchandise which is destined for a zone is imported, within the meaning of § 101.1(h), Customs Regulations. Under § 499, Tariff Act of 1930, as amended (19 U.S.C. 1499), imported merchandise is subject to examination in Customs territory. Therefore, examination of zone-destined merchandise is already provided for under the law. The frequency and intensity of these examinations, however, will be reduced by selective examination procedures. Also, only occasional examinations will be necessary at certain subzones and zone sites because shipments to these sites are repetitive, liability for violations is known in advance, and elaborate audit trails for checking for diversions of the merchandise exist.

Comment: The proposed regulations do not clearly distinguish between physical and record identification of merchandise. The two systems cannot work together. Record identification is the only viable system under the proposed revision.

Response: We disagree, The physical and record systems of identifying merchandise are compatible. Under the specific identification system, the zone operator maintains a zone lot control system, physically segregating his merchandise by zone lots and controlling identification of merchandise by zone lot records from admission through final zone removal. Under the record identification system, the merchandise is identified by inventory records, using a Customs-approved inventory method, *e.g.,* the first-in, first-out method (FIFO). Both methods require a reconciliation, at least annually, of physical merchandise on hand to quantities reflected by the Customs-approved inventory method. Any discrepancies would require corrective action by the operator.

The physical identification of merchandise is required to ensure reliability of admissions, inventory record accuracy, and proper zone status requests, among other things. For these reasons, it is retained in the regulations.

zone status requests, among other things. For these reasons, it is retained in the regulations.

Comment: The proposal provides no mechanism or guidance for transition to the audit-inspection method of supervision. Serious consideration should be given to grandfathering in some zones or allowing them sufficient time to change over to the new method.

Response: We disagree. Allowing some zone operations to be grandfathered in, *i.e.*, granted an exemption from the new foreign trade zone regulations, is not feasible because it would result in the perpetuation of different sets of rules for some zones. The intent of the proposed regulations is that one set of rules should govern all zone operations.

The regulatory changes will become effective as a final rule 90 days from the date of publication, except that zones with Alternative Inventory Control Systems (AICS) will have either 180 days after the publication date or to the end of their current business year to comply with the new recordkeeping regulations. This 90-day period, instead of the 30-day period ordinarily granted, will allow zone operators a sufficient period of time for bringing their inventory system into compliance with the new regulations.

Zones under the AICS are different from other zones in that the record of inventory is maintained by the zone grantee or operator, or by the individual zone firms or their agents, under the supervision of the grantee or operator, rather than by Customs. The zone grantee or operator is responsible for the posting of inventory ledgers, the supervision of individual zone firms which maintain their own inventory records, the correction of inventory discrepancies, the conducting of periodic selective inventories of open lots of all zone firms, and various additional tasks which require time and other resources to handle the paperwork associated with these tasks. Because of the complexity of operating this type of inventory control system, these zones will require more time than non-AICS zones to convert to the audit-inspection supervision system under the new regulations. For this reason zones under AICS will be given either 180 days from the date of publication of the new regulations or to the end of their business year to bring their inventory system into compliance with the new regulations. However, they will be subject to the 90-day period for bringing all other aspects of their zone operations into compliance with the new regulations.

Conversion to audit-inspection supervision under the new regulations will occur as follows:

All zone operators, except as noted below, will furnish a certification that their inventory control and recordkeeping system complies with the new regulations, a procedures manual, the date of the end of their business year, and the annual fee on or before the date the new regulations take effect, and the prescribed zone operator's bond. If these requirements are not complied with by the ef-

In addition, the following actions will be taken with respect to specific zones:

(a) *Zones where Customs has maintained inventory records.* Customs will provide a listing of inventory balances for all lots in the zone on the effective date. The operator will have 30 days to review the lot balances, conduct a physical inventory, and resolve any differences with Customs. On or before the end of the 30-day period, the operator will sign to accept the lot balances as reflecting the inventory on hand on the effective date, with such adjustments as are mutually agreed to between the operator and the district director.

(b) *Zones with voluntary audit-inspection agreements.* Zone operators will have the option of conducting a physical inventory before the effective date and certifying as to specific quantities of merchandise for which they are responsible on the effective date. Otherwise, they will be held responsible for losses and overages unless they can clearly show, with competent evidence, that the losses and/or overages occurred before the effective date.

(c) *Zones with alternative inventory control systems.* Zone operators may request postponement of the procedures manual and certification requirements until one of the following dates:

(i) 90 days after the effective date of the new regulations; or

(ii) end of their current business year.

With respect to paragraph (c), the district director may approve the request for a postponement if he is satisfied that the postponement is necessary for the conversion of the operator's recordkeeping system to comply with the requirements of Subpart B, Part 146, Customs Regulations. During the interim before the procedures manual and certification are received, the operator will be allowed to maintain the inventory and recordkeeping system as agreed under the AICS, and he need not meet the requirements of Subpart B. However, the operator must meet and follow all the other requirements of the new regulations upon their effective date. The same physical inventory option will be available for zones with an AICS as for zones with a voluntary audit-inspection agreement. If that option is not exercised, any losses or overages found after the effective date will be considered to have occurred after the effective date, unless the operator can clearly show, with competent evidence, that the losses and/or overages occurred before the effective date.

Comment: The proposed regulations are inconsistent with generally accepted accounting principles as well as modern business practices.

Response: The commenters do not point to any specific instance of inconsistency. However, we do not that Customs method of identifying merchandise by the first-in, first-out (FIFO) method does not conform to generally accepted accounting principles (GAPP) under

tifying merchandise by the first-in, first-out (FIFO) method does not conform to generally accepted accounting principles (GAPP) under which FIFO is used to determine the value of goods in an ending inventory. Customs use of FIFO to indentify merchandise expedites the movement of goods in and out of zones. It is used as an alternative to specific identification of merchandise.

Comment: While the proposed regulations provide for the removal of Customs officers from zones, there are no provisions detailing the methods and the time restraints for transmitting data and documents to Customs, particularly when a zone is remote from a Customs office. There should be a variety of mechanisms to transmit data and documents to expedite zone operations.

Response: We disagree. The regulations need not specify the method of transmittal. Many methods of transmittal, such as mail, messenger delivery, or electronic transmittal, can be accommodated so long as they can be administratively handled by Customs. There should be no problem with timely delivery of the required documentation to Customs on the part of any zone since, in order to be designated a foreign trade zone, it must be in or adjacent to a port of entry.

There are specific provisions for the timing of the transmittal and receipt of documentation by Customs from zone operators, such as in § 146.40(a) and (b), and wherever else specific provisions are necessary. In the absence of any stated provisions, documentation must be received by Customs before a permit to admit, handle or transfer merchandise can be issued.

Comment: The regulations should include a provision allowing merchandise to be temporarily removed from a zone for repair, restoration, or incidental operations and then returned to the zone.

Response: Customs has been testing such a proposal with, as yet, inconclusive results. If the test has favorable results, the procedure will be implemented on a permanent basis through a separate rulemaking proceeding.

Comment: One commenter states that Customs should not extend its concept of adjacency, in respect to subzones, beyond 35 miles from a port. Other commenters believe that subzones that are distant from ports should not be required to deliver merchandise and documentation to Customs, as is required in proposed § 146.15(a).

Response: The adjacency concept, and its application to subzones which are 35 miles from a port, is under review in a separate rulemaking proceeding at the Department of Commerce. Since this entire issue is under review, proposed § 146.15 is premature. Accordingly, it has been deleted from the final regulations.

Comment: Several commenters believe that the proposed regulations are too complicated, impose unnecessary requirements, and make zones less manageable.

Response: We have simplified the proposed regulations and removed certain requirements. The regulations, as revised, impose

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own recordkeeping and inventory control requirements. The requirements for recordkeeping are similar to those any conscientious businessman would adhere to in the supervision of his business. The revised regulations make zones more, not less, manageable. They also allow Customs to carry out its mission of protecting U.S. revenue and enforcing importation laws and regulations more efficiently.

Comment: Many commenters criticize the criteria under proposed § 146.14 for allowing domestic status merchandise to be admitted to a zone without a prior application and permit for each shipment. They believe the criteria are too stringent, particularly those involving commercially identical merchandise and merchandise which has been combined so that it has lost its identity.

Response: We agree with these comments. Therefore, proposed § 146.14 is deleted. The subject matter of § 146.14 is transferred to § 146.43, which is further amended to specify that no prior permit will be required for the admission, handling, or transfer to Customs territory of domestic status merchandise except (1) when mixed or combined with merchandise of another zone status, or (2) when so ordered by the Commissioner of Customs under certain circumstances. This latter authority on the Commissioner's part allows Customs to properly control domestic status merchandise in unusual circumstances. The zone operator must still maintain proper inventory records of domestic status merchandise as prescribed in Subpart B, Part 146, Customs Regulations, even if no permit is required.

Comments: Several commenters inquire as to the authority for Customs allowing activation of a zone under § 146.6. They also question whether this allowance is not more appropriately within the authority of either the Board or the zone grantee.

Response: Authority for Customs approval of activation of zones is found in the individual grants to the zones and subzones, as well as the Act itself. The grants contain provisions to the effect that operations at the zone shall not commence until the grantee obtains all the necessary permits from Federal authorities, and that the grant is subject to an agreement between the grantee and Customs regarding compliance with requirements for the protection of the revenue.

Section 15(b) of the Foreign-Trade Zones Act (19 U.S.C. 81o(b)) gives the Secretary of the Treasury broad authority to approve regulations for the protection of the revenue under the Act, while § 9 (19 U.S.C. § 81(i)) directed the Board to cooperate with Customs. The activation procedure is the method which Customs has chosen for protecting the revenue. Through this procedure Customs is assured that the zone is ready to receive merchandise in zone status.

Comment: Section 146.65 creates a new valuation concept, *i.e.*, "total zone value." There are a substantial number of Customs rul-

Comment: Section 146.65 creates a new valuation concept, *i.e.*, "total zone value." There are a substantial number of Customs rulings dealing with zone valuation issues. These rulings should serve as the proper guidance for Customs position on this issue.

Response: "Total zone value" may be a new regulatory term, but it is not a novel regulatory concept. It is the value provided for by current § 146.48(e). Its significance relates to the valuation of recoverable waste or scrap from a zone operation and situations where the rate of duty applicable to nonprivileged foreign merchandise is dependent on the value of the article being transferred from a zone. Section 146.65 therefore, accurately reflects the current Customs position on zone valuation matters.

Comment: Many commenters are concerned with proposed § 146.8, which authorizes the zone operator to affix and break Customs in-bond seals. Heretofore, only Customs officers could affix and break Customs in-bond seals.

Response: Since under the audit-inspection approach a Customs officer will no longer be physically present in most cases, it is necessary that the zone operator be given authority in certain areas to perform functions that were previously conducted by Customs. One of these is the authority to affix and break in-bond seals. Under the new regulation, the zone operator will report to Customs any discrepancies in seal condition. This will protect the zone operator from liability when it is determined that the loss of merchandise occurred prior to arrival of the merchandise at the zone site.

Comment: Special procedures for admitting and removing zone merchandise limited to subzones and zone sites should be extended to general-purpose zones. Also, the criteria for admittance and removal are too stringent for most zones.

Response: We disagree. The audit-inspection requirement is that a permit is required before admission to a zone or transfer to Customs territory. The purpose of proposed § 146.13 is to exempt shipments from this prior permit requirement only when they are repetitive, predictable, and relatively unchanging over a period of time. The exemption was intended to be restrictive because of Customs experience that a major portion of trade destined for zones is non-repetitive and difficult to predict.

In response to the comments on this subject, however, Customs has made a number of changes in the special procedures. First, the criteria for direct delivery are moved to § 146.39 since they are applicable only to merchandise being admitted to a zone, and § 146.13 is deleted.

Secondly, the criteria for direct delivery as they appear in § 146.39 have been simplified. There is now no requirement for direct transmittal of statistical information to the Bureau of the Census. Also, the criteria have been grouped according to those that apply to merchandise and those that apply to the operator. The specific restriction of the direct delivery procedure to subzones

the zone operator is not the owner or purchaser of the merchandise (as interpreted by Customs in Customs Directive 3530–02, dated November 6, 1984). The criteria for direct delivery ensure that not only are the shipments repetitive and relatively unchanging, but also that the zone operator is in a position to see that they remain so.

Finally, the criteria for direct delivery no longer apply to merchandise transferred from a zone for weekly entry or permit for consumption, transportation, or exportation under proposed §§ 146.63 and 146.69. Instead, the criteria for a weekly permit under the direct delivery procedure in these sections is whether the merchandise is manufactured or changed to its final form just shortly (within 24 hours) before physical transfer from the zone. These sections are necessary for assembly-line type operations where there otherwise would be little time for examination of the merchandise and furnishing of proper entry documentation after the merchandise is in its final form but before physical removal from the zone. By allowing a weekly entry based on an estimate of merchandise to be removed during the week, Customs has prior information as to merchandise to be removed and documentation to serve as the basis of physical examination of the merchandise. At the same time, the assembly-line operation need not be delayed pending acceptance of an entry and Customs examination of the merchandise.

Comment: To qualify for many of the more liberal procedures, zones must provide statistical data directly to the Bureau of the Census instead of providing a statistical carbon copy of Customs Form 214–A, titled "Application For Foreign Trade Zone Admission And/Or Status Designation" to Customs. This may be very difficult for many zone users, and it abrogates the responsibility of Customs to collect statistics.

Responses: We disagree. Customs responsibility is to support the Census in collecting foreign trade statistics. In some instances, Census has allowed direct transmittal of statistics by zone importers, relieving Customs of the necessity of collecting a copy of Customs Form 214–A. Normally, collection of this form is very important to Census because it ensures that statistical information is collected on each and every shipment to a zone. Direct transmittal of statistics is permitted by Census only when it is satisfied through other means that each and every shipment will be covered by the direct transmittal.

Census has indicated that trade statistics need not be collected for domestic status merchandise admitted to a zone. Therefore, the criteria in proposed § 146.13(b)(1) is not needed. Also, Customs will not, except as ordered by the Commissioner, require a prior permit for the admission of domestic status merchandise to a zone.

Under proposed § 146.13(b), direct transmittal of statistical information to Census is necessary to qualify a zone importer for direct

delivery of merchandise to a zone without a prior permit to admit merchandise. Section 146.40 requires importers to submit Customs Form 214 for merchandise recorded into the zone inventory and recordkeeping system the previous business day. The previous business day may not occur until several weeks after the merchandise is physically received in the zone. Census is concerned that statistical information on zone importations may not be reported timely.

To alleviate Census concern, yet reduce barriers to use of the direct delivery procedures by importers under § 146.40, Customs has decided to allow two alternatives to meeting Census statistical reporting requirements. The zone importer must either have a direct transmittal arrangement with Census or he must submit an individual Customs Form 214 and 241–A under § 146.40(c)(2) for each shipment, within 10 days after the end of the month in which the merchandise is physically received in the zone. No extension will be authorized to this statistical reporting requirement. The statistics for each shipment of merchandise to the U.S., including nationality of the shipping vessel or aircraft, date of exportation, and date of importation, must be reported separately.

These requirements are being incorporated into § 146.40 inasmuch as § 146.13 is deleted, as discussed above.

Comment: Many commenters object to proposed regulations concerning Customs examination and documentation requirements before or upon admission to zones. Specifically, the objections are that the examination required by the proposed regulations (1) is contrary to the Act; (2) would unreasonably delay the shipment of merchandise to zones; (3) reduces the advantages to using zones; and (4) would result in insufficient supervision for the proper enforcement of the foreign trade zone regulations. Commenters also state that examination should only be done in zones, that removal of Customs officers from zones would make it impossible to examine merchandise there, that commercial invoices are not usually available for presentation before or upon admission to a zone, further delaying shipments, and that merchandise admitted to a zone but destined only for exportation should not be examined by Customs.

Responses: We do not agree. Physical examination is a key principle of audit-inspection supervision because it enables Customs to determine the initial responsibility of the operator for the merchandise. Proper duty assessment and enforcement of admissibility requirements are also benefits of zone merchandise examination. The authority for such examinations is found in §§ 4, 8, and 15(b) of the Act (19 U.S.C. 81d, h, and o(b)), as well as in § 499 of the Tariff Act of 1930, as amended (19 U.S.C. 1499).

The purpose of providing a commercial invoice or similar documentation is to assist Customs in physical examination by disclosing the purported nature of the merchandise. It also aids in plan-

ning examinations under Customs selective examination procedures.

Furthermore, the proposed examination and documentation requirements do not unreasonably delay shipments to zones. First, under selective examination procedures, only about 20–30 percent of shipments are examined. Secondly, merchandise destined for zone sites under direct delivery procedures (§ 146.40) is examined even less frequently. Thirdly, if proper documentation is not available or is incomplete, the merchandise may be temporarily deposited in the zone, pending its receipt and Customs examination (§ 146.35).

Additionally, the examination and documentation requirements do not decrease the advantages of zones. First, there would not be unreasonable delays. Secondly, zone importers would not have to await the arrival of a Customs officer to physically supervise admission, as under the existing system. Thirdly, at worst the delays caused by examination and documentation requirements and those caused by awaiting the arrival of a Customs officer for physical supervision are equal. Zones will have very significant advantages conferred upon them under the Act.

As to the place of examination, we believe that this should be left to the discretion of the district director, so as to allow the most efficient deployment of personnel to carry out Customs tasks. In many cases, examination can be done more quickly at the dock, where Customs officers may be stationed full time, rather than at a zone with no full-time Customs officers.

The main purpose of audit-inspection supervision is to replace the physical supervision of zones. It does not deal directly with Customs staffing of zones for examination or documentation purposes. If the workload of a zone is large enough to warrant assignment of an officer full-time to examine merchandise and review documentation, the district director may do so. If the zone workload is light and commitments to other segments of the import community heavy, it would be inefficient and unreasonable to assign a full-time officer to a zone. There is nothing in the Act or elsewhere that obliges Customs, in its deployment of personnel, to accord zones more favorable treatment than other segments of the importing community.

Audit-inspection supervision will not result in ineffective enforcement of U.S. laws and regulations in zones. Under this system, Customs does not abandon supervision; rather, it supervises in a different manner, relying on physical supervision and recordkeeping by zone operators, enforced through liquidated damages, penalites, and suspension procedures. Customs believes these deterrents will provide better enforcement than physical supervison.

As to merchandise with no invoice or an incomplete invoice, we note that this merchandise may be sent to a zone for temporary deposit. Customs will accept alternate documentation in lieu of a

commercial invoice, providing the documentation provides a clear description of the nature of the merchandise. However, Customs experience has been that commercial invoices exist for most zone shipments.

Finally, with regard to merchandise destined only for exportation, this merchandise is subject to examination for identification purposes under audit-inspection supervision just as any other merchandises destined for zones.

Comment. Proposed § 146.73(d)(2) prohibits duty-paid merchandise from being futher processed in a zone. This provision is contrary to the Act and Customs Headquarters Ruling 215870. It therefore should be deleted.

Response: Whether or not the provision is contrary to Ruling 215870, the regulations take precedence. The prohibition against further processing of duty-paid merchandise is applicable only to merchandise previously in a zone, and not to all duty-paid merchandise.

The purpose of proposed § 146.73(d)(1) was to allow merchandise to remain in a zone after it had been constructively transferred to Customs territory and entered. It was intended to accommodate zone users who wished to make entry for a large amount of merchandise, but for various commercial reasons did not wish to immediately remove all or some of the merchandise from the zone. The prohibition on further processing was intended to avoid abuse of this privilege by an assortment of schemes designed to circumvent high duty rates or import restrictions. Examples of such schemes are as follows:

1. Merchandise is entered for consumption at a duty rate of 5 percent. After entry the merchandise is retained in the zone, or it is removed but shortly thereafter returned to the same or a different zone in domestic status. Then it is further manufactured into a product whose rate of duty is 25 percent. However, the merchandise is no longer subject to duty since it is now wholly in domestic status.

2. There is a quota on sugar products containing over 65 percent sucrose. The importer adds another product to the sugar in a zone to produce a product with less than 65 percent sucrose content, which is not subject to the quota. The importer files an entry on the product in the latter state, but the merchandise is retained in the zone in domestic status. Then the added product is sifted out, leaving a sugar product containing 90 percent sucrose. The merchandise is no longer subject to quota upon its ultimate removal from the zone because it is in domestic status.

3. A firm produces pharmaceutical products in a zone. During an intermediate stage of processing, the merchandise is in a condition subject to a free rate of duty, while the final rate of duty would be 15 percent. The intermediate stage is transitory, lasting no more than an hour. During this period, the firm files an entry at the free

rate of duty. The intermediate stage merchandise is left in the zone for continuous processing, or is piped in a loop that runs into Customs territory and immediately back into the zone, whereupon the firm requests readmission in domestic status. By the time Customs accepts the entry and has an opportunity to examine the merchandise, it is no longer in its condition as entered. Besides circumventing the higher rate of duty, the merchandise covered by the entry can no longer be examined for verification or appraisement purposes.

Entry for consumption in these cases is a sham. Merchandise which is entered but not commingled with U.S. commerce is not, in Customs opinion, entered for consumption, and such entries may be declared null and void and cancelled by the district director. We note that there is a line of court decisions in support of the view that entered for consumption means that the merchandise has entered U.S. commerce as an integral part thereof. See *U.S.* v. *Rolls Royce of America, Inc.*, T.D. 41202 and *U.S.* v. *Mussman and Schafer*, C.A.D. 506, C.D. 1367.

Section 3 of the Act permits zones two choices in the rate of duty upon entry for consumption—the rate of duty on the merchandise in its condition when the choice is made, or the rate of duty on the merchandise in its condition when transferred to Customs territory. A sham consumption entry allows a third choice—the rate applicable to the merchandise in an intermediate stage of processing in the zone.

In lieu of a prohibition on further processing, proposed § 146.73(d)(1) (now § 146.71(d)(1)) is being amended to authorize district directors to reject or cancel consumption entries from zones when the merchandise is not timely removed from the zone after entry, and merchandise removed from the zone does not enter U.S. commerce and is subsequently readmitted to a zone in domestic status. If the merchandise is so readmitted and the entry cancelled, it will be restored to its last zone status and a new entry required upon its transfer to Customs territory. This amendment closes an existing loophole so as to protect the revenue and properly enforce U.S. import laws and regulations.

A determination as to whether merchandise has not entered the commerce will be made by district directors on a case by case basis, considering factors such as the following:

1. Length of time the merchandise was outside the zone before readmission.
2. Whether readmission was requested by the importer of record or his agent, or a person acting in collusion with the importer of record.
3. Credible evidence that there was an intent by the importer or others, at the time of entry, to seek readmission to the zone.

4. The merchandise evades a higher rate of duty or an import restriction because of its having been admitted in domestic status.

5. The merchandise was not used or was not the subject of a bona fide sale by the importer after entry.

6. The merchandise was not further processed or manufactured outside the zone, or such processing or manufacture was minimal or cosmetic in nature.

Entries of merchandise readmitted in zone-restricted status will not be cancelled under this provision. It is noted that the position set forth in § 146.71(d)(1) is consistent with those in §§ 146.61, 146.63(c)(1) and 146.71(d)(2) in that merchandise which was entered but never removed from the zone is treated as constructively transferred back to the zone in its previous zone status.

An exception is made in § 146.71(c) from the general requirement of prompt zone removal for articles for use in a zone, such as production equipment, construction materials, and articles to be consumed in a zone.

A new § 146.71(d)(3) is added to clarify that merchandise which is actually entered into commerce may be readmitted to a zone in domestic status.

Comment: Several commenters were concerned that under the revised regulations, Customs would no longer approve a zone's procedures manual.

Response: Currently, Customs has three methods of supervising zones: (1) Customs maintained zone inventory ledgers; (2) Alternative Inventory Control Systems (AICS) maintained by the zone operator; and (3) the Audit-Inspection Program where the zone operator maintains his inventory control. Only under AICS has Customs approved a zone operator's inventory control system. The reason for Customs allowing the AICS method of operating a zone stems from the fact that Customs did not have regulatory guidelines available for use by zone operators. However, there were some problems with the AICS method due to Customs limited ability to assist in the design of sophisticated data processing systems within short time frames so as to allow zones to be activated. Also, several zone systems were approved where zone operations were delayed sometimes for several years, resulting in the original system either being rendered obsolete or in need of major changes at the time the zone was activated.

Accordingly, Customs decided to provide much needed inventory control guidelines in the regulations and allow the individual zones to adopt their own inventory systems within the guidelines devised by Customs. Questions as to whether particular elements of a proposed inventory control and recordkeeping system meet the criteria in revised Subpart B, Part 146, Customs Regulations, may be referred to the district director for a non-binding ruling, or to Customs Headquarters for a ruling in accordance with Part 177, Cus-

toms Regulations (19 CFR Part 177). Customs will not review any system in its entirety to render an opinion as to whether it meets all of the criteria in Subpart B.

Comment: Since the Government's expense in providing Customs officers at the zone is reimbursed by the zone itself, there is no logical reason why Customs personnel cannot be permanently stationed at the zone.

Response: Although the expense of maintaining a Cusoms officer at a zone is a consideration in our decision to implement audit-inspection supervision, there are other considerations of equal value. One is that audit-inspection supervision would provide protection to the revenue, which is equal to or greater than that under the existing systems. This was apparent from a 4-year study of warehouses which had converted to audit-inspection supervision. Another consideration is that the new system allows Customs to assign personnel to other areas which have a higher priority. A great many zone operators, grantees and users do not realize that Customs warehouse and zone officer positions, although they are fully reimburseable, are counted against Customs overall personnel ceiling. If officers are assigned to warehouses and zones, there will be fewer officers for assignment to higher priority tasks.

Comment: The proposed regulations do not reduce recordkeeping and information costs to operators.

Response: We disagree. To meet present document filing requirements, zone operators must gather, maintain, and compile certain data on their zones's admissions and removals and file required documents with Customs. Under the proposal, data gathering and maintenance needs will not change appreciably, but required document filings will be reduced dramatically. We estimate 50,000–70,000 annual form filings will be eliminated by the proposal, resulting in operator data handling and form filing cost reductions of from $600,000 to $700,000. We regard document cost reductions of an average $10,000 per year per activated zone site to be real and significant.

Comment: Since Customs no longer will be approving operator procedures manuals in their entirety, it is not fulfilling its obligations to assist the importing and exporting public. Customs should therefore provide some instruction to zone operators.

Response: We agree. Accordingly, Customs will provide the following assistance to the importing and exporting public:

1. Every attempt has been made to make the new regulations clear and concise.
2. Rewrite the Customs pamphlet on foreign trade zones.
3. Develop a booklet on foreign trade zones for operators and users.
4. Provide informational seminars for the public on the new regulations.

5. Rewrite operational guidelines based upon the new regulations.

6. Provide materials and seminars for Customs personnel, as well as the public.

Comment: Because of its impact, the proposal qualifies as a major rule under E.O. 12291 and thus requires a regulatory analysis.

Response: We disagree. Section 1(b) of E.O. 12291 requires a regulatory impact analysis for a proposal when one or more of the following criteria are met:

(1) A net national economic cost of $100 million or more;

(2) Significant cost increases for consumers; and

(3) Adverse effect upon the international competitiveness of U.S. firms.

In conducting an initial regulatory analysis under the terms of the Regulatory Flexibility Act (5 U.S.C. 603, 604), we concluded that none of the criteria was met.

Comment: Many commenters object to the panalty and liquidated damages provisions of the proposed regulations as excessive, unwarranted and not comparable to the bonded warehouse liquidated damages provisions or the penalties for fraud under § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592). They also question the authority of district directors to suspend a zone's activated status, claiming that this action amounts to revocation of the zone grant.

Response: As to the liquidated damages and penalties provisions of the new regulations not being comparable to those for bonded warehouse, we note that there are considerable differences between zones and bonded warehouses. Merchandise in a bonded warehouses is in Customs territory, has been entered, and is secured by both the warehouse proprietor's bond and the warehouse entry bond, whereas merchandise in a zone is not in Customs territory, is not entered and is not generally subject to the Customs laws or the bonding requirements. Also, there is much greater freedom to manufacture and manipulate merchandise in a zone than in a bonded warehouse. In view of this relative freedom from Customs control of activities in zones as compared to warehouses, the bonding requirements proposed are minimal.

As to the comment that the liquidated damages provisions under the new regulations should be consistent with those for bonded warehouses, we note that the proposed liquidated damages provisions for restricted merchandise or alcoholic beverages are consistent with those for such articles under the importor's and warehouse proprieter's bonds. They are in a higher amount than liquidated damages for other merchandise. This is necessary to remove the economic incentive to breach the bond, in certain cases, in order to evade quota, licensing, labeling or other restrictions.

With respect to liquidated damages claims not relating to merchandise, the liquidated damages proposed were in an amount to be determined by the district director, but not more than $200. Sev-

eral commenters, however, were of the opinion that liquidated damages for non-merchandise related defaults of the zone operator's bond should be consistent with those for default of the warehouse proprietor's bond. Customs agrees with this position. Therefore, proposed § 146.81 is deleted, and the zone operator's bond in § 113.73, Customs Regulations (19 CFR 113.73), is modified to include the provisions previously appearing in § 146.81. Liquidated damages for merchandise and non-merchandise related defaults of the zone operator's bond will conform to these applicable to the warehouse proprietor's bond as well as other Customs bonds.

The only *penalty* provision in the new regulations is a restatement of 19 U.S.C 81s (§ 19, the Act), which authorizes a fine of not more than $1,000 for violation of the Act or any regulations thereunder. The regulations in Part 146, Customs Regulations, are regulations under the Act. The penalty for fraud under 19 U.S.C. 1592 is the domestic value of the merchandise plus any duties. These two penalty provisions are concerned with preventing two different types of activity which bear no relationship to each other. The penalties can in no way be compared to each other.

With respect to Customs authority to suspend activation of a zone, in proposed § 146.83, we note that §§ 3, 5, 8 and 15(b) of the Act (19 U.S.C. 81c, e, h, o(b)), confer authority upon the Secretary of the Treasury to make rules and regulations under the Act. Customs derives this authority from the Secretary.

Suspension of activation of a zone is not a revocation of the zone grant, which is the only remedy currently available to Customs for improper activity or continued violations of the foreign trade zones regulations, provided that the Board orders the revocation. Furthermore, under § 18 of the Act (19 U.S.C. 81r), the zone grant cannot be revoked without giving four months notice and taking other actions.

Suspension gives Customs an alternative method for dealing with improper activity in a zone. It allows Customs to single out the improper activity, subzone, or zone site involved and apply certain sanctions, without disturbing other proper zone activities. For example, suspension may be limited to the activities of a particular site, such as suspension of the privilege to admit merchandise for a particular activity, and it may not necessarily be directed at the activation of the zone as a whole. Proposed §§ 146.83 (a) and (b)(1) (now §§ 146.82 (a) and (b)(1)) have been modified to clarify this procedure.

Some commenters also object to the proposed regulations on suspension on the grounds that they recognize only the operator as a party to suspension proceedings. These commenters suggest that grantees and users also be made parties to suspension proceedings. Customs agrees with this suggestion with respect to grantees, and, accordingly, we have added new paragraph (4) to § 146.83(b) to recognize the grantee. However, we do not agree that a user should be

a party. Approval of zone activation is given to a grantee or operator, not to users. Suspension, or partial suspension, of that approval is a matter between Customs and the grantee or operator who is responsible for the zone.

Finally, it is noted that suspensions are for a limited period, are designed for fast action to minimize developing problems, and are substantially less onerous than revocation provisions applicable to customs brokers, warehouses proprietors, container station operators, and cartmen.

Comment: Language is not used consistently and accurately throughout the proposal. In describing the process of merchandise flow through a zone, the following words are used: admit, brought, enter, receive, remove, transfer, deliver, and withdraw. Also the terms zone, zone site, noncontiguous zone site, zone user, zone firm and zone seller are used with different intents but without definition.

Response: Customs does not agree with this comment. Nevertheless, it appears that some commenters do not understand, or misunderstand, the use of a number of terms. Accordingly, it has been decided to revise and expand the definitions section and, through editorial changes throughout the proposed regulations, improve clarity. "Secretary", "Board', "State," "Corporation", "Public Corporation", "Private Corporation", "Applicant", "Grantee", and "Zone", are defined in § 1 of the Act (19 U.S.C. 81a), and wherever those terms appear in Part 146, they are used in consonance with their statutory meaning, unless otherwise stated. The statutory definitions will not be repeated in the new regulations.

Definitions of several terms, i.e., "subzone", "operator", and "user" have appeared in the proposed regulations of the Board published on February 18, 1983, in the Federal Register (48 FR 7189). As it is not known when those proposed regulations may become final, and as the use of these words is necessary in these regulations, their definitions have been added to § 146.1. If it appears necessary, the definitions may be modified when the proposed regulations of the Board become final.

The terms "zone site" and "noncontiguous zone site" result from particular grants of authority by the Board to establish and operate a zone. It is believed that grantees and operators of those sites are aware of their meanings. The term "noncontiguous zone" has been deleted from these regulations wherever it appears. A definition of "zone site" has been added.

The exclusion of production equipment, building materials, and supplies from the definition of "merchandise" in § 146.1(h) is consistent with Customs decision on this subject. Production equipment, building materials, and supplies are not "merchandise" within the meaning of § 3 of the Act (19 U.S.C. 81c) for the reasons set forth in Customs Service Decision (C.S.D.) 79-418. Also, in H.R. 98-267 on H.R. 3398 (Trade and Tariff Act of 1984, June 24, 1983),

at page 36, it is stated that the Act does not apply to machinery and equipment. They are, therefore, dutiable upon entry.

This position is supported by 19 U.S.C. 1311, the statute establishing bonded manufacturing warehouses, which specifically prohibits the duty-free entry of imported implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein. It would be inconsistent for Customs to prohibit the duty-free entry of such articles into a manufacturing warehouse, from which manufactured goods must be exported, and to permit the duty-free entry of the same articles into a zone. If zones had no such limitation, they would have a distinct advantage over domestic manufacturers since domestic manufacturers are required to enter and pay duty on those articles.

Review does not reveal differing intents in the use of "zone user", "zone firm", and "zone seller" and their meaning is self-evident in context. However, a definition of "user" has been added to § 146.1, and an effort has been made to remove the terms or to further clarify their meaning by editorial changes.

"Enter", where used, refers to the entry of merchandise into the Customs territory of the United States. "Withdrawal" refers to withdrawal from warehouses. Both words are used in the ordinary tariff sense.

To minimize confusion, and since goods are neither entered into nor withdrawn from a zone in the tariff sense, the words "admit", for bringing goods into a zone in zone status, and "transfer", for taking goods out of a zone, have been used. Definitions of these words have been added. "Brought", "receive", "remove", and "deliver", wherever used, have their ordinary meaning. While inconsistent and inaccurate use of the terms in the proposed regulations is not evident, their use has been reviewed and editorial changes have been made wherever appropriate.

Comment: Several commenters objected to the procedures for appealing decisions of the district director denying applications to activate a zone or suspending the activated status of a zone, but these comments were not specific.

Response: We see no problem with the appeal procedure for suspensions of the activated status of a zone or of certain activities in a zone. The procedures include the right to request a hearing and to obtain the decision of the regional commissioner.

With respect to denial of an application to activate a zone or zone site, the decision of the district director is considered the final adminstrative decision for several reasons. First, there may not even be an appealable right. The grant to establish and operate a zone is conditioned upon the grantee's obtaining all necessary permits and licenses, and securing the permission of the district director to begin operations in the zone. Where the district director denies activation because the conditions have not been complied

with, or for other stated reasons, denial of activation does not result in denial of an appealable right since the right to activate the zone has not been granted.

Secondly, the district director is more closely connected with the application for and activation of a zone than Customs regional or headquarters officials. Appeals of denials to the Customs region or to Headquarters would result in little more than delay and inquiries into the factual basis of the decision. We believe that the Board and the courts provide the most suitable forum for appeals from denials of activation on the part of the district director.

Comment: The annual fees proposed for zones are unreasonably high.

Response: We disagree. The purpose of the annual fee is to recover Customs costs incurred in carrying out the audit-inspection supervision program. The annual fee to be charged each zone is a function of the degree of complexity in Customs auditing and inspection of zones.

Under the present inspectional system, Customs bills zone operators approximately $1.3 million annually for inspectional services. Zone operators recover this expense in their fee and rental/lease billings to zone users. We estimate that the Customs component of these fees paid by zone users averages $870 per year per user.

Under the proposed audit-inspection system with different fee tiers, Customs billings to operators of general purpose zones will amount to approximately $1 million per year, versus the estimated $1.3 million at present. The Customs component of small business users' payment to operators will average $670 per year per user, versus the $870 per year per user at present. Future increases in the annual fee will reflect cost increases incurred by Customs in delivering audit and inspection services. These increases will consist largely of annual rises in labor costs. It is expected that labor costs, and thus annual fees charged zone operators, will rise by a moderate 2–4 percent each year.

The proposed fees, therefore, are not unreasonable. Moreover, the proposed annual fee has been restructured into a three-tiered system with the larger, more active zones set to pay higher fees than the smaller zones. This would provide equitable treatment for the smaller zones in that they would no longer subsidize the larger zones. Appendix B reflects the revised structure of the annual fee.

Comment: Many commenters requested clarification of the respective liabilities to Customs of grantees, operators, and users of zones.

Response: As the privilege of establishing, operating, and maintaining a zone is given to a grantee, Customs is of the opinion that all liabilities to Customs involving zone activities reside ultimately with the grantee of the zone. If the operator is not the grantee, these liabilities can be minimized by the operator's being named as principal on the zone operator's bond. There is no liability to Cus-

toms on the part of zone users, other than users that are also operators. It is the grantee or the grantee and operator who have responsibilities to Customs with the attendant liabilities. Grantees are free to make whatever contractual agreements regarding indemnification with operators and users that they choose. Furthermore, Customs is not aware of any way that a grantee can divest itself of all liability, or limit its liability, in the event of loss or damage to Customs resulting from zone activities. While 19 U.S.C. 1623(c) and § 113.51, Customs Regulations (19 CFR 113.51), authorize the cancellation of bonds or bond charges under certain circumstances, that authority does not apply to prospective transactions nor does it extend to the waiver of any lawful claims against the grantee, not secured by bond, that arise from zone activities.

Comment: A few comments were received concerning Subpart D, Part 146. The commenters stated that many of the sections and subsections of Subpart D were definitional in nature and should be in Subpart A.

Response: The subject matter of Subpart D—the status of merchandise in a zone is of sufficient importance to merit its own subpart. The terms "privileged foreign merchandise," "nonprivileged foreign merchandise," "domestic merchandise," and "zone-restricted merchandise" do not appear in the Act. They were coined to describe the status of certain merchandise in a zone with reference to particular provisos of § 3 of the Act (19 U.S.C. 81c). In that sense, the terms are not definitional but descriptive, in that they simply provide a name for conditions prescribed by law, *e.g.*, "zone-restricted" describes the status of merchandise subject to the fourth proviso of 19 U.S.C. 81c.

One commenter urged that § 146.44 (zone-restricted merchandise) be expanded to include a requirement that merchandise placed in a zone to obtain payment of drawback and subsequently removed for shipment to an insular possession of the U.S. be reported by the zone operator to the district director. Upon consideration, it has been decided not to add that requirement to Part 146. Section 191.13, Customs Regulations (19 CFR 191.13), provides that there is no authority to allow drawback on articles shipped to insular possessions. There is authority to allow drawback on articles placed in a zone in zone-restricted status. Subsequent shipment of such articles to an insular possession would be contrary to the Act since it would not be an exportation, destruction, or storage. The likelihood of such shipments is remote and since § 191.13 essentially covers the situation, there is no need to make allowance for it in § 146.44.

In connection with the deletion of § 146.14, § 146.43 is amended to specify that no permit will be required for the admission, handling, or transfer to Customs territory of domestic status merchandise except (1) when mixed or combined with merchandise of another zone status, and (2) when so ordered by the Commissioner in individual circumstances. The latter residual authority is retained

to allow Customs to properly control domestic status merchandise in unusual circumstances. The operator must still maintain proper records of domestic status merchandise under Subpart B, Part 146, even if no permit is required.

Finally, a new § 146.1 has been added. This section is a restatement of the statutory limitation on retail trade in a zone, found in § 15(d) of the Act (19 U.S.C. 81o(d)).

Changes are made throughout the regulations to conform them to the changes made by this document. Also, as a general point, whenever the word "days" appears in this revision, it means calendar days, unless "working days" is specified.

After careful analysis of all the comments received and upon further review of the matter, it has been determined advisable to adopt the proposed regulatory amendments with the various modifications as set forth above.

Executive Order 12291

It has been determined that these amendments are not a "major rule" within the criteria provided in § 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are applicable to this document. An initial regulatory analysis was prepared and included in the NPRM as Appendix C. A final regulatory flexibility analysis is attached to this document as an appendix.

Paperwork Reduction Act

The collection of information requirements contained in § 146.25 and the recordkeeping requirement contained in § 146.4, are subject to the provisions of the Paperwork Reduction Act (44 U.S.C. 3504(h)) and have been cleared by the Office of Management and Budget (OMB). Accordingly, Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and the control numbers assigned by OMB, is being amended to include OMB control number 1515–0151.

Drafting Information

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

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LIST OF SUBJECTS IN 19 CFR PARTS 146 AND 178

Customs duties and inspection, Exports, Foreign trade zones, Imports, Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

Chapter 1, Title 19, Code of Federal Regulations, is amended by revising Part 146 to read as follows:

PART 146—FOREIGN TRADE ZONES

Sec.

146.0 Scope.

SUBPART A—GENERAL PROVISIONS

146.1 Definitions.
146.2 District director as Board representative.
146.3 Customs supervision.
146.4 Operator responsibility and supervision.
146.5 Activation fee and annual fee.
146.6 Procedure for activation.
146.7 Zone changes.
146.8 Seals; authority of operator to break and affix.
146.9 Permission of operator.
146.10 Authority to examine merchandise.
146.11 Transportation of merchandise to a zone.
146.12 Use of zone by carrier.
146.13 Customs forms and procedures.
146.14 Retail trade within a zone.

SUBPART B—INVENTORY CONTROL AND RECORDKEEPING SYSTEM

146.21 General requirements.
146.22 Admission of merchandise to a zone.
146.23 Accountability for merchandise in a zone.
146.24 Transfer of merchandise from a zone.
146.25 Annual reconciliation.
146.26 System review.

SUBPART C—ADMISSION OF MERCHANDISE TO A ZONE

146.31 Admissibility of merchandise into a zone.
146.32 Application and permit for admission of merchandise.
146.33 Temporary deposit for manipulation.
146.34 Merchandise transiting a zone.
146.35 Temporary deposit in a zone; Incomplete documentation.
146.36 Examination of merchandise.
146.37 Operator admission responsibilities.
146.38 Certificate of arrival of merchandise.
146.39 Direct delivery procedures.
146.40 Operator responsibilities for direct delivery.

SUBPART D—STATUS OF MERCHANDISE IN A ZONE

146.41 Privileged foreign status.
146.42 Nonprivileged foreign status.
146.43 Domestic status.
146.44 Zone-restricted status.

SUBPART E—HANDLING OF MERCHANDISE IN A ZONE

146.51 Customs control of merchandise.
146.52 Manipulation, manufacture, exhibition, or destruction; Customs Form 216.
146.53 Shortages and overages.

SUBPART F—TRANSFER OF MERCHANDISE FROM A ZONE

146.61 Constructive transfer to Customs territory.
146.62 Entry.
146.63 Entry for consumption.
146.64 Entry for warehouse.
146.65 Classification, valuation, and liquidation.
146.66 Transfer of merchandise from one zone to another.
146.67 Transfer of merchandise for exportation.
146.68 Transfer for transportation or exportation; estimated production.
146.69 Supplies, equipment, and repair material for vessels or aircraft.
146.70 Transfer of zone-restricted merchandise into Customs territory.
146.71 Release and removal of merchandise from zone.

SUBPART G—PENALTIES; SUSPENSION; REVOCATION

146.81 Penalties.
146.82 Suspension.
146.83 Revocation of zone grant.

AUTHORITY: 19 U.S.C. 66, 81a–81u, 1202 (Gen. Hdnote 11), 1623, 1624, § 146.5 also issued under 31 U.S.C. 9701.

SOURCE: T.D. 86–16 unless otherwise noted.

§ 146.0 Scope.

Foreign trade zones are established under the Foreign Trade Zones Act and the general regulations and rules of procedure of the Foreign Trade Zones Board contained in 15 CFR Part 400. This Part 146 of the Customs Regulations governs the admission of merchandise into a foreign trade zone, manipulation, manufacture, or exhibition in a zone; exportation of the merchandise from a zone; and transfer of merchandise from a zone into Customs territory.

SUBPART A—GENERAL PROVISIONS

§ 146.1 Definitions.

(a) The following words, defined in § 1 of the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a), are given the same meaning when used in this part, unless otherwise stated: "Board", "Grantee", and "Zones".

(b) The following are general definitions for the purpose of this part:

(1) *Act.* "Act" means the Foreign-Trade Zones Act of June 18, 1934, as amended (48 Stat. 998–1003; 19 U.S.C. 81a–u).

(2) *Activation.* "Activation" means approval by the grantee and district director for operations and for the admission and handling of merchandise in zone status.

(3) *Admit.* "Admit" means to bring merchandise into a zone with zone status.

(4) *Alteration.* "Alteration" means a change in the boundaries of an activated zone or subzone; activation of a separate site of an already-activated zone or subzone with the same operator at the same port; or the relocation of an already-activated site with the same operator.

(5) *Customs territory.* "Customs territory" is the territory of the U.S. in which the general tariff laws of the U.S. apply. "Customs territory of the United States" includes only the States, the District of Columbia, and Puerto Rico. (General Headnote 2, Tariff Schedules of the United States (19 U.S.C. 1202)).

(6) *Constructive transfer.* "Constructive transfer" is a legal fiction which permits acceptance of a Customs entry for merchandise in a zone before its physical transfer to the Customs territory.

(7) *Deactivation.* "Deactivation" means voluntary discontinuation of the activation of an entire zone or subzone by the grantee or operator. Discontinuance of the activated status of only a part of a zone site is an alteration.

(8) *Default.* "Default" means an action or omission that will result in a claim for duties, taxes, charges, or liquidated damages under the Foregn Trade Zone Operator Bond.

(9) *Merchandise.* "Merchandise" includes goods, wares and chattels of every description, except prohibited merchandise. Building materials, production equipment, and supplies for use in operation of a zone are not "merchandise" for the purpose of this part.

(10) *Domestic merchandise.* "Domestic merchandise" is merchandise which has been (1) produced in the U.S. and not exported therefrom, or (2) previously imported into Customs territory and properly released from Customs custody.

(11) *Foreign merchandise.* "Foreign merchandise" is imported merchandise which has not been properly released from Customs custody in Customs territory.

(12) *Conditionally admissible merchandise.* "Conditionally admissible merchandise" is merchandise which may be imported into the U.S. under certain conditions. Merchandise which is subject to permits or licenses, or which may be reconditioned to bring it into compliance with the laws administered by various Federal agencies, is an example of conditionally admissible merchandise.

(13) *Prohibited merchandise.* "Prohibited merchandise" is merchandise the importation of which is prohibited by law on grounds of public policy or morals, or any merchandise which is excluded from a zone by order of the Board. Books urging treason or insurrection against the U.S., obscene pictures, and lottery tickets are examples of prohibited merchandise.

(14) *Fungible merchandise.* "Fungible merchandise" means merchandise which for commercial purposes is identical and interchangeable in all situations.

(15) *Operator.* "Operator" is a corporation, partnership, or person that operates a zone or subzone under the terms of an agreement with the zone grantee. Where used in this part the term "operator" also applies to a "grantee" that operates its own zone.

(16) *Reactivation.* "Reactivation" means a resumption of the activated status of an entire area that was previously deactivated without any change in the operator or the area boundaries. If the boundaries are different, the action is an alteration. If the operator is different, it is an activation.

(17) *Subzone.* "Subzone" is a special-purpose zone established as part of a zone project for a limited purpose, that cannot be accommodated within an existing zone. The term "zone" also applies to a subzone, unless specified otherwise.

(18) *Transfer.* "Transfer" means to take merchandise with zone status from a zone for consumption, transportation, exportation, warehousing, cartage or lighterage, vessel supplies and equipment, admission to another zone, and like purposes.

(19) *Unique identifier.* "Unique identifier" means the numbers, letters, or combination of numbers and letters that identify merchandise admitted to a zone with zone status.

(20) *User.* "User" means a person or firm using a zone or subzone for storage, handling, or processing of merchandise.

(21) *Zone lot.* "Zone lot" means a collection of merchandise maintained under an inventory control method based on specific identification of merchandise admitted to a zone by lot.

(22) *Zone site.* "Zone site" means the physical location of a zone or subzone.

(23) *Zone status.* "Zone status" means the status of merchandise admitted to a zone, i.e., nonprivileged foreign, privileged foreign, zone restricted, or domestic.

§ 146.2 District director as Board representative.

The district director in whose district the zone is located shall be in charge of the zone as the representative of the Board.

§ 146.3 Customs supervision.

(a) *Assignment of Customs officers.* Customs officers will be assigned or detailed to a zone as necessary to maintain appropriate Customs supervision of merchandise and records pertaining thereto in the zone, and to protect the revenue.

(b) *Supervision.* Customs supervision over any zone or transaction provided for in this part will be in accordance with § 161.1 of this chapter. The district director may direct a Customs officer to Supervise any transaction or procedure at a zone. Supervision may be performed through a periodic audit of the operator's records, guantity count of goods in a zone inventory, spot check of selected transactions or procedures, or review of recordkeeping, security, or conditions of storage in a zone.

§ 146.4 Operator responsibility and supervision.

(a) *Supervision.* The operator shall supervise all admissions, transfers, removals, recordkeeping, manipulations, manufacturing, destruction, exhibition, physical and procedural security, and conditions of storage in the zone as required by law and regulations. Supervision by the operator shall be that which a prudent manager of a storage, manipulation, or manufacturing facility would be expected to exercise, and may take into account the degree of supervision exercised by the zone user having physical possession of zone merchandise.

(b) *Customs access.* The operator shall permit any Customs officer access to a zone.

(c) *Safekeeping of merchandise and records.* The operator responsible for safekeeping of merchandise and records concerning merchandise admitted to a zone. The operator, at its liability, may allow the zone importer or owner of the goods to store, safeguard, and otherwise maintain or handle the goods and the inventory records pertaining to them.

(d) *Records maintenance.* The operator shall (i) maintain the inventory control and recordkeeping system in accordance with the provisions of Subpart B, (ii) retain all records required in this Part and defined In § 162.1(a) of this chapter, pertaining to zone merchandise for 5 years after the merchandise is removed from the zone, and (iii) protect proprietary information in its custody from unauthorized disclosure. Records shall be readily available for Customs review at the zone.

(e) *Merchandise security.* The operator shall maintain the zone and establish procedures adequate to ensure the security of merchandise located in the zone in accordance with applicable Customs security standards and specifications.

(f) *Storage and handling.* The operator shall store and handle merchandise in a zone in a safe and sanitary manner to minimize damage to the merchandise, avoid hazard to persons, and meet local, state, and Federal requirements applicable to a specific kind of goods. All trash and waste will be promptly removed from a zone. Aisles will be established and maintained, and doors and entrances left unblocked for access by Customs officers and other persons in the performance of their official duties.

(g) *Guard service.* The operator is authorized to provide guards or contract for guard service to safeguard the merchandise and ensure the security of the zone. This authorization does not limit the authority of the district director to assign Customs guards to protect the revenue under section 4 of the Act (19 U.S.C. 81d).

(h) *Miscellaneous responsibilities.* The operator is responsible for complying with requirements for admission, manipulation, manufacture, exhibition, or destruction, shortage, or overage; inventory control and recordkeeping systems, transfer to Customs territory, and other requirements as specified in this part.

§ 146.5 Activation fee and annual fee.

The operator, or where there is no operator, the grantee, will be charged a nonrefundable fee to activate a zone or any portion of a zone, or to alter or relocate an activated portion of a zone, under the provisions of 31 U.S.C. 9701. The operator of an activated zone will be charged a nonrefundable annual fee for each activated zone as payment of the cost of the additional Customs service required under the Act as provided in 19 U.S.C. 81n and the regulations in this part. The operator or grantee shall pay the annual fee to the district director of the district in which the zone is located within 14 days after activation and within 14 days after the effective date of the published fee schedule for each year thereafter that the area remains activated. The fee schedule will be revised annually and published in the Federal Register and the CUSTOMS BULLETIN.

§ 146.6 Procedure for activation.

(a) *Application.* A zone operator, or where there is no operator, a grantee, shall make written application to the district director of the district in which the zone is located to obtain approval of activation of a zone or zone site. The area to be activated may be all or any portion of the zone approved by the Board. The application must include a description of all the zone sites covered by the application, any operation to be conducted therein, and a statement of the general character of the merchandise to be admitted.

(b) *Supporting documents.* The appliclation must be accompanied by the following:

(1) The application fee required by § 146.5;

(2) A blueprint of the area approved by the Board to be activated showing area measurements, including all openings and buildings; and all outlets, inlets, and pipelines to any tank for the storage of liquid or similar product, that portion of the blueprint certified to be correct by the operator of the tank;

(3) A gauge table, when appropriate, showing the capacity, in the appropriate unit, of any tank, certified to be correct by the operator of the tank;

(4) A procedures manual describing the Inventory control and recordkeeping system that will be used in the zone, certified by the operator or grantee to meet the requirements of Subpart B; and

(5) The written concurrence of the grantee, when the operator applies for activation, in the requested zone activation.

(c) *Inquiry by district director.* As a condition of approval of the application, the district director may order an inquiry by a Customs officer into:

(1) The qualifications, character, and experience of an operator and/or grantee and their principal officers; and

(2) The security, suitability, and fitness of the facility to receive merchandise in a zone status.

(d) *Decision of the district director.* The district director shall promptly notify the applicant in writing of his decision to approve or deny the application to activate the zone. If the application is denied, the notification will state the grounds for denial which need not be limited to those listed in § 146.82. The decision of the district director will be the final Customs administrative determination in the matter. On approval of the application, a Foreign Trade Zone Operator's Bond shall be executed on Customs Form 301, containing the bond conditions of § 113.73 of this chapter.

(e) *Activation.* Upon the district director's approval of the application and acceptance of the executed bond, the zone or zone site will be considered activated; and merchandise may be admitted to the zone. Execution of the bond by an operator does not lessen the liability of the grantee to comply with the Act and implementing regulations.

§ 146.7 Zone changes.

(a) *Alteration of an activated area.* An operator shall make written application to the district director for approval of an alteration of an activated area, including an alteration resulting from a zone boundary modification. The application must be accompanied by the fee required in § 146.5 and the supporting document requirements specified in § 146.6, as applicable. The district director may review the security, suitability, and fitness of the area, and shall reply to the applicant as provided for in § 146.6.

(b) *Deactivation or reactivation.* A grantee, or an operator with the concurrence of a grantee, shall make written application to the district director for deactivation of a zone site, indicating by layout

or blueprint the exact site to be deactivated. The district director shall not approve the application unless all merchandise in the site in zone status (other than domestic status) has been removed at the risk and expense of the operator. The district director may require an accounting of all merchandise in a zone as a condition of approving the deactivation. A zone may be reactivated using the above procedure if a sufficient bond is on file under § 146.6(d). No fee is required for deactivation or reactivation.

(c) *Suspenson of activated site.* When approval of an activated status has been suspended through the procedure in Subpart G, the district director may require all goods in that area in zone status (other than domestic status) to be transferred to another zone, a bonded warehouse, or other location where they may lawfully be stored, if the district director considers that transfer advisable to protect the revenue or administer any Federal law or regulation.

(d) *New bond.* The district director may require an operator to furnish, on 10 days notice, a new Foreign Trade Zone Operator's Bond on Customs Form 301. If the operator fails to furnish the new bond, no more merchandise will be received in the zone in zone status. Merchandise in zone status (other than domestic status) will be removed at the risk and expense of the operator. A new bond may be required if (i) the activated zone area is substantially altered; (ii) the character of merchandise admitted to the zone or operations performed in the zone are substantially changed; (iii) the existing bond lacks good and sufficient surety; or (iv) for any other reason that substantially affects the liability of the operator under the bond. Although a new bond may not be required, the operator shall obtain the consent of the surety to any material alteration in the boundaries of the zone.

(e) *New operator.* A grantee of an activated zone site shall make written application to the district director for approval of a new operator, submitting with the application a certification by the new operator that the inventory control and recordkeeping system meets the requirements of Subpart B, and a copy of the system procedures manual if different from the previous operator's manual. The district director may order an inquiry into the qualifications, character, and experience of the operator and its principal officers.

(f) The bond in § 146.6 shall be submitted by the operator before the operating agreement may become effective in respect to merchandise in zone status. The district director shall promptly notify the grantee, in writing, of the approval or disapproval of the application.

(g) *List of officers, employees, and other persons.* The district director may make a written demand upon the operator to submit, within 30 days after the date of the demand, a written list of the names, addresses, social security numbers, and dates and places of birth of officers and persons having a direct or indirect financial interest in the operator, and of persons employed in the carriage,

receipt or delivery of merchandise in zone status, whether employed by the zone operator or a zone user. If a list was previously furnished, the district director may make a written demand for the same informaton in respect to new persons employed in the carriage, receipt, or delivery of zone status merchandise within 10 days after such employment. The list need not include employees of common or contract carriers transporting goods to or from the zone.

§ 146.8 Seals, authority of operator to break and affix.

The district director may authorize an operator to break a Customs in-bond seal affixed under § 18.4 of this chapter, or under any Customs order or directive, on any vehicle or intermodal container containing merchandise approved for admission to the zone upon its arrival at the zone; or to affix a Customs in-bond seal to any vehicle or intermodal container of merchandise for which an entry, withdrawal, or other approval document has been obtained for movement in-bond from the zone. The authorized affixing or breaking of that seal will be considered to have been done under Customs supervision. The operator shall report to the district director, upon arrival of the vehicle or container at the zone, any seal found to be broken, missing, or improperly affixed, and hold the vehicle or container and its contents intact pending instructions from the district director. If the operator does not obtain the written concurrence of the carrier as to the condition of the seal or delivering conveyance, the district director shall deem the seal or delivering conveyance to be intact.

§ 146.9 Permission of operator.

An application for permission to admit merchandise into a zone, or to manipulate, manufacture, exhibit, or destroy merchandise in a zone must include the written concurrence of the operator, except where the regulations of this part provide for the making of application by the operator itself or where the operator files a separate specific or blanket application. The written concurrence of the operator in the removal of merchandise from a zone is not required because the merchandise is released by the district director to the operator for delivery from the zone, as provided in § 146.71(a).

§ 146.10 Authority to examine merchandise.

The district director may cause any merchandise to be examined before or at the time of admission to a zone, or at any time thereafter, if the examination is considered necessary to facilitate the proper administration of any law, regulation, or instruction which Customs is authorized to enforce.

§ 146.11 Transportation of merchandise to a zone.

(a) *From outside Customs territory.* Merchandise may be admitted directly to a zone from any place outside Customs territory.

(b) *Through Customs territory, foreign merchandise.* Foreign merchandise destined to a zone and transported in-bond through Customs territory will be subject to the laws and regulations applicable to other merchandise transported in-bond between two places in Customs territory.

(c) *From Customs territory, domestic merchandise.* Domestic merchandise may be admitted to a zone from Customs territory by any means of transportation which will not interfere with the orderly conduct of business in the zone.

(d) *From a bonded warehouse.* Merchandise may be withdrawn from a bonded warehouse under the procedure in § 144.37(g) of this chapter and transferred to a zone for admission in zone restricted status.

§ 146.12 Use of zone by carrier.

(a) *Primary use; lading and unlading.* The water area docking facilities, and any lading and unlading stations of a zone are intended primarily for the unlading of merchandise into the zone or the lading of merchandise for removal from the zone. Their use for other purposes may be terminated by Customs if found to endanger the revenue, or by the Board if found to impede the primary use of the zone.

(b) *Carrier in zone not exempt from law or regulations.* Nothing in the Act or the regulations in this part shall be construed as excepting any carrier entering, remaining in, or leaving a zone from the application of any other law or regulation.

§ 146.13 Customs forms and procedures.

Where a Customs form or other document is required in this part, the number of copies of the form or document required to be presented and their manner of distribution and processing shall be determined by the district director, except as otherwise specified in this part.

§ 146.14 Retail trade within a zone.

Retail trade is prohibited within a zone except as provided in 19 U.S.C. 81o(d). See also the regulations of the Board as contained in 15 CFR Part 400.

Subpart B—Inventory Control and Recordkeeping System

§ 146.21 General requirements.

(a) *Systems capability.* The operator shall maintain either manual or automated inventory control and recordkeeping systems or combination manual and automated systems capable of:

(1) Accounting for all merchandise, including domestic status merchandise, temporarily deposited, admitted, granted a zone status and/or status change, stored, exhibited, manipulated, manufactured, destroyed, transferred, and/or removed from a zone;

(2) Producing accurate and timely reports and documents as required by this part;

(3) Identifying shortages and overages of merchandise in a zone in sufficient detail to determine the quantity, description, tariff classification, zone status, and value of the missing or excess merchandise;

(4) Providing all the information necessary to make entry for merchandise being transferred to the Customs territory;

(5) Providing an audit trail to Customs forms from admission through manipulation, manufacture, destruction or transfer of merchandise from a zone either by zone lot or Customs authorized inventory method.

(b) *Procedures manual.*

(1) The operator shall provide the district director with an English language copy of its written inventory control and recordkeeping systems procedures manual in accordance with the requirements of this part.

(2) The operator shall keep current its procedures manual and shall submit to the district director any change at the time of its implementation.

(3) The operator may authorize a zone user to maintain its individual inventory control and recordkeeping system and procedures manual. The operator shall furnish a copy of the zone user's procedures manual, including any subsequent changes, to the district director. However, the operator will remain responsible to Customs and liable under its bond for supervision, defects in, or failures of a system.

(4) The operator's procedures manual and subsequent changes will be furnished to the district director for information purposes only. Customs receipt of a manual does not indicate approval or rejection of a system.

(c) *Liability of operator.* Upon zone activation approval the operator remains liable for complying with all inventory control and recordkeeping system requirements set forth in this part.

§ 146.22 Admission of merchandise to a zone.

(a) *Identification.* All merchandise will be recorded in a receiving report or document using a zone lot number or unique identifier. All merchandise, except domestic status merchandise for which no permit for admission is required under § 146.43, will be traceable to a Customs Form 214 and accompanying documentation.

(b) *Reconciliation.* Quantities received will be reconciled to a receiving report or document such as an invoice with any discrepancy reported to the district director as provided in §146.37.

(c) *Incomplete documentation.* Merchandise received without complete Customs documentation or which is unacceptable to the inventory control and recordkeeping system will be recorded in a suspense account or record until documentation is complete or the system is capable of accepting the information, at which time it

will be formally admitted to the zone under § 146.32 or 146.40. The receiving report or document will provide sufficient information to identify the merchandise and distinguish it from other merchandise. The suspense account or record will be completely documented for Customs review to explain the differences noted and corrections made.

(d) *Recordation.* Merchandise received will be accurately recorded in the inventory system records from the receiving report or document using the zone lot number or unique identifier for traceability. The inventory record will state the quantity and date admitted, cost or value where applicable, zone status, and description of the merchandise, including any part or stock number.

§ 146.23 Accountability for merchandise in a zone.

(a) *Identification of merchandise.*

(1) *General.* A zone lot number or unique identifier will be used to identify and trace merchandise.

(2) *Fungible merchansise.* Fungible merchandise may be identified by an inventory method authorized by Customs, which is consistently applied, such as First-In-First-Out (FIFO) and using an unique identifier.

(b) *Inventory records.* The inventory records will specify by zone lot number or unique identifier:

(1) Location of merchandise;

(2) Zone status;

(3) Cost or value, unless operator's or user's financial records maintain cost or value and the records are made available for Customs review;

(4) Beginning balance, cumulative receipts and removals, adjustments, and current balance on hand by date and quantity;

(5) Destruction of merchandise; and

(6) Scrap, waste, and by-products.

(c) *Physical inventory.* The operator shall take at least an annual physical inventory of all merchandise in the zone (unless continuous cycle counts are taken as part of an ongoing inventory control program) with prior notification of the date(s) given to Customs for any supervision of the inventory deemed necessary. The operator shall notify the district director of any discrepancies in accordance with §146.53.

§ 146.24 Transfer of merchandise from a zone.

(a) *Accountability.*

(1) All zone status merchandise transferred from a zone will be accurately recorded within the inventory control and recordkeeping system.

(2) The inventory control and recordkeeping system for merchandise transfers must have the capability to trace all transfers back to a zone admission under a Customs authorized inventory method.

(b) *Information.* The inventory control and recordkeeping system must be capable of providing all information necessary to make entry for transfer of merchandise from the zone.

§ 146.25 Annual reconciliation.

(a) *Report.* The operator shall prepare a reconciliation report within 90 days after the end of the zone/subzone year unless the district director authorizes an extension for reasonable cause. The operator shall retain that annual reconciliation report for a spot check or audit by Customs, and need not furnish it to Customs unless requested. There is no form specified for the preparation of the report.

(b) *Information required.* The report must contain a description of merchandise for each zone lot or unique identifier, zone status, quantity on hand at the beginning of the year, cumulative receipts and transfers (by unit), quantity on hand at the end of the year, and cumulative positive and negative adjustments (by unit) made during the year.

(c) *Certification.* The operator shall submit to the district director within 10 working days after the annual reconciliation report, a letter signed by the operator certifying that the annual reconciliation has been prepared, is available for Customs review, and is accurate. The certification letter must contain the name and street address of the operator, where the required records are available for Customs review; and the name, title, and telephone number of the person having custody of the records. Reporting of shortages and overages based on the annual reconciliation will be made in accordance with § 146.53. These reports must accompany the certification letter.

§ 146.26 System review.

The operator shall perform an annual internal review of the inventory control and recordkeeping system and shall report to the district director any deficiency discovered and corrective action taken, to ensure that the system meets the requirements of this part.

Subpart C—Admission of Merchandise to a Zone

§ 146.31 Admissibility of merchandise into a zone.

Merchandise of every description may be admitted into a zone unless prohibited by law. A distinction is made between prohibited and conditionally admissible merchandise.

(a) *Prohibited merchandise.* District directors shall not admit prohibited merchandise. If there is a question as to whether the merchandise may be prohibited, district directors may permit the temporary deposit of the merchandise in a zone pending a final determination of its status. Any prohibited merchandise which is found within a zone will be disposed of in the manner provided for in the laws and regulations applicable to that merchandise.

(b) *Conditionally admissible merchandise.* The admission of this merchandise into a zone is subject to the regulations of the Federal agency concerned.

§ 146.32 Application and permit for admission of merchandise.

(a) *Application on Customs Form 214 and permit.* Merchandise may be admitted into a zone only upon application on a uniquely and sequentially numbered Customs Form 214 ("Application for Foreign Trade Zone Admission and/or Status Designation") and the issuance of a permit by the district director. Exceptions to the Customs Form 214 requirement are for merchandise temporarily deposited (§ 146.33), transiting merchandise (§ 146.34), or domestic merchandise admitted without permit (§ 146.43). The applicant for admission shall present the application to the district director and shall include a statistical copy on Customs Form 214-A for transmittal to the Bureau of Census, unless the applicant has made arrangements for the direct transmittal of statistical information to that agency.

(b) *Supporting documents.*

(1) *Commercial documentation.* The applicant shall submit with the application two copies of an examination invoice meeting the requirements of Subpart F, Part 141, of this chapter, for any merchandise, other than that excepted in paragraph (a) of this section, to be admitted to a zone. The notation of tariff classification and value required by § 141.90 of this chapter need not be made, unless the merchandise is to be admitted in privileged status.

(2) *Evidence of right to make entry.* The applicant for admission shall submit with the application a document similar to that which would be required as evidence of the right to make entry for merchandise in Customs territory under § 141.11 or 141.12 of this chapter.

(3) *Release order.* Merchandise will not be authorized for delivery by Customs to a zone until a release order has been executed by the carrier which brought the merchandise to the port, unless the merchandise is released back to that same carrier for delivery to the zone (see § 141.11 of this chapter). When a release order is required, it will be made on any of the forms specified in § 141.111 of this chapter, or by the following statement attached to Customs Form 214:

Authority is hereby given to release the merchandise described in this application to _____

_____

Name of carrier _____

_____

Signature and title of carrier representative _____

_____

A blanket or qualified release order may be authorized for the transfer of merchandise to a zone as provided for in § 141.111 of this chapter.

(4) *Application to unlade.* For merchandise unladen in the zone directly from the importing carrier, the application on Customs Form 214 will be supported by an application to unlade on Customs Form 3171.

(5) *Other documentation.* The district director may require additional information or documentation as needed to conduct an examination of merchandise under Customs selective entry processing criteria, or to determine whether the merchandise is admissible to the zone.

(c) *Conditions for issuance of a permit.* The district director will issue a permit for admission of merchandise to a zone when:

(1) The application is properly executed and includes the zone status desired for the merchandise, as provided in Subpart D of this part;

(2) The operator's approval appears either on the application or in a separate specific or blanket approval;

(3) The merchandise is retained for examination at the place of unlading, the zone, or other location designated by the district director, except for merchandise for direct delivery to a zone under §§ 146.39 and 146.40. The merchandise may be examined as if it were to be entered for consumption or warehouse; and

(4) All requirements have been fulfilled.

(d) *Blanket application for admission of merchandise.* Merchandise may be admitted to a zone under blanket application upon presentation of a Customs Form 214 covering more than one shipment of merchandise. A blanket application for admission is for:

(1) Shipments which arrive under one transportation entry as described in § 141.55 of this chapter, or

(2) Shipments which are destined to the same zone applicant on a single business day, in which case the applicant shall:

(i) Present the examination invoices required by paragraph (b) of this section to the district director before the merchandise is admitted into the zone,

(ii) Have been approved for the direct transmittal of statistical trade information to the Bureau of Census under an agreement with that agency; and

(iii) Have examination invoices containing a unique identifier to trace the shipment to the manifest of the carrier that brought the merchandise to the port having jurisdiction over the zone, as well as to the inventory control and recordkeeping system of the operator as described in Subpart B.

§ 146.33 Temporary deposit for manipulation.

Imported merchandise for which an entry has been made and which has remained in continuous Customs custody may be brought temporarily to a zone for manipulation and return to Cus-

toms territory under Customs supervision, pursuant to § 562, Tariff Act of 1930, as amended (19 U.S.C. 1562), and § 19.11 of this chapter. That merchandise will not be considered within the purview of the Act but will be treated as though remaining in Customs territory. No zone form or procedure will be considered applicable, but the merchandise will remain subject to any requirements necessary for the enforcement of § 562 and other Customs laws while in the zone.

§ 146.34 Merchandise transiting a zone.

The following procedure is applicable when merchandise is to be unladen from any carrier in the zone for immediate transfer to Customs territory, or if it is to be transferred from Customs territory through the zone for immediate lading on any carrier in the zone:

(a) *Application.* Application for permission to lade or unlade will be filed with the district director on Customs Form 3171 prior to transfer of the merchandise into the zone.

(b) *Permit.* The district director shall permit the transfer unless he has reason to believe that the merchandise will not be moved promptly from the zone or will be made the subject of an application for admission in accordance with § 146.32(a).

(c) *Treatment of merchandise.* Upon the issuance of a permit to lade, or unlade, the merchandise will be treated as though the lading or unlading were in the Customs territory.

(d) *Delay in zone transit.* Merchandise delayed while transiting a zone must be made the subject of an application for admission in accordance with § 146.32, or it must be removed from the zone.

§ 146.35 Temporary deposit in a zone: Incomplete documentation.

(a) *General.* Temporary deposit of merchandise in a zone is allowed in circumstances where the information or documentation necessary to complete the Customs Form 214 is not available at the time of arrival of merchandise within the jurisdiction of the port. The merchandise will be subject to examination as provided in § 146.36.

(b) *Application.* An application for temporary deposit will be made to the district director on a properly signed and uniquely numbered Customs Form 214, annotated clearly "Temporary Deposit in a Zone".

(c) *Conditions.* Merchandise temporarily deposited under the provisions of this section has no zone status and is considered to be in the Customs territory. It will:

(1) Be physically segregated from all other zone merchandise;

(2) Be held under the bond and at the risk of the operator; and

(3) Be manipulated only to the extent necessary to obtain sufficient information about the merchandise to file the appropriate admission or entry documentation.

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(d) *Approval.* The district director shall approve the application for temporary deposit of merchandise in a zone if the provisions of paragraphs (b) and (c) are met.

(e) *Submission of Customs Form 214.* A complete and accurate Customs Form 214 will be submitted, as provided in § 146.32, within 5 working days plus any extension granted by the district director, or the merchandise shall be placed in general order.

§ 146.36 Examination of merchandise.

Except for direct delivery procedures provided for in § 146.39, all merchandise covered by a Customs Form 214 may be retained for Customs examination at the place of unlading, the zone, or another location, as designated by the district director. The district director may authorize release of the merchandise without examination, as provided in § 151.2 of this chapter. If a physical examination is conducted, the Customs officer shall note the results of the examination on the examination invoices.

§ 146.37 Operator admission responsibilities.

(a) *Maintenance admission documentation.* The operator shall maintain either:

(1) *Lot file.* The operator shall open and maintain a lot file containing a copy of the Customs Form 214, the examination invoice, and all other documentation necessary to account for the merchandise covered by each Customs Form 214. The lot file will be maintained in sequential order by using the unique number assigned to each Customs Form 214 as the file reference number; or

(2) *Authorized inventory method.* Where a Customs authorized inventory method other than a lot system (specific identification of merchandise) is used, e.g., First-In-First-Out (FIFO), no lot file is required but the operator shall maintain a file of all Customs Form's 214 in sequential order.

(b) *Examination invoice.* The operator shall give a copy of the examination invoice to the person making entry to transfer the merchandise from the zone upon request of that person or the district director.

(c) *Liability for merchandise.* The operator will be held liable under its bond for the receipt of merchandise admitted in the quantity and condition as described on the Customs Form 214, except as modified by a discrepancy report:

(1) Signed jointly by the operator and carrier on the Customs Form 214 or other approved form within 15 days after admission of the merchandise, and reported to the district director within 2 working days thereafter; or

(2) Submitted on Customs Form 5931 under the provisions of Subpart A, Part 158, of this chapter within 20 days after admission of the merchandise. The operator may file a Customs Form 5931 on behalf of the person who applied for admission of merchandise to the zone.

(d) *Supervision of merchandise.* The district director may authorize the receipt of zone status merchandise at a zone without physical supervision by a Customs officer (see section 146.3). In that case, the operator shall supervise the receipt of merchandise into the zone, report the receipt and condition of the merchandise, and mark packages with the unique Customs Form 214 number so that the merchandise can be traced to a particular Customs Form 214. Packages that are accounted for under a Customs-authorized inventory method other than specific indentification, need not be marked with a unique Customs Form 214 number but must be adequately identified so Customs can conduct an inventory count. The operator shall submit the Customs Form 214 to Customs at the location specified by the district director.

§ 146.38 Certificate of arrival of merchandise.

When a certificate prepared by Customs as to the arrival of any merchandise in a zone is required by a Federal agency, the district director shall issue the document certifying only that authorization to deliver the merchandise to a zone has been made. The operator shall issue a certificate of arrival of merchandise at a zone.

§ 146.39 Direct delivery procedures.

(a) *General.* This procedure is for delivery of merchandise to a zone without prior application and approval on Customs Form 214.

(b) *Application.* An operator, meeting the criteria of paragraph (c) of this section, shall file a written application with the district director at least 30 days before the special procedure is to become effective. The application will describe the merchandise to be handled or processed, and the kind of operation which it will undergo in the zone.

(c) *Criteria.* the district director shall approve the application if the following criteria are met:

(1) The merchandise is not restricted or of a type which requires Customs examination or documentation review before or upon its arrival at the zone;

(2) The merchandise to be admitted to the zone, and the operations to be conducted therein, are known well in advance, are predictable and stable over the long term, and are relatively fixed in variety by the nature of the business conducted at the site; and

(3) The operator is the owner or purchaser of the goods.

(d) *Application decision.* The district director shall promptly notify the operator, in writing, of Customs decision on the application. If the application is denied, the district director shall specify the reason for denial in his reply. The district director's decision will constitute the final Customs administrative determination concerning the application.

(e) *Revocation of approval.* The district director may revoke the approval given under this section if it becomes necessary for Cus-

toms routinely to examine the merchandise or documentation before or upon admission to the zone.

§ 146.40 Operator responsibilities for direct delivery.

(a) *Arrival of conveyance.* Upon arrival at a subzone or zone site of a conveyance containing foreign merchandise, the operator shall:

(1) Collect in-bond or cartage documentation from the carrier;

(2) Check the condition of any seal affixed to the conveyance, and if broken, missing or improperly affixed, notify the district director and receive instructions before unloading the merchandise;

(3) Check each incoming in-bond and cartage shipment to determine if the manifested quantity or the quantity on the cartage document agrees with the quantity actually received;

(4) Sign and date the in-bond or cartage documentation to accept responsibility for the merchandise under the Foreign Trade Zone Operator' Bond and to relieve the carrier of responsibility.

(5) Forward the in-bond or cartage documentation so as to reach the district director within 2 working days after the date of arrival of the conveyance at the subzone or zone site;

(6) Maintain a file of open in-bond manifests in chronological order of date of conveyance arrival to identify shipments that have arrived but the entire contents of which have not been admitted to the subzone or zone site; and

(7) Notify the district director, by annotation on the Customs Form 214, when the entire contents of a shipment have been admitted.

(b) *Admission of merchandise: alternative procedures.*

(1) *Cumulative Customs Form 214.* If the operator has an agreement with the Bureau of Census for direct transmittal of statistical information, he shall submit to the district director each business day a properly signed and uniquely numbered Customs Form 214 listing all merchandise except for domestic status merchandise admitted under § 146.43 recorded into the inventory control and recordkeeping system during the previous business day. The Customs Form 214 must contain a list of all in-bond (I.T.) numbers or the unique number of any cartage document, as well as the number of invoices for each I.T. or cartage document, pertaining to merchandise which has been entered into the system.

(2) *Individual Customs Form 214.* If a cumulative Customs Form 214 is not submitted as provided in paragraph (b)(1) of this section, the operator shall file with the district director each business day an individual Customs Form 214 and 214-A covering each shipment recorded into the inventory control and recordkeeping system during the previous business day. The forms shall be submitted within 10 days after the end of the month in which the merchandise was received in the zone, and no extension beyond that time will be approved by the district director.

(3) *General order.* Merchandise which is not admitted into a subzone or zone site as provided in this section within 5 working days after its arrival there may be sent to general order unless:

(i) The district director grants the operator's request for an extension of the 5 working day period; or

(ii) The importer of record files an appropriate Customs entry for the merchandise and removes it from the zone premises.

(4) *inventory control and recordkeeping system.* The operator shall establish and maintain a continuing input quality control program to ensure that information concerning merchandise in admission documents, verified or corrected by counts and checks, is accurately recorded in the inventory control and recordkeeping system. Quantities recorded in the system, after allowance by the district director for any discrepancies, will be the quantities of merchandise for which the operator shall be held liable under its bond for admission to the subzone or zone site. A discrepancy involving a within-case shortage (or overage) need not be reported on Customs Form 5931, if the operator is able to report that information in another manner so that the district director can determine whether there is liability for the discrepancy under the bond of any party to the importation.

Subpart D—Status of Merchandise in a Zone

§ 146.41 Privileged foreign status.

(a) *General.* Foreign merchandise which has not been manipulated or manufactured so as to effect a change in tariff classification will be given status as privileged foreign merchandise on proper application to the district director.

(b) *Application.* Each application for this status will be made on Customs Form 214 at the time of filing the application for admission of the merchandise into a zone or at any time thereafter before the merchandise has been manipulated or manufactured in the zone in a manner which has effected a change in tariff classification.

(c) *Supporting documentation.* Each applicant for this status shall submit to the district director, with the application, an invoice notated as provided for in § 141.90 of this chapter.

(d) *Determination of duties and taxes.* Upon receipt of the application and accompanying invoice, the district director may examine the merchandise to determine whether to approve the application. The merchandise will be subject to classification and valuation as provided in § 146.65.

(e) *Status as privileged foreign merchandise binding.* A status as privileged foreign merchandise cannot be abandoned and remains applicable to the merchandise even if changed in form by manipulation or manufacture, except in the case of recoverable waste (see § 146.42(b)), as long as the merchandise remains within the purview of the Act. However, privileged foreign merchandise may be export-

ed or withdrawn for supplies, equipment, or repair material of vessels or aircraft without the payment of taxes and duties, in accordance with §§ 146.67 and 146.69.

§ 146.42 Nonprivileged foreign status.

All of the following will have the status of nonprivileged foreign merchandise:

(a) *Foreign merchandise.* Foreign merchandise properly in a zone which does not have the status of privileged foreign merchandise or of zone-restricted merchandise;

(b) *Waste.* Waste recovered from any manipulation or manufacture of privileged foreign merchandise in a zone; and

(c) *Certain domestic merchandise.* Domestic merchandise in a zone, which by reason of noncompliance with the regulations in this part has lost its identity as domestic merchandise, will be treated as foreign merchandise. Any domestic merchandise will be considered to have lost its identity if the district director determines that it cannot be identified positively by a Customs officer as domestic merchandise on the basis of an examination of the articles or consideration of any proof that may be submitted promptly by a party-in-interest.

§ 146.43 Domestic status.

(a) *General.* Domestic status may be granted to merchandise:

(1) The growth, product, or manufacture of the U.S. on which all internal-revenue taxes, if applicable, have been paid;

(2) Previously imported and on which duty and tax has been paid; or

(3) Previously entered free of duty and tax.

(b) *Application.* No application or permit is required for the admission of domestic status merchandise, including domestic packing and repair material, to a zone, except upon order of the Commissioner of Customs. No application or permit is required for the manipulation, manufacture, exhibition, destruction, or transfer to Customs territory of domestic status merchandise, including packing and repair materials, except (1) when it is mixed or combined with merchandise in another zone status, or (2) upon order of the Commissioner of Customs. When the Commissioner orders a permit to be required for domestic status merchandise, he may also order the procedures, forms, and terms under which the permit will be received and processed.

(c) *Return of merchandise to Customs territory.* Upon compliance with the provisions of this section, any of the merchandise specified in paragraph (a) of this section, may subsequently be returned to Customs territory free of quotas, duty, or tax.

§ 146.44 Zone-restricted status.

(a) *General.* Merchandise taken into a zone for the sole purpose of exportation, destruction (except destruction of distilled spirits, wines, and fermented malt liquors), or storage will be given zone-

restricted status on proper application. That status may be requested at any time the merchandise is located in a zone, but cannot be abandoned once granted. Merchandise in zone-restricted status may not be removed to Customs territory for domestic consumption except where the Board determines the return to be in the public interest.

(b) *Application.* Application for zone-restricted status will be made on Customs Form 214.

(c) *Merchandise considered exported.*

(1) *For Customs purposes.* If the applicant desires a zone-restricted status in order that the merchandise may be considered exported for the purpose of any Customs law, all pertinent Customs requirements relating to an actual exportation shall be complied with as though the admission of the merchandise into the zone constituted a lading on an exporting carrier at a port of final exit from the U.S. Any declaration or form required for actual exportation will be modified to show the merchandise has been deposited in a zone in lieu of actual exportation, and a copy of the approved Customs Form 214 may be accepted in lieu of any proof of shipment required in cases of actual exportation.

(2) *For other purposes.* If the merchandise is to be considered exported for the purpose of any Federal law other than the Customs laws, the district director shall be satisifed that all pertinent laws, regulations, and rules administered by the Federal agency concerned have been complied with before the Customs Form 214 is approved.

(d) *Merchandise entered for warehousing transferred to a zone.* Merchandise entered for warehousing and transferred to a zone, other than temporarily for manipulation and return to Customs territory as provided for in § 146.33, will have the status of zone-restricted merchandise when admitted into the zone. The application on Customs Form 214 will state that zone-restricted status is desired for the merchandise.

Subpart E—Handling of Merchandise in a Zone

§ 146.51 Customs control of merchandise.

No merchandise, other than domestic status merchandise provided for in § 146.43, will be manipulated, manufactured, exhibited, destroyed, or transferred from a zone in any manner or for any purpose, except under Customs permit as provided for in this part. The district director may require segregation of any zone status merchandise whenever necessary to protect the revenue or properly administer U.S. laws or regulations.

§ 146.52 Manipulation, manufacture, exhibition or destruction; Customs Form 216.

(a) *Application.* Prior to any action, the operator shall file with the district director an application (or blanket application) on Cus-

toms Form 216 for permission to manipulate, manufacture, exhibit, or destroy merchandise in a zone. After Customs approves the application (or blanket application), the operator will retain in his recordkeeping system the approved application.

(b) *Approval.*

(1) The district director shall approve the application unless (i) the proposed operation would be in violation of law or regulation; (ii) the place designated for its performance is not suitable for preventing confusion of the identify or status of the merchandise, or for safeguarding the revenue; (iii) the district director is not satisfied that the destruction will be effective; or (iv) the Executive Secretary of the Board has not granted approval of a new manufacturing operation.

(2) The district director is authorized to approve a blanket application for a period of up to one year for a continuous or repetitive operation. The district director may disapprove or revoke approval of any application, or may require the operator to file an individual application.

(c) *Appeal of adverse ruling.* If an approved application is subsequently rescinded by the district director for any reason, the applicant or grantee may appeal the adverse ruling pursuant to the hearing provisions of § 146.82(b)(2). The rescission shall remain in effect pending the decision on the appeal.

(d) *Report results.*

(1) *Separate application.*—The operator shall report on Customs Form 216 the results of an approved manipulation, manufacture, exhibition, or certification of destruction (other than by a blanket application), unless the district director chooses physically to supervise the operation.

(2) *Blanket application.*—The operator shall maintain a record of an approved manipulation, manufacture, exhibition, or certification of destruction, in its inventory control and recordkeeping system so as to provide an accounting and audit trail of the merchandise through the approved operation.

(e) *Destruction.*

The district director may permit destruction to be done outside the zone, in whole or in part and at the risk and expense of the applicant, and under such conditions as are necessary to protect the revenue, if proper destruction cannot be accomplished within the zone. Any residue from the destruction within a zone, which is determined to be without commercial value, may be removed to Customs territory for disposal.

§ 146.53 Shortages and overages.

(a) *Report required.* The operator shall report, in writing, to the district director upon identification, as such, of any:

(1) Theft or suspected theft of merchandise;

(2) Merchandise not properly admitted to the zone; or

(3) Shortage of one percent (1%) or more of the quantity of merchandise in a lot or covered by a unique identifier, if the missing merchandise would have been subject to duties and taxes of $100 or more upon entry into the Customs territory. The operator shall record upon identification all shortages and overages, whether or not they are required to be reported to the district director at that time, in its inventory control and recordkeeping system. The operator shall record all shortages and overages as required in the annual reconciliation report under § 146.25.

(b) *Certain domestic merchandise.* Except in a case of theft or suspected theft, the operator need not file a report with the district director, or note in the annual reconciliation report, any shortage or overage concerning domestic status merchandise for which no permit is required.

(c) *Shortage.*

(1) *Operator responsibility.* The operator is responsible under its Foreign Trade Zone Operator's Bond for any loss of merchandise or for any merchandise which cannot be located or otherwise accounted for (except domestic status merchandise for which no permit is required), unless the district director is satisfied that the merchandise was:

(i) Never received in the zone;

(ii) Removed from the zone under proper permit;

(iii) Not removed from the zone; or

(iv) Lost or destroyed in the zone through fire or other casualty, evaporation, spillage, leakage, absorption, or similar cause, and did not enter the commerce of the U.S.

(2) *Liability for duty and taxes.* Upon demand of the district director, the operator shall make entry for and pay duties and taxes applicable to merchandise which is missing or otherwise not accounted for.

(d) *Overage.* The person with the right to make entry shall file, within 5 days after identification of an overage, an application for admission of the merchandise to the zone on Customs Form 214 or file a Customs entry for the merchandise. If a Customs Form 214 or a Customs entry is not timely filed, and the district director has not granted an extension of the time provided, the merchandise shall be sent to general order.

(e) *Damage.* The liability of the operator under its Foreign Trade Zone Operator's Bond may be adjusted for the loss of value resulting from damage to merchandise occurring in the zone. The operator shall segregate, mark, and otherwise secure damaged merchandise to preserve its identiy as damaged merchandise.

Subpart F—Transfer of Merchandise From a Zone

§ 146.61 Constructive transfer to Customs territory.

The district director shall accept receipt of any entry in proper form provided under this subpart, and the merchandise described

therein will be considered to have been constructively transferred to Customs territory at that time, even though the merchandise remains physically in the zone. If the entry is thereafter rejected or cancelled, the merchandise will be considered at that time to be constructively transferred back into the zone in its previous zone status.

§ 146.62 Entry.

(a) *General.* Entry for foreign merchandise which is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse, will be made on Customs Form 7512, Customs Form 3461, Customs Form 7501, or other applicable Customs forms. If entry is made on Customs Form 3461, the person making entry shall file an entry summary for all the merchandise covered by the Customs Form 3461 within 10 working days after the time of entry.

(b) *Documentation.* Customs Form 7501 or the entry summary will be accompanied by the entry documentation, including invoices, as provided in Parts 141 and 142 of this chapter. The person with the right to make entry shall submit any other supporting documents required by law or regulations that relate to the transferred merchandise and provide the information necessary to support the admissibility, the declared values, quantity, and classification of the merchandise. If the declared values are predicated on estimates or estimated costs, that information must be clearly stated in writing at the time an entry or entry summary is filed.

Customs Form 7512 for merchandise to be transferred to another port or zone or for exportation shall state that the merchandise covered is foreign trade zone merchandise; give the number of the zone from which the merchandise was transferred; state the status of the merchandise; and, if applicable, bear the notation or endorsement provided for in § 146.64(c), 146.66(b), or 146.70(c).

(c) *Waiver of supporting documents.* The district director may waive presentation of an invoice and supporting documentation required in paragraph (b) of this section with the entry or entry summary, if satisfied that presentation of those documents would be impractical, and the person making entry or the operator either files invoices and supporting documentation with the district director or maintains and makes those records available for examination by Customs.

§ 146.63 Entry for consumption.

(a) *Foreign merchandise.* Merchandise in foreign status or composed in part of merchandise in foreign status may be entered for consumption from a zone.

(b) *Zone-restricted merchandise.* Merchandise in a zone-restricted status may be entered for consumption only when the Board has ruled that merchandise can be entered for consumption.

(c) *Estimated production.*

(1) *Weekly entry.* When merchandise is manufactured or otherwise changed in a zone (exclusive of packing) to its physical condition as entered within 24 hours before physical transfer from the zone for consumption, the district director may allow the person making entry to file an entry on Customs Form 3461 for the estimated removals of merchandise during the calendar week. The Customs Form 3461 must be accompanied by a *pro forma* invoice or schedule showing the number of units of each type of merchandise to be removed during the week and their zone and dutiable values. Merchandise covered by an entry made under the provisions of this section will be considered to be entered and may be removed only when the district director has accepted the entry on Customs Form 3461. If the actual removals will exceed the estimate for the week, the person making entry shall file an additional Customs Form 3461 to cover the additional units before their removal from the zone. Notwithstanding that a weekly entry may be allowed, all merchandise will be dutiable as provided in § 146.65. When estimated removals exceed actual removals, the excess merchandise will not be considered to have been entered or constructively transferred to the Customs territory.

(2) *Individual transfers.* After acceptance of the weekly entry, individual transfers of merchandise covered by the entry may be made from the zone.

(d) *Textiles and textile products.* Subject to the existing statutory authority of the Board, textiles and textile products admitted into a zone, regardless of whether the merchandise has privileged or nonprivileged foreign status, which would have been subject to quota or visa or export license requirements in their condition at the time of importation (if entered for consumption rather than admitted to a zone), may not be subsequently transferred into the Customs territory for consumption if, during the time the merchandise is in the zone, there has been a change by manipulation, manufacture, or other means:

(1) In the country of origin of the merchandise as defined by § 12.130 of this chapter;

(2) To exempt from quota or visa or export license requirements other than a change brought about by statute, treaty, executive order or Presidential proclamation; or

(3) From one textile category to another textile category.

§ 146.64 Entry for warehouse.

(a) *Foreign merchandise.* Merchandise in privileged foreign status or composed in part of merchandise in privileged foreign status may not be entered for warehouse from a zone. Merchandise in nonprivileged foreign status containing no components in privileged foreign status may be entered for warehouse in the same or at a different port.

(b) *Zone-restricted merchandise.* Foreign merchandise in zone-restricted status may be entered for warehouse in the same or at a

different port only for storage pending exportation, unless the Board has approved another disposition.

(c) *Textiles and textile products.* Textiles and textile products which have been changed as provided for in § 146.63(d) may be entered for warehouse only if the entry is endorsed by the district director to show that the merchandise may not be withdrawn for consumption.

(d) *Time limit.* Merchandise may neither be placed nor remain in a Customs bonded warehouse after 5 years from the date of importation of the merchandise.

§ 146.65 Classified, valuation, and liquidation.

(a) *Classification.*

(1) *Privileged foreign merchandise.* Privileged foreign merchandise provided for in this section will be subject to tariff classification according to its character, condition and quantity, at the rate of duty and tax in force on the date of filing, in complete and proper form, the application for privileged status. Classification of merchandise subject to a tariff-rate import quota will be made only at the higher non-quota duty rate in effect on the date privileged foreign status was granted.

(2) *Nonprivileged foreign merchandise.* Nonprivileged foreign merchandise provided for in this section will be subject to tariff classification in accordance with its character, condition and quantity as constructively transferred to Customs territory at the time the entry or entry summary is filed with Customs.

(b) *Valuation.*

(1) *Total zone value.* The total zone value of merchandise provided for in this section will be determined in accordance with the principles of valuation contained in §§ 402 and 500 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1401a, 1500). The total zone value shall be that price actually paid or payable to the zone seller in the transaction that caused the merchandise to be transferred from the zone. Where there is no price paid or payable, the total zone value shall be the cost of all materials and zone processing costs related to the merchandise transferred from the zone.

(2) *Dutiable value.* The dutiable value of merchandise provided for in this section shall be the price actually paid or payable for the merchandise in the transaction that caused the merchandise to be admitted into the zone less, if included, international shipment and insurance costs and U.S. inland freight costs. If there is no such price actually paid or payable, or no reasonable representation of that cost, the dutiable value may be determined by excluding from the zone value any included zone costs of processing or fabrication, general expenses and profit and the international shipment and insurances costs and U.S. inland freight costs related to the merchandise transferred from the zone. The dutiable value of recoverable waste or scrap provided for in § 146.42(b) will be the

price actually paid or payable to the zone seller in the transaction that caused the recoverable waste or scrap to be transferred from the zone.

(3) *Allowance.* An allowance in the dutiable value of zone merchandise may be made by the district director in accordance with the provisions of Subparts B and C of Part 158 of this chapter, for damage, deterioration, or casualty while the merchandise is in the zone.

(c) *Liquidation; extension to update cost data.* When the declared value of values of the merchandise are based on an estimate or estimates, the person making entry may request an extension of liquidation pending the presentation of updated or actual cost data. A request for an extension may be granted at the discretion of the district director.

§ 146.66 Transfer of merchandise from one zone to another.

(a) *At the same port.* A transfer of merchandise to another zone with a different operator at the same port (including a consolidated port) will be by a licensed cartman under an entry for immediate transportation on Customs Form 7512 or other appropriate form with a Customs Form 214 filed at the destination zone. A transfer of merchandise between zone sites at the same port having the same operator may be made under a permit on CF 6043 or under a local control system approved by the district director wherein any loss of merchandise between sites will be treated as if the loss occured in the zone.

(b) *At a different port.* A transfer of merchandise from a zone at one port of entry to a zone at another port will be by bonded carrier under an entry for immediate transportation on Customs Form 7512. All copies of the entry must bear a notation that the merchandise is being transferred to another zone designated by its number.

(c) *Forwarding of merchandise history; documentation.* When merchandise is transferred under the provisions of this section, the operator of the transferring zone shall provide the operator of the destination zone with the documented history of the merchandise being transferred.

(1) The following documentation must accompany merchandise maintained under a lot inventory control system:

(i) A copy of the original Customs Form(s) 214 with accompanying invoices for admission of the merchandise and all components thereof;

(ii) A copy of any Customs Form 214 filed subsequent to admission to change the status of the merchandise or its components; and

(iii) A copy of any Customs Form 216 to manipulate or manufacture the merchandise.

(2) The following documentation must accompany merchandise not under a lot system, and not manufactured in a zone:

(i) A copy of the original Customs Form(s) 214 with accompanying invoices for admission of the merchandise as attributed under the particular zone inventory method;

(ii) A copy of any Customs Form 214 filed subsequent to admission to change the status of the merchandise as attributed under the particular zone inventory method; and

(iii) A copy of any Customs Form 216 to manipulate the merchandise as attributed under the particular zone inventory method.

(3) If the documents specified in paragraph (c)(2) of this section are not presented, the operator of the transferring zone shall submit the following:

(i) A statement of the zone value, dutiable value, quantity, description, unique identifier, and zone status (showing any changes of status after admission and whether the merchandise was manipulated so as to change its tariff classification) of all the merchandise in the shipment covered by the transportation entry; and

(ii) A certification that the statement in paragraph (c)(3)(i) of this section, is true and that the information contained therein is contained in the inventory control and recordkeeping system of the transferring zone.

(4) The following documentation must accompany merchandise not under a lot system, but manufactured in a zone:

(i) A statement by the transferring zone operator of the zone value, dutiable value, quantity, description, unique identifier, and zone status of all the merchandise (and components thereof, where applicable) covered by the transportation entry. The statement will also show any change in zone status in the transferring zone and whether the merchandise has been manufactured or manipulated in the zone so as to change its tariff classification; and

(ii) A certification by the operator of the transferring zone that the statement in paragraph (c)(4)(i) of this section is true and the information therein is contained in the inventory control and recordkeeping system of the zone.

(5) The operator of the transferring zone shall transmit the historical documentation of the merchandise to the receiving zone within 10 working days after it has been delivered to the bonded carrier for transportation. The documentation will be referenced to the I.T. number covering the merchandise.

(d) *Arrival at destination zone.* Upon arrival of the merchandise at the destination zone, it will be admitted under the procedure provided for in § 146.32, except that no invoice or Customs examination will be required. When the historical documentation is received, the operator of the destination zone shall associate it with the Customs Form 214 for admission of the merchandise and incorporate that information into the zone inventory control and recordkeeping system.

§ 146.67 Transfer of merchandise for exportation.

(a) *Direct exportation.* Any merchandise in a zone may be exported directly therefrom (without transfer into Customs territory) upon compliance with the procedures of paragraph (b) of this section.

(b) *Immediate exportation.* Each transfer of merchandise to the Customs territory for exportation at the port where the zone is located, will be made under an entry for immediate exportation on Customs Form 7512. The person making entry shall furnish an export bond on Customs Form 301 containing the bond conditions provided for in § 113.62 of this chapter.

(c) *Transporation and exportation.* Each transfer of merchandise to the Customs territory for transportation to and exportation from a different port, will be made under an entry for transportation and exportation on Customs Form 7512. The bonded carrier will be responsible for exportation of the merchandise in accordance with § 18.26 of this chapter.

(d) *Textiles and textile products.* Textiles and textile products which have been changed as provided for in § 146.63(d) may be exported and returned to Customs territory for warehousing provided the entry for warehouse is endorsed by the district director to show that the merchandise may not be withdrawn for consumption.

(e) *Merchandise produced or manufactured in a zone and returned to Customs territory after exportation.* Merchandise produced or manufactured in a zone and exported without having been transferred to Customs territory other than for exportation or for transportation and exportation will be subject, on its return to Customs territory, to the duties and taxes applicable to like articles of wholly foreign origin, unless it is conclusively established that it was produced or manufactured exclusively with the use of domestic merchandise. The identity of the domestic merchandise must have been maintained in accordance with the provisions of this part, in which case that merchandise will be subject to the provisions of Schedule 8, Part 1, Tariff Schedules of the United States (19 U.S.C. 1202).

§ 146.68 Transfer for transportation or exportation; estimated production.

(a) *Weekly permit.* The district director may allow the person making entry for merchandise provided for in § 146.63(c) to file an application for a weekly permit to enter and release merchandise during a calendar week for exportation, transportation, or transportation and exportation. The application will be on Customs Form 7512 stating at the top the words "Application for Weekly Zone Permit," and will be filed with the district director. The application must be accompanied by a *pro forma* invoice or schedule like that required in § 146.63(c)(1). If actual transfers will exceed the estimate for the week, the person with the right to make entry shall

file a supplemental Customs Form 7512 to cover the additional merchandise to be transferred from the subzone or zone site. No merchandise covered by the weekly permit may be transferred from the zone before approval of the application by the district director.

(b) *Individual entries.* After approval of the application for a weekly permit by the district director, the pereson making entry will be authorized to execute individual Customs Forms 7512 for exportation, transportation, or transportation and exportation of the merchandise covered by permit. Upon transfer of the merchandise, the operator shall obtain a receipt from the carrier on Customs Form 7512 to ensure its assumption of liability under the carrier's or cartman's bond. Customs will consider the time of entry to be when the removing carrier signs the receipt for the merchandise. The operator shall give the bonded carrier a copy of the individual Customs Form 7512 and the destination copy (Customs Form 7512–C), as provided for in § 18.2(c) of this chapter. The operator also shall ensure that the district director receives a copy of the Customs Form 7512 and the origin copy (Customs Form 7512–C) by the end of the next working day after the carrier has receipted for the merchandise.

(c) *Statement of merchandise entered.* The person making entry for merchandise under an approved weekly permit shall file with the district director, by the close of business on the second working day of the week following the week designated on the permit, a statement of the merchandise entered under that permit. The statement must list each Customs Form 7512 by its unique I.T. number, and will provide a reconciliation of the quantities on the weekly permit with the manifested quantities on the individual Customs Forms 7512 submitted to Customs, as well as an explanation of any discrepancy.

§ 146.69 Supplies, equipment, and repair material for vessels or aircraft.

(a) *General.* Any merchandise which may be withdrawn duty and tax free in Customs territory under § 309 or § 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317), and under §§ 10.59 through 10.65 of this chapter, may similarly be transferred from a zone, regardless of its zone status, under those statutes and regulations. Each transfer from a zone for delivery to a qualified vessel or aircraft, will be made on Customs Form 7512 (see § 10.60 of this chapter). The person making entry shall furnish a bond on Customs Form 301 containing the bond conditions provided for in § 113.62 of this chapter.

(b) *Merchandise for delivery within zone.* Upon acceptance of the entry and bond, the district director shall release the merchandise to the operator for delivery to the qualified vessel or aircraft for lading in the zone.

(c) *Merchandise for delivery outside zone.* Upon acceptance of the entry and bond, the district director shall release the merchandise to the operator for delivery to the bonded cartmen, lighterman, or carrier, for transportation through the Customs territory to the qualified lading vessel or aircraft.

§ 146.70 Transfer of zone-restricted merchandise into Customs territory.

(a) *General.* Zone-restricted merchandise may be transferred to Customs territory only for entry for exportation, for entry for transportation and exportation, for warehousing pending exportation, for destruction (except destruction of distilled spirits, wines and fermented malt liquors), for transfer from one zone to another, or for delivery to a qualified vessel or aircraft or as ground equipment of a qualified aircraft under § 309 or 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317), unless the Board has ruled that the return of the merchandise to Customs territory for domestic consumption is in the public interest. With Board approval (See 15 CFR Part 400), that merchandise may be entered for consumption, for warehousing, for immediate transportation without appraisement, or under any other provision of the Customs laws, unless the Board has specified the form of entry to be made.

(b) *For consumption.* If the return of zone-restricted merchandise to Customs territory for consumption has been ruled by the Board to be in the public interest, the entry shall be endorsed by the district director to show the authority under which it was made, and that the merchandise is subject to the provisions of Schedule 8, Part 1, Tariff Schedules of the United States (19 U.S.C. 1202).

(c) *For warehousing.* Zone-restricted merchandise may be transferred from a zone to a Customs bonded warehouse for storage pending exportation. The Customs Form 7501 shall be endorsed by the district director to show that the merchandise may not be withdrawn for consumption. In the case of zone-restricted merchandise transported in bond to another port for warehousing and exportation, Customs Form 7512 shall be endorsed by the district director to show that the merchandise in foreign trade zone merchandise in zone-restricted status, which shall be entered for warehouse with proper endorsement on Customs Form 7501, and which may not be withdrawn for consumption. Zone-restricted merchandise transferred from a zone to a Customs bonded warehouse may not be manipulated, except for packing or unpacking incidental to exportation.

(d) *For other purposes.* Upon acceptance of an entry or withdrawal for zone-restricted merchandise for any purpose other than that described in a Board order, the entry shall be endorsed by the person making entry to show that actual exportation of the merchandise is required by the fourth proviso to § 3 of the Act, as amended, or the entry endorsed to require delivery to a qualified

vessel or aircraft, under § 309 or 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317).

§ 146.71 Release and removal of merchandise from zone.

(a) *General.* Except as provided for in § 146.43, no merchandise will be transferred from a zone without a Customs permit on the appropriate entry or withdrawal form or other document as required in this part. The district director may authorize transfer from a zone without physical supervision or examination by a Customs officer. Upon issuance of a permit, the district director will authorize delivery of the merchandise only to the operator, who then may release the merchandise to the importer or carrier.

(b) *Liability for discrepancy.* When a transfer is not physically supervised by a Customs officer, the operator will be relieved of responsibility only for the merchandise in a zone in the condition and quantity as shown on the entry, withdrawal, or other appropriate form. The operator will be relieved of responsibility only if it receives the signed receipt on the document of the importer or the carrier named in that document. The responsibility of the operator may be adjusted by any discrepancy report made jointly by the operator and the bonded cartman, lighterman, or carrier, or the importer, and signed by the above or an authorized representative within 15 days after transfer of the merchandise from the zone. Any adjustment must be noted on the permit copy of the entry, withdrawal, or other appropriate form or document. A copy of any joint report of discrepancy must be submitted to the district director within 10 working days of signing by the parties.

(c) *Time limit.* Except in the case of articles for use in a zone, merchandise for which a Customs permit for transfer to Customs territory has been issued must be physically removed from the zone within 5 working days of issuance of that permit. The district director, upon request of the operator, may extend that period for good cause. Merchandise awaiting removal within the required time limit will not be further manipulated or manufactured in the zone, but will be segregated or otherwise identified by the operator as merchandise that has been constructively transferred to Customs territory.

(d) *Retention or return of merchandise to zone for consumption.*

(1) The district director shall cancel any entry for consumption where (i) the merchandise is not removed from the zone within the period specified in paragraph (c) of this section, or (ii) the merchandise was removed from the zone but did not enter the commerce of the U.S. in Customs territory and was subsequently readmitted to a zone in domestic status. If the district director has reason to believe any new entry would be cancelled under the provisions of this subparagraph, he may reject the entry or demand a written stipulation, as a condition of entry acceptance, that the merchandise will not be returned to a zone in domestic status. Merchandise cov-

ered by an entry which has been cancelled under this subparagraph shall be restored to its last foreign status.

(2) A component of merchandise which has been entered, but not physically removed from a zone, shall be restored to its last zone status, provided the district director determines that the component was included in the entry through clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of the law. Such an error, including that in appraisement of any entry or liquidation due to the above circumstances, may be corrected pursuant to § 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)), in accordance with the procedures described in Part 173 of this chapter. If the district director decides there has been no error, mistake, or inadvertence, or that the information was not timely provided, the component will be considered as an overage and subject to the provisions of § 146.53(d).

(3) When merchandise which has been entered for consumption is subsequently returned to a zone for a reason other than that specified in subparagraph (d)(1), it shall be admitted in domestic status.

Subpart G—Penalties; Suspension; Revocation

§ 146.81 Penalties.

(a) *Amount.* Upon violation of the Act, or any regulation issued under the Act, by the grantee, or any officer, agent, operator or employee thereof, the person responsible for or permitting the violation shall be subject to a fine of not more than $1,000. Each day during which a violation continues will constitute a separate offense. Liquidated damages, where applicable, will be imposed in addition to the fine (19 U.S.C. 81s).

(b) *Review.* All fines assessed by the district director under this section will be reviewed by the Director, Entry Procedures and Penalties Division, Headquarters, to determine whether further action against the grantee or operator, such as suspension or a recommendation for revocation of the grant, is warranted.

§ 146.82 Suspension.

(a) *For cause.* The district director may suspend for cause the activated status of a zone or zone site, or the privilege to admit, manufacture, manipulate, exhibit, destroy, transfer or remove merchandise at a zone or zone site for a period not to exceed 90 days. Upon order of the Board the suspension may be continued. If appropriate, the suspension may be limited to an individual user or users and not to the zone or zone site as a whole, or may be limited to a particular activity of an operator or user, such as suspension of the privilege to admit merchandise or the privilege to manufacture. An action to suspend will be taken in accordance with the procedure in paragraph (b) of this section if:

(1) The approval of the application to activate the zone was obtained through fraud or the misstatement of a material fact;

(2) The operator neglects or refuses to obey any proper order of a Customs officer or any Customs order, rule, or regulation relating to the operation or administration of a zone;

(3) The operator, or any officer of a corporation which has been granted the right to operate a zone, is convicted of or has committed an act that would constitute a felony, or would constitute a misdemeanor involving theft.

(4) The operator fails to furnish a current list of names, addresses, or other information as required by § 146.7;

(5) The operator does not provide a secure facility or properly safeguard merchandise within a zone;

(6) The operator fails to pay, within 30 days after the due date, all annual fees associated with the operation of a zone;

(7) The operator, or any officer, agent, or employee of the operator, discloses to an unauthorized person proprietary information contained on a Customs form or in the inventroy control and recordkeeping system; or

(8) The inventory control and recordkeeping system is impaired to the point where the identity of merchandise in zone status has been lost and cannot be reestablished without a suspension of zone operations.

(b) *Procedure.*

(1) *Notice.* The district director may, at any time, serve notice, writing, upon an operator to show cause why its right to continue operation of a zone should not be suspended or why an individual user or activities of an individual user should not be suspended, as provided for in paragraph (a) of this section. The notice will advise the operator of the grounds for the proposed action and will afford the operator an opportunity to respond, in writing, within 15 days after receipt of the notice. Thereafter, the district director shall consider the allegations and any response made by the operator and issue a decision, unless the operator requests a hearing in the matter.

(2) *Hearing.* If the operator requests a hearing, it will be held before a hearing officer designated by the Commissioner of Customs or his designee within 30 days following the operator's request. The operator may be represented by counsel at the hearing, and any evidence and testimony of witnesses in the proceeding, including substantiation of the allegations and the response thereto, will be presented. The right of cross-examination will be available to both parties. A stenographic record of the proceeding will be made and a copy will be delivered to the operator. At the conclusion of the hearing, the hearing officer shall transmit promptly all papers and the stenographic record of the hearing to the regional commissioner of the region in which the zone is located, together with a recommendation for final action.

(3) *Decision of regional commissioner.* Within 10 calendar days after delivery to the operator of a copy of the stenographic record of the hearing, the operator may submit to the regional commissioner in writing any additional views or arguments. The regional commissioner shall then render a written decision stating his reasons therefor. That decision will be served on the operator and will be considered the final Customs administrative action in the case.

(4) *Grantee.* If the grantee of the zone is not the operator, a copy of the notice to show cause will be served upon the grantee. The grantee, as a party-in-interest, may join the operator in any proceeding under this section.

§ 146.83 Revocation of zone grant.

(a) *Recommendation of district director.* The district director may at any time recommend to the Board that the privilege of establishing, operating, and maintaining a zone or subzone under Customs jurisdiction be revoked for willful and repeated violations of the Act (19 U.S.C. 81r). If the district director believes that a substantial question of law exists as to whether willful and repeated violations of the Act have occurred, that officer may request internal advice under the provisions of Part 177 of this chapter from the Director, Carriers, Drawback and Bonds Division, Headquarters. A recommendation to the Board that a zone or subzone grant be revoked does not preclude, and may be in addition to, any liquidated damages, penalty, or suspension for cause.

(b) *Decision of the Board.* The procedure for revocation of a grant, the decision of the Board, and appeal is covered by the provisions of the Act and Title 15, Chapter IV, Part 400, Code of Federal Regulations.

CONFORMING AMENDMENTS

PARTS 18, 24, 112, 113, 141, 144, 178, AND 191

To conform the Customs Regulations to the changes made by the revision of Part 146, Customs Regulations (19 CFR Part 146), Parts 18, 24, 112, 113, 141, 144, 178, and 191, Customs Regulations (19 CFR Parts 18, 24, 112, 113, 141, 144, 178, and 191) are amended in the following manner:

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The authority citation for Part 18 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1551-1553, 1624.

2. Section 18.2 is amended in the following manner:

a. By revising the heading to paragraph (a)(1) to read "Merchandise other than from warehouse or foreign trade zone delivered to bonded carrier."

b. By removing the words "paragraph (a)(2)" in the first sentence of paragraph (a)(1) and inserting, in their place, the words "paragraphs (a)(2) and (a)(3) of this section."

c. By adding a new paragraph (a)(4) to read as follows:

§ 18.2 Receipt by carrier manifest.

(a) * * *

(4) *Merchandise delivered from foreign trade zone.* When merchandise is delivered from a foreign trade zone to a bonded carrier for transportation in bond, supervision of lading will be accomplished in accordance with the procedure set forth in § 146.71(a) of this chapter.

* * * * * * *

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624, 31 U.S.C. 9701.

2. Section 24.13 is amended by inserting in the first sentence of paragraphs (c) and (f), the words "a foreign trade zone operator," before the words "and bonded warehouse proprietor," respectively.

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. All other statutory authority cited at the end of various sections in Part 112 is removed.

3. The last sentence of § 112.12(b)(3), is revised to read as follows:

§ 112.12 Application for authorization.

* * * * * * *

(b) *Special requirements.*

* * * * * * *

(3) *Private carriers.* * * * If the private carrier is the proprietor of one or more Customs bonded warehouses or bonded container stations, or the operator of a foreign trade zone, to which imported merchandise will be transported, he shall accompany the bond and copies of the bond by a statement showing the location of each warehouse, container station, or zone.

* * * * * * *

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1623, 1624.

2. Section 113.73 is amended by revising paragraphs (a)(1) and (a)(2), and by adding paragraph (d), to read as follows:

§ 113.73 Foreign trade zone operator bond conditions.

* * * * * * *

(a) *Receipt, Handling, and Disposition of Merchandise.* The principal agrees to comply with:

(1) The law and Customs Regulations relating to the receipt, admission, status, handling, transfer, and removal of merchandise from the foreign trade zone or subzone, and

(2) The Customs Regulations concerning the maintenance of inventory control and recordkeeping systems covering merchandise in the foreign trade zone or subzone. If the principal defaults and the default involves merchandise other than domestic merchandise for which no permit for admission is required, the obligors (principal and surety) agree to pay liquidated damages equal to the value of the merchandise involved in the default, or three times the value of the merchandise involved in the default if the merchandise is restricted merchandise or alcoholic beverages, or such other amount as may be authorized by law or regulation. It is understood and agreed that whether the default involves merchandise is a determination made by Customs, that the amount to be collected under this condition shall be based upon the quantity and value of the merchandise as determined by Customs, and that value as used in these provisions means value as determined under 19 U.S.C. 1401a. If the principal defaults and the default does not involve merchandise, the obligors agree to pay liquidated damages of $1000 for each default, or such other amount as may be authorized by law or regulations.

(b) * * *

(c) * * *

(d) *Payment of Annual Fee.* The principal agrees to pay timely any annual fee or fees as provided in the Customs Regulations. If the principal defaults, the obligors agree to pay liquidated damages equal to the amount of the annual fee due but not paid and an amount equal to one percent of the annual fee for each of the first seven days the annual fee is in arrears, two percent of the annual fee for each of the succeeding seven days the annual fee is in arrears, and three percent of the annual fee for each day thereafter in which the annual fee is in arrears.

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624.

2. Section 141.111(d) is revised to read as follows:

§ 141.111 Carrier's release order.

* * * * * * *

(d) *Qualified release order.* In the case of merchandise which is entered for warehousing, for transportation in bond, for exportation, or is to be admitted to a foreign trade zone, the release order may be qualified as follows:

(1) "For transfer to the bonded warehouse designated in the warehouse entry," if the merchandise is entered for warehousing;

(2) "For transfer to the bonded carrier designated in the transportation entry," if the merchandise is entered for transportation in bond;

(3) "For transfer to the carrier designated in the export entry," if the merchandise is entered for exportation; or

(4) "For transfer to the foreign trade zone designated in Customs Form 214," if the merchandise is to be admitted to a foreign trade zone.

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The authority citation for Part 144 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301, 7 U.S.C. 1854, 19 U.S.C. 66, 1311, 1312, 1484, 1552, 1553, 1555, 1556, 1557, 1559, 1562, 1563, 1623, 1624, 1646(a), 26 U.S.C. 5214; Pub. L. 95-410; Pub. L. 95-176; Pub. L. 96-511.

2. All other statutory authority cited at the end of various sections in Part 144 is removed.

3. Section 144.36(g) is revised to read as follows:

§ 144.36 Withdrawal for transportation.

* * * * * * *

(g) *Procedure at destination.* Upon arrival at destination, the merchandise may be:

(1) Entered for rewarehouse in accordance with § 144.41;

(2) Entered for combined rewarehouse and withdrawal for consumption in accordance with § 144.42;

(3) Exported in accordance with paragraph (h) of this section;

(4) Forwarded to another port or returned to the port of origin in accordance with § 18.5 (c) or (d) of this chapter; or

(5) Admitted to a foreign trade zone in zone-restricted status as provided in Part 146 of this chapter.

§ 144.37 Withdrawal for exportation.

* * * * * * *

4. Section 144.37 is amended by adding a new paragraph (g), to read as follows:

* * * * * * *

(g) *Exportation at a foreign trade zone.* Merchandise may be withdrawn for exportation at a foreign trade zone in the same or at a different port. The merchandise will be considered exported upon admission to a zone in zone-restricted status, as provided in § 146.44(c) of this chapter.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting the following in the appropriate numerical sequence according to the section number the colums indicated:

§ 178.2 Listing of OMB Control Numbers.

19 CFR Section	Description	OMB Control No.
146.6, 146.7	Procedures for activation of a foreign trade zone; procedures for zone changes, including alteration, deactivation and suspension.	1515-0151

PART 191—DRAWBACK

1. The authority citation for Part 191 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1313, 1624.

§§ 191.163-191.165 also issued under 19 U.S.C. 81c.

2. Section 191.162 is amended by removing reference to "§ 146.25," and inserting, in its place, reference to "§ 146.44."

3. Section 191.163 (c) and (d) are revised to read as follows:

§ 191.163 Articles manufactured or produced in the U.S.

* * * * * * *

(c) *Action of the district director on the notice of transfer.* The district director shall assign a number to each notice of transfer, return one copy to the transferor and forward another copy to the zone operator at the foreign trade zone.

(d) *Action of foreign trade zone operator.* After articles have been received in the zone, the zone operator at the zone shall certify on a copy of the notice of transfer the receipt of the articles (see

§ 191.164(d)(2)) and forward the notice to the transferor or the person designated by the transferor. The transferor shall verify that the notice has been certified before filing it with the drawback entry.

* * * * * * *

4. Paragraphs (b) and (c) of § 191.164 are revised to read as follows:

§ 191.164 Merchandise transferred from continuous Customs custody.

* * * * * * *

(b) *Drawback entry.* Before the transfer of merchandise from continuous Customs custody to a foreign trade zone, the importer or a person designated in writing by the importer for that purpose shall file with the district director a direct export entry on Customs Form 7512 in duplicate. The district director shall forward one copy of Customs Form 7512 to the zone operator at the zone.

(c) *Certification by zone operator.* After the merchandise has been received in the zone, the zone operator at the zone shall certify on the copy of Customs Form 7512 the receipt of the merchandise (see paragraph (d)(2) of this section) and forward the form to the transferor or the person designated by the transferor. After executing the certifications provided for in paragraph (d)(3) of this section, the transferor shall resubmit Customs Form 7512 to the district director in place of the bill of lading required by § 191.136.

* * * * * * *

5. Paragraphs (b) and (c) of § 191.165 are revised to read as follows:

§ 191.165 Same condition drawback merchandise and merchandise not conforming to sample or specifications or shipped without the consent of the consignee.

* * * * * * *

(d) *Drawback entry.* Before transfer of the merchandise to a foreign trade zone, the importer or a person designated in writing by the importer for that purpose shall file with the district director an entry on Customs Form 7539 in duplicate. The district director shall forward one copy of Customs Form 7539 to the zone operator at the zone.

(c) *Certification by zone operator.* After the merchandise has been received in the zone, the zone operator at the zone shall certify on the copy of Customs Form 7539 the receipt of the merchandise and forward the form to the transferor or the person designated by the transferor. After executing the certifications provided for in paragraph (d)(3) of this section, the transferor shall resubmit Customs

Form 7539 to the district director in place of the bill of lading required by § 191.136.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: December 10, 1985.
DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, February 11, 1986 (51 FR 5040)]

PARALLEL REFERENCE TABLE

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Revised section	Superseded section
146.0	146.0.
146.1(a)	New.
146.1(b) (2), (3), (4), (6), (7), (8), (12), (13), (14), (15), (16), (17), (18), (19), (20), (21), (22), (23).	New.
146.1(b)(1)	146.1(a).
146.1(b)(5)	146.1(c).
146.1(b)(9)	146.1(e).
146.1(b)(10)	146.1(e)(1).
146.1(b)(11)	146.1(e)(2).
146.2	146.2.
146.3(a)	146.3.
146.3(b)	New.
146.4	New.
146.5	146.4.
146.6	New.
146.7	New.
146.8	New.
146.9	146.5.
146.10	146.6.
146.11 (a), (b), and (c)	146.7 (a), (b), and (c).
146.11(d)	New.
146.12	146.8.
146.13	New.
146.14	New.
146.21	New.
146.22	New.
146.23	New.
146.24	New.
146.25	New.
146.26	New.
146.31	146.11.
146.32(a)	146.12(a).
146.32(b)(1)	New.

PARALLEL REFERENCE TABLE—Continued

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Revised section	Superseded section
146.32(b)(2)	146.12(b)(1)(ii).
146.32(b)(3)	146.12(b)(1)(i).
146.32(b)(4)	146.12(b)(2).
146.32(b)(5)	New.
146.32(c) (1), (2), and (4)	146.12(c) (1), (2), and (3).
146.32(c)(3)	New.
146.32(d)	New.
146.33	146.13.
146.34	146.14.
146.35	New.
146.36	New.
146.37	New.
146.38	146.15.
146.39	New.
146.40	New.
146.41 (a), (b), and (c)	146.21 (a), (b), and (c) (1) and (2).
146.41(d)	146.21(c)(3) (i) and (v).
146.41(e)	146.21(d).
146.42	146.23.
146.43	146.22, 146.24.
146.44	146.25.
146.51	146.31 (a), (b).
146.52(a)	146.21(f), 146.32(a), 146.33(a).
146.52(b)	146.21(f), 146.32(b), 146.33(b).
146.52(c)	146.32(c).
146.52(d)(1)	New.
146.52(d)(2)	146.32(d).
146.52(e)	146.33(b).
146.53 (a), (b)	146.31(c).
146.53 (c), (d), and (e)	New.
146.61	146.47(c), 146.48(b).
146.62	New.
146.63(a)	146.45, 146.46, 146.48(c).
146.63(b)	146.47.
146.63(c)	New.
146.63(d)	146.49.
146.64(a)	146.48(c).
146.64(b)	146.47(e)(4).
146.64 (c), (d)	New.
146.65(a)(1)	146.21(c)(3)(iv).
146.65(a)(2)	146.48(e)(1).
146.65(b)	146.48(e)(2).
146.65(c)	New.

PARALLEL REFERENCE TABLE—Continued

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Revised section	Superseded section
146.66(a)	146.43(b)(1).
146.66(b)	146.43(b)(1).
146.66(c)	146.43(b)(2).
146.66(d)	New.
146.67(a)	146.41.
146.67 (b), (c)	146.45(d), 146.46(d).
146.67(d)	New.
146.67(e)	146.46(e).
146.68	New.
146.69	146.42.
146.70(a)	146.47(a).
146.70(b)	146.47(e)(3).
146.70(c)	146.47(e)(4).
146.70(d)	146.47(e)(3).
146.71	New.
146.81	New.
146.82	New.
146.83	New.

Old section	New section
146.0	146.0.
146.1(a)	146.1(b)(1).
146.1(b)	Removed.
146.1(c)	146.1(b)(5).
146.1(d)	Removed.
146.1(e)	146.1(b)(9).
146.1(e)(1)	146.1(b)(10).
146.1(e)(2)	146.1(b)(11).
146.1(f)	Removed.
146.2	146.2.
146.3	146.3(a).
146.4	146.5.
146.5	146.9.
146.6	146.10.
146.7 (a), (b), and (c)	146.11 (a), (b), and (c).
146.8	146.12.
146.11	146.31.
146.12(a)	146.32(a).
146.12(b)(1)(i)	146.32(b)(3).
146.12(b)(1)(ii)	146.32(b)(2).
146.12(b)(2)	146.32(b)(4).
146.12(c) (1), (2), and (3)	146.32(c) (1), (2), and (4).
146.13	146.33.
146.14	146.34.

PARALLEL REFERENCE TABLE—Continued

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Old section	New section
146.15	146.38.
146.21 (a), (b), and (c)(1)(2)	146.41 (a), (b), and (c).
146.21(c)(3) (i) and (v)	146.41(d); 146.65(a)(1).
146.21(c)(3)(iv)	146.65(a)(1).
146.21(c)(3) (ii) and (iii)	Removed.
146.21(d)	146.41(e).
146.21(e)	Removed.
146.21(f)	146.52 (a) and (b).
146.22	146.43.
146.23	146.42.
146.24	146.43.
146.25	146.44.
146.31 (a) and (b)	146.51.
146.31(c)	146.53 (a), (b).
146.32(a)	146.52(a).
146.32(b)	146.52(b).
146.32(c)	146.52(c).
146.32(d)	146.52(d)(2).
146.33(a)	146.52(a).
146.33(b)	146.52(b).
146.41	146.67(a).
146.42	146.69.
146.43(a)	Removed.
146.43(b)(1)	146.66(b).
146.43(b)(2)	146.66(c).
146.44	Removed.
146.45 (a), (b), and (c)	146.63.
146.45(d)	146.67 (b), (c).
146.46 (a), (b), and (c)	146.63.
146.46(d)	146.67 (b), (c).
146.46(e)	146.67(e).
146.47(a)	146.70(a).
146.47 (b), (d), and (e) (1) and (2)	Removed.
146.47(c)	146.61.
146.47(e)(3)	146.70 (b) and (d).
146.47(e)(4)	146.64, 146.70(c).
146.47(f)	Removed.
146.48(a)	Removed.
146.48(b)	146.61.
146.48(c)	146.63(a) and 146.64(a).
146.48(d)	Removed.
146.48(e)(1)	146.65(a)(2).
146.48(e)(2)	146.65(b).
146.48(f)	Removed.
146.49	146.63(d).

APPENDIX

FINAL REGULATORY FLEXIBILITY ANALYSIS ON PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO FOREIGN TRADE ZONES

INTRODUCTION

The economic impact review below constitutes the Customs Service final regulatory flexibility analysis in compliance with the requirements of Section 3 of the Regulatory Flexibility Act (5 U.S.C. 603). The Act requires that regulatory effects be analyzed so as to determine and quantify, if possible, the economic effects of proposals on small business operations. The Act's key concepts revolve around identifying "significant economic impacts on a substantial number of small entities." The initial analysis was modified as necessary into a final regulatory flexibility analysis upon receipt and review of public comments resulting from Federal Register publication of this rule as a notice of proposed rulemaking.

RATIONAL

The number of Foreign Trade Zones, complexity of operations and volume of trade passing through zones has increased significantly in recent years. From less than 20 zones in the early 1970's, activated zones and sub-zones reporting activity at the end of 1984 numbered 88 (57 general purpose zones and 31 subzones), with 83 other zones approved but not reporting activity (see table 1).

Meanwhile, Customs inspection and supervision of zone activity has changed little in practice. Secular reductions in agency resources have combined with unchanged practices to produce (1) operational hardships on zone grantees and users and (2) uncertain inspection and control of zone activity.

The proposed revisions to 19 CFR Parts 18, 24, 112, 141, 144, 146, and 191 (relating to Customs administration of foreign trade zones) is an administrative attempt to update zone supervision in accordance with current business practices.

OBJECTIVES

The proposal is intended to bring about three fundamental changes:

1. The method of accountability of merchandise admitted, stored, manipulated, exhibited, manufactured and removed from zones;

2. The method of enforcement of Customs laws through audits and spot checks instead of more costly physical presence of inspectional resources; and
3. The method of reimbursing Customs for its zone-related operational expenses.

Legal Basis for Proposal

This regulatory project is initiated under the authority of R.S. 251, as amended, Sections 1-21, 48 Stat. 998, 999, as amended, 1000, 1002, as amended, 1003, 77A Stat. 14, Section 624, 46 Stat. 759 (19 U.S.C. 66, 81a-81u, 1202 (General Headnote 11), 1924).

Estimated Number of Small Entities Affected

Tallies of zone activity in Customs regions indicated that approximately 1,500 users occupy space in zones and carry out the range of permitted manipulation manufacturing and storage activities. Of these, 600 operate on a full-time, year-round basis. The remaining 900 operate on a part-time basis. These estimates do not include users in foreign trade sub-zones. Sub-zone users tend to be large (oftentimes multinational) corporations and thus do not fit within the purview of the requirements of the Regulatory Flexibility Act which concentrate on small business concerns.

Economic Effects of Compliance With the Proposal

After review of the proposal's work plan, we have identified within the proposal the following seven procedural/administrative and fee-related changes likely to affect economic concerns of small business:

A. Procedural administrative changes:
1. Inventory control and record keeping system;
2. Operator's control over admission and removal of goods;
3. Elimination of customs forms 7502/7505/215.

B. Fee changes:
1. Elimination of present form of reimbursement to Customs;
2. Implementation of an annual fee covering audits and spot checks;
3. Zone activation an boundary alteration fee.

TABLE I.—NUMBER OF FOREIGN TRADE ZONES IN THE UNITED STATES [1]

	Approved	Reporting Activity	No Reported Activity
Total	171	88	83
General Purpose Zones	111	57	54
Sub-zones	60	31	29

[1] As of the end of FY 1984.

Source: Foreign Trades Zones Board, U.S. Department of Commerce and special reports from U.S. Customs Service Regions.

A. *Procedural/Administrative Changes*

—Inventory Control and Record Keeping System

An inventory control and record keeping system with Customs prescribed data will result from this proposal. A similar system (Alternative Inventory Control System) has been in effect since 1976 and currently operates at 7 general purpose zones. Data required for the new system will consist of standard business data currently collected and tabulated for small users by each zone's operator/grantee. We do not anticipate a significant net reporting burden on users or operators as a result of this segment of the proposal.

—Operators' Control Over Admission and Removal of Goods

Under present Customs supervision, a Customs officer must be present to clear admissions of merchandise to and removals of merchandise from a zone, thus limiting these transactions to the availability of a Customs officer. Under the present proposal, an operator will be able to admit and remove merchandise without a Customs officer being present, after receiving Customs approval. However, Customs approval for admission will require an invoice in support of the application for admission on CF 214 and that the merchandise be retained for Customs examination at the place of unlading, the zone, or other location designated by the district director. Upon admittance to a zone, textile goods subject to visa controls will require a CF 214 with an invoice annotated by a Customs officer. Withdrawal of those goods will require the visa, either the original if withdrawn in its original lot size or new visas if withdrawn in break bulk, partial quantities. Presentation of an invoice and merchandise examination prior to admission are not currently required and will represent an additional paperwork requirement and possible delay in the arrival of merchandise at the zone. Customs approval for removals will be simplified by a reduction in paperwork as outlined in the next section. In total, the additional admission requirements will be offset by the simplified removal procedure and the enhanced business flexibility derived from being able to admit or remove merchandise freely into and out of the zone after Customs approval has been received.

—Forms Reduction—Customs Forms 7501/7505/215

Under present practice, Customs forms 7501 and 214 are required to obtain privileged foreign status. Removal of privileged foreign status merchandise from a zone requires filing CF 7505 for consumption. CF 215 is required to remove all zone status merchandise, except merchandise in privileged status or wholly composed of merchandise in privileged status. The estimated number of forms filed in FY 1984 appear in Table 2 below.

Table 2

Form		
*7501	.....	15,000
7505	.....	20,000
215	.....	45,000

* The present CF 7501 requires data previously requested on the CF 7502.

Under a provision of this proposal, a request for privileged foreign status would require a CF 214 and invoice (as before) but would eliminate the CF 7501. Upon removal of privileged foreign status goods from a zone, the applicable entry form would replace the 7505 (no net gain or loss). Further, the CF 215 will be eliminated under this proposal. Current clerical, data base management and brokerage costs for an estimated 60,000 forms 7501/215 would be eliminated, giving small businesses a net gain on the order of $650,000 yearly from this procedural change.

—Mandatory Bonding

One of the major proposed changes in zone administration is to involve the operator/grantee in data keeping and reporting. A new mandatory bond at a minimum level of $50,000 would be required in another provision of the proposal, with the goal of encouraging operator/grantee accuracy in compliance with his new responsibilities. The new bond would cover non-compliance with these proposed regulations as well as losses of merchandise. In terms of practical effects of this provision on small businesses, we anticipate no net appreciable added burden or cost. Most activated zones currently have bonds which meet or exceed the proposed minimum level.

B. *Fee Changes*

—Elimination of Present Forms of Customs Reimbursement

Under present practices, operators/grantees reimburse Customs for inspectional services rendered at zones. In fiscal year 1984, payments to Customs totaled an estimated $1.7 million, of which $1.3 million pertain to operations at general purpose zones. Assuming operators charge users flat fees to recover these payments, then

each small user pays an average of $870 per year for these present Customs services. The proposed revisons would *eliminate* this $1.3 million present fee, substituting in its place (see below) tiered fees which would cover Customs costs in carrying out audits and spot checks.

A particular concern is underscored at this point, concerning the distribution of this $1.3 million benefit (eliminated Customs reimbursement). The 57 general purpose zones at the end of FY 1984 are widely distributed around the country. A small business interested in participating in a foreign trade zone generally finds itself limited to one and only one zone provider in its operating area. The offering of foreign trade zone services could thus be regarded as a monopolistic market condition. Significant regulatory requirements and administrative and application costs in seeking approval and setting up a zone essentially prevents access by (especially small) businesses. In essence, then, they must generally contract with the sole established zone operator in the geographic area.

In economic theory, the pricing practices of a good/service provided under monopolistic conditions are oriented towards extracting a maximum profit for the unique provider, and, in practice, the level of fees charged by some zone operators/grantees is a known concern of the Commerce Department's Foreign Trade Zone Board.

As stated above, average savings per user from elimination of Customs reimbursement is expected to approximate $870 per year. Based on actual trade zone market conditions, however, real actual savings to users may total well below the average $870/year. We expect that zone operator/grantees will pass through to small users only a portion (quite possible small) of the total $1.3 estimated benefit of this provision of the proposed regulation. In the public comments, no commenters (largely major general purpose and sub-zone operators) addressed this issue. We expect that in most cases operators will neglect to pass on savings to small users. The Foreign Trade Zone Board has authority to review fees and charges to users if those fees are challenged as unreasonable.

The fiscal year 1984-based fee schedule is tiered. The purpose of the annual fee is to recover Customs costs incurred in carrying out the audit-inspection supervision program. The annual fee to be charged each zone is a function of the degree of complexity in Customs auditing and inspection of zones. In order to account for those distinct operating conditions, each zone with fall into a distinct size/complexity tier, with a specific fee for each tier. In this way, small, less operationally complex zones will not subsidize large zones. The tiers are based on operational complexity as measured by the number of admissions and removals of foreign and zone restricted merchandise.

A zone will be classified as to its fee tier according to the following simple criteria if admissions/transfers of foreign and zone restricted merchandise:

(i) Are less than 300 per year, then TIER I ($1,400 per year fee);
(ii) Fall between 300 and 3,000 per year, then TIER II ($15,500 per year fee);
(iii) Are greater than 3,000 per year, then TIER III ($33,800 per year fee).

We expect general purpose zones to be largely skewed towards the TIER I level (see Table 3).

The annual fee is due and payable on the effective date of final Rule and on January 1 of each subsequent year. For existing zones the tier will be based on the number of admissions and transfers of foreign and zone restricted merchandise made during fiscal year ending September 30, 1984. Zones currently under a voluntary audit-inspection agreement need not pay an additional annual fee for calendar year 1985, nor will there be any refunds of fees paid. For subsequent years the tier will be based on the number of admissions and transfers of foreign and zone restricted merchandise made during the previous fiscal year ending September 30. Each zone operator is responsible for determining the appropriate tier. The operator's determination is subject to Customs verification. Operators of zones activated during a calendar year will be responsible for paying an annual fee based on tier I.

TABLE 3.—DISTRIBUTION OF FOREIGN TRADE ZONES BY ANNUAL FEE TIERS

	Tier I [1]	Tier II [2]	Tier III [3]	Small Business Users
Total	44	33	11	1,500
General Purpose Zones	30	18	8	1,300
Sub-zones	14	15	3	200

[1] $1,400 fee per year.
[2] $15,500 fee per year.
[3] $33,800 fee per year.

Under the present inspectional system Customs bills general purpose zone operators approximately $1.3 million annually for inspectional services. Zone operators recover this expense in their fee and rental/lease billings to zone users. As above, we estimate that the Customs component of these fees paid by zone users average $870 per year per user.

Under the proposed audit-inspection system with different fee tiers, Customs billings to general purpose operators will amount to approximately $591,000 per year, versus the estimated $1.3 million at present. The Customs component of small business users' payments to operators will average $450 per year per user, versus the

$870 per year per user at present. Future increases in the annual fee will reflect cost increases incurred by Customs in delivering audit and inspection services. These increases will consist largely of annual rises in labor costs. It is expected that labor costs, and thus annual fees charged zone operators, will rise by a moderate 2–4% per year.

Since sub-zone users are generally large companies, the effects of fees on them do not fall within the purview of the RFA and this analysis and thus will not be considered in this economic review. The burden on small business from this fee schedule (yielding $591,000/yr.) would be an average $450 per small user. Elimination of the current reimbursement method ($870 per small user annually), even under the caveats noted above, would more than cover these new audit-inspection approach fees.

—New Zone Activation and Boundary Alteration Fees

Under present procedures, zone applicants are not billed for necessary Customs preparatory work prior to a zone's activation or alteration. The proposed revisions contain a provision allowing Customs to recover its costs for such tasks, among others, as site surveys, background investigations, zone approval processing, inventory systems review and associated clerical costs. These fees would be applicable to zones which are activated, relocated or altered on or after the effective date of final rulemaking.

Prospective fees are currently estimated at the following:

(a) $1,021 for zone activation;

(b) $442 for zone relocation; and

(c) $442 for zone alterations.

Concerning effects on small businesses, we expect average added cost pass-through from this source to be insignificant.

Overlapping Rules

None identifiable.

Alternative Rules

None feasible. The *Status Quo* becomes more untenable as complex zone manufacturing operations increase in number, while Customs resources diminish.

Summary of Economic Effects

Based on present available data, the proposed revisions would appear to provide net yearly benefits to zone operators and users of $1.3 million, as summarized below:

Quantified Cost (−)/Benefits (+)

[In dollars]

Document Reduction	+650,000
Current Reimbursement Eliminated	+1,300,000
New Annual Fees for Audit Approach	−591,000
Total	+1,359,000

Non-Quantified Factors

	Added Costs	New Benefits	Neutral Effect
Admission of goods	X		
Removal of goods		X	
Inventory control and record keeping system.			X
Mandatory bonding			X

(T.D. 86-17)

Leaded Naphtha; Change of Tariff Classification

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Change of practice.

SUMMARY: Customs has determined that a uniform and established practice exists to classify certain imported leaded naphtha for tariff purposes as motor fuel. Because this petroleum product, as imported, is not chiefly used as motor fuel, it cannot be classified as such, nor can it be classified as naphtha in view of the added lead content. Accordingly, Customs believes the classification practice is clearly wrong. The most appropriate tariff provision for the classification of leaded naphtha is for mixtures not specifically provided for, i.e., mixtures that are in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil, or natural gas.

EFFECTIVE DATE: This change of practice will be effective as to merchandise entered for consumption, or withdrawn from warehouse for consumption, on or after May 8, 1986.

FOR FURTHER INFORMATION CONTACT: John G. Hurley, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In Treasury Decision 83-173, dated August 17, 1983, and published in the Customs Bulletin of September 7, 1983, new standards were established to aid Customs in classifying petroleum products which are chiefly used as motor fuels under the provision for motor fuel in item 475.25, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202). It was further stated in T.D. 83-173 that classification under item 475.25, TSUS, would be indicated if the imported petroleum product met the current American Society for Testing and Materials (ASTM) standards set out in D439 for automotive gasoline, D1655 for aviation turbine fuels, or D910 for aviation gasoline.

T.D. 83-173 revoked T.D. 66-23(13) dated Janaury 19, 1966, which set out critical properties for petroleum products chiefly used as motor fuels at that time. Although this guide was widely used both by Customs and importers for the classification of products claimed to be motor fuel, it had long been recognized that the standards set out in T.D. 66-23(13) were outmoded and required updating. Nonetheless, it should be noted that T.D. 66-23(13) itself stated that the critical properties listed were to be used only as a guide and that it was intended that to be classified as a motor fuel, a product should meet the requirements of Headnote 2(b), Part 10, Schedule 4, TSUS.

Despite this requirement, which has been recognized by the court in *United States* v. *Exxon Corp.*, 607 F.2d 985 (1979), C.A.D. 1233, Customs found that reliance has been placed on T.D. 66-23(13) to establish whether a particular petroleum importation was classified as motor fuel in item 475.25, TSUS. In view of the change in the critical properties of gasoline in the intervening years, as necessitated by the higher performance engines developed, the standards for automotive fuel as stated in T.D. 66-23(13) are no longer valid. Petroleum products which meet the criteria set out in T.D. 66-23(13) cannot be said to be chiefly used as motor fuel, as imported.

Customs has learned that petroleum products entered as motor fuel and which met the standards of T.D. 66-23(13) generally were not intended to be used as gasoline, as imported, but were used as blending stock; that is, they were products which were made into finished gasoline subsequent to importation. The gasoline blending industry imports hydrocarbon distillate mixtures, such as low octane, off specification motor gasoline, petroleum naphtha, leaded naphtha and similar products for the purpose of blending them into a final product which meets the requirements of modern gasoline engines.

A review of entries made over the past few years shows that, based on liquidations, an uniform and established practice exists to classify gasoline blendstock, particularly leaded naphtha, which

meets the criteria set out in T.D. 66-23(13), as motor fuel in item 475.25, TSUS.

On the basis of the above information, Customs determined that the established and uniform practice of classifying leaded naphtha, which met the criteria set out in T.D 66-23(13), as motor fuel in item 475.25 TSUS, is clearly wrong. Leaded naphtha cannot be classified as naphtha in item 475.35, TSUS, in view of the added lead content.

Accordingly, Customs published a notice in the Federal Register on February 27, 1985 (50 FR 7929), soliciting public comments on the proposed change of practice and stating the most appropriate provision for classification is that for mixtures not specially provided for, i.e., mixtures that are in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil, or natural gas, in item 432.10, TSUS. The current rate of duty for articles classified under item 432.10, TSUS, is 5 percent ad valorem, but not less than the highest rate applicable to any component material. The component material with the highest duty rate would be tetraethyl lead in item 429.70, TSUS, with a current duty rate of 9.8 percent ad valorem.

The notice stated that it pertained to certain leaded naphtha only and not to petroleum naphtha classifiable in item 475.35, TSUS, or catalytic naphtha containing by weight over 5 percent synthetically produced dutiable benzenoids, classifiable as a benzenoid mixture in item 407.16, TSUS.

Discussion of Comments

Of the 17 comments received in response to the notice, some believed that the practice to classify such blendstock as motor fuel in item 475.25, TSUS, was correct and others believed that it was wrong. Those who believed that the practice was wrong agreed with the Customs view that the various blendstock materials should be classified according to composition if they did not meet motor fuel standards. Leaded naphtha which failed to meet current commercial gasoline standards would be classifiable as a mixture in item 432.10, TSUS, dutiable at the rate for tetraethyl lead in item 429.70, TSUS, of 9.8 percent ad valorem. If the imported material contained over 5 percent dutiable benzenoids it would be classifiable as a benzenoid mixture in item 407.16, TSUS. Reformate and catalytic naphtha containing over 5 percent dutiable benzenoids (whether or not containing tetraethyl lead) would be classifiable as a benzenoid mixture in item 407.16, TSUS, dutiable at the rate for alkylbenzenes in item 402.36, TSUS, of 0.8 cent per pound plus 17.3 percent ad valorem.

Various arguments were made in opposition to any change in the classification of blendstock materials as motor fuel. One argument was that such products were "unfinished gasoline" not required to be a finished product; that they were dedicated to use as a motor

fuel. An example given was the Mexican product which was sold commercially in Mexico as a motor fuel and could be used, it was claimed, as a motor fuel in this country. However, even though it was acknowledged that it did not meet commercial U.S. standards, it was claimed such a petroleum product was of a "class or kind" that was chiefly used as motor fuel, as it contained the general physical characteristics of motor fuel.

Several court decisions were listed to support the position that the imported blendstock was of a class or kind of petroleum material to be classifed as motor fuel. Considerable reliance was placed on *Cities Service Oil Co.* v. *United States,* C.D. 994 (1946). There the court stated that an oil which did not meet the specifications for oil commonly and commercially used as fuel oil but was used as such after heating, was of a class or kind chiefly used for fuel. The court noted that while the oil product exceeded the highest viscosity rating of standard grades, the evidence was that large consumers of fuel oils use these high viscosity oils. If there is only one practical use for merchandise of this type, it seems obvious, stated the court, that it must be the chief use. In *California Oil Co.* v. *United States,* C.D. 1442 (1952), the court noted that a blending component used in gasoline but not suited for use as motor fuel was not chiefly used as motor fuel. An early Customs decision on this issue, T.D. 46069 (1932), ruled that a petroleum naphtha was taxable as a motor fuel only if in its condition as imported it was of a grade which was chiefly used in the U.S. as a motor fuel.

As pointed out in *United States* v. *Exxon Corporation, Chevron Oil Co.,* C.A.D. 1233 (1979), Congress added a definition of the term "motor fuel" to the tariff. Under Headnote 2(b), Part 10, Schedule 4, TSUS, a product, stated the court, must be chiefly used as a motor fuel to be classified as such. Because the product in issue was unsuitable for use as motor fuel, it could not be classifiable as such.

The basic argument against changing the practice is that a petroleum product which is used as a motor fuel after only a minor amount of processing is of the same "class or kind" and therefore should be classified as a motor fuel.

Customs is of the opinion that if item 475.25, TSUS, was an "eo nomine" provision, the claim that the imported gasoline blendstock is an unfinished gasoline would have some merit. However, motor fuel is defined by Headnote 2(b), Part 10, Schedule 4, TSUS, and this limits motor fuel to a petroleum product chiefly used or imported as a motor fuel. This qualification only permits finished gasoline to be classified as motor fuel. As blendstock is not a finished gasoline, it would not be classified in item 475.25, TSUS.

T.D. 66-23(13) listed critical properties for petroleum products used as motor fuel about 20 years ago. During the intervening years the standards have changed and the specifications published then are no longer applicable. The Research and Motor Octane

numbers for leaded gasoline, for example, gradually increased from the 1930's to the early 1960's and have generally levelled off since then—*e.g.*, the average Research Octane number in 1942 was about 77, while in the 1980's the average is about 93. The lead requirements for motor fuels have changed over the years and the distillation characteristics have varied within limits.

In *Amorient Petroleum Co.*, v. *United States*, Slip Op. 85–46 (1985), "the statutory definition of motor fuel contained in Schedule 4, Part 10, Headnote 2(b), determines what is or what is not a motor fuel," the court stated, adding that since the chief use of the petroleum product in issue was as a motor fuel, the fact that in one area it could not be so used, but had to be further blended before it could be used as a finished gasoline, did not change the classification. "The fact that plaintiff intended to, and later did, blend some of the imported petroleum derivatives with other materials is irrelevant if the chief use in the United States of the imported merchandise at the time of importation was a motor fuel." Thus, even though the petroleum derivative may not be a motor fuel in a particular area, if it is chiefly used as such in the rest of the country, its status in a particular locale is not determinative, as it is of a "class or kind" chiefly used as motor fuel.

As to the question of naphtha, it is urged that naphtha regardless of origin, since it is a blendstock, be considered a petroleum product for tariff purposes and classifiable in item 475.35, TSUS, as petroleum naphtha. Headnote 1, Part 10, Schedule 4, TSUS, made allowances for the benzenoid content only in motor fuels, fuel oils and lubricating oils and greases. No exception is made for naphtha. Therefore, a catalytic naphtha or reformate, with over a *de minimis* amount of dutiable benzenoids present, which is not chiefly used as motor fuel could only be classifiable as a benzenoid mixture and not a petroleum naphtha.

Change of Practice

After careful analysis of the comments and further review of the matter it is concluded on the basis of the entire record, that the practice of classifying leaded naphtha or any other type of gasoline blendstock as motor fuel is clearly wrong and should be changed. Under Headnote 2(b), Part 10, Schedule 4, TSUS, only those petroleum derivative products which are chiefly used as motor fuel as imported are classifiable as motor fuel in item 475.25, TSUS. Those petroleum products which are not chiefly used as motor fuel as imported but are considered blendstocks are classifiable according to composition. Leaded naphtha is classifiable as a mixture in item 432.10, TSUS, with the rate of duty for tetraethyl lead in item 429.70, TSUS; catalytic naphtha or reformate with over 5 percent dutiable benzenoids present is classifiable as a benzenoid mixture in item 407.16, TSUS, dutiable at the rate of alkylbenzenes in item 402.36, TSUS.

AUTHORITY

This change is being made under the authority of § 315(d), Tariff Act of 1930, as amended (19 U.S.C. 1315(d)), and § 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 12, 1985.
DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, February 7, 1986 (51 FR 4839)]

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19 CFR Part 178

(T.D. 86-18)

Customs Regulations Amendment to Listing of OMB Control Numbers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include the clearance number issued by the Office of Management and Budget (OMB), necessary for certain information collection requirements included in a recent interim amendment to the Customs air commerce regulations. The interim amendment stated that an application for clearance was submitted to OMB. That office has since approved the regulation an issued the clearance number which appears later in this document.

EFFECTIVE DATE: March 5, 1986.

FOR FURTHER INFORMATION CONTACT: Larry L. Burton, Regulations Control and Disclosure Law Divison, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8237).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 6, Customs Regulations (19 CFR Part 6), was amended on an interim basis by T.D. 86-12, published in the Federal Register on February 3, 1986 (51 FR 4161). The amendment created a new § 6.12a, Customs Regulations (19 CFR 6.12a), to enhance security in certain designated areas of international airports in the U.S. The major thrust of the regulation is to define a "Customs security area" which may only be entered by airport personnel wearing a Customs approved and issued identification strip or seal on an existing airport identification card. A strip or seal is issued only after an airport employer attests, in writing, that a background check has been conducted on an employee seeking access including, at a minimum, references and employment history necessary to verify employee representations regarding employment in the preceeding five years. Thus, the regulations place upon the employer the burden of conducting an investigation and making a written submission to Customs concerning that investigation.

The Paperwork Reduction Act of 1980 (Pub. L. 96-511, 94 Stat. 2812, 44 U.S.C. 3501 *et seq.*) established policies and procedures for controlling paperwork burdens imposed on the public by federal agencies. Pursuant to this Act, by a document published in the Federal Register on March 31, 1983 (48 FR 13666), the Office of Management and Budget (OMB) promulgated rules implementing the Act. The OMB rules are codified at 5 CFR Part 1320 *et seq.*

One aspect of OMB's oversight function is the review and approval of information collections. Generally, information collections include any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. OMB analyzes such requests for three basic requirements. First, the collection of information must be necessary for proper performance of the agency functions. Second, the request for information or records must not duplicate information otherwise accessible to the agency. Third, the information must have practical utility.

When an information collection is approved by OMB, it is issued a control number. The control number provides a simple and effective way to inform the public that a particular information collection has been approved by OMB pursuant to the Paperwork Reduction Act.

In the February 3, 1986, interim regulation, Customs stated that the amendment was subject to the Paperwork Reduction Act, and that an application for approval was submitted to OMB. OMB was able to quickly review the information collection requirements included in T.D. 86-12, and has issued a control number. This document amends the Customs Regulations by including that control number in the list of previously issued numbers for Part 6, Customs Regulations (19 CFR Part 6), which appears in Part 178, Customs Regulations (19 CFR Part 178).

E.O. 12291, Regulatory Flexibility Act, Inapplicability of Public Notice Requirement

This document merely amends listing of the status of other already published regulations. Therefore, the requirements of E.O. 12291, the Regulatory Flexibility Act, and the notice and public comment requirements of the Administrative Procedure Act (5 U.S.C. 552) are not applicable.

List of Subjects in 19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However personnel from other Customs offices participated in its development.

Amendment to the Regulations

Part 178, Customs Regulations, (19 CFR Part 178), is amended as set forth below:

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting, in proper numerical order, the following entry:

§ 178.2 Listing of OMB Control Numbers.

* * * * * * *

19 CFR Section	Description	OMB
§ 6.12a	Customs security areas in international airports	1515-0152

Dated: February 4, 1986.

B. James Fritz,
Director, Regulations Control, and Disclosure Law Division.

[Published in the Federal Register, February 7, 1986 (51 FR 4721)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 12

Proposed Customs Regulations Amendments Relating to Importation of Motor Vehicles and Boats by Employees of Public International Organizations

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: Currently, the members of the Secretariat of a public international organization are exempted from compliance with federal emission standards, motor vehicle safety standards, and boat safety standards when importing a motor vehicle, boat, or related piece of equipment into the U.S. More than 15,000 staff personnel of such organizations are eligible to make nonconforming importations and the State Department has determined that the number of exemptions has extended well beyond the intended limits of the program.

Along with the problem associated with the number of people making such nonconforming importations, continuation of the exemption program would allow for the continued unjustified introduction into the U.S. of motor vehicles and boats which injure the public health and pose an unnecessary risk to the public safety.

The State Department has informed Customs that the exemption is not required by international law and is no longer warranted. Therefore, this document proposes to remove the exemption available to public international organization employees. In the rare instance when some international agreement might require such a privilege being granted, or to accommodate special circumstances, the proposal allows the State Department to designate certain individuals who would be granted the privilege of making nonconforming importations.

The document invites written comments on the proposal for consideration before final regulations are prepared.

DATE: Comments must be received on or before April 8, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2426,

U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: William Burns, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8651).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Service, in the discharge of its duties, is often called upon to help enforce some 400 statutory and regulatory requirements on behalf of approximately 40 other Federal agencies. Three such instances are the cooperative efforts of Customs and the Environmental Protection Agency, the National Highway Traffic Safety Administration, and the Coast Guard, respectively, in enforcing regulations pertaining to the importation of motor vehicles, motor vehicle engines, boats, and related equipment. The specific regulations involved are § 12.73, Customs Regulations (19 CFR 12.73), concerning emission standards for imported motor vehicles and engines, § 12.80, Customs Regulations (19 CFR 12.80), concerning safety standards for imported motor vehicles, and § 12.85, Customs Regulations (19 CFR 12.85), concerning safety standards for imported boats.

In all three of these regulations, there are examples of certain types of importations which will be exempted from compliance with the applicable emission or safety standard. Common to all three is the exemption available to members of the Secretariat of a public international organization. The exemptions appear at §§ 12.73(b)(5)(iv), 12.80(b)(1)(vi), and 12.85(c)(5), Customs Regulations (19 CFR 12.73(b)(5)(iv), 12.80(b)(1)(vi), and 12.85(c)(5)). More precisely, the exemption is available to a member of the Secretariat of a public international organization, so designated pursuant to the International Organizations Immunities Act (22 U.S.C. 288), on assignment in the U.S. A list of these organizations is included in § 148.87, Customs Regulations (19 CFR 148.87).

The International Organizations Immunities Act (the IOIA) was passed in 1945 to bring some standardization to the conduct of affairs with public international organizations. The U.S. had been dealing directly with other governments for a very long time, and diplomatic law was fairly well established. However, the U.S. was dealing with other countries through the medium of public international organizations with increasing frequency at this time. The IOIA was the U.S. response to the need for formal methods of dealing with public international organizations. The law was passed with the thought in mind that public international organizations, and the employees thereof, should be granted privileges and immunities similar to, but less extensive, than the privileges and immunities granted to foreign governments and diplomats. This reflected

the fact that public international organizations were not foreign governments but were public organizations often carrying on work or research of a governmental nature.

The use of the IOIA in the three Customs Regulations mentioned above has expanded beyond the concept of the law as passed in 1945. It is not a necessary practice to grant employees of public international organizations the right to import nonconforming motor vehicles or boats for personal use. The IOIA was intended to extend privileges and immunities only to official acts of the organization and its employees.

The State Department has advised Customs that the current exemption program is not required by any international law and is no longer warranted. Currently, over 15,000 staff employees of public international organizations can import nonconforming motor vehicles, motor vehicle engines, boats, and related pieces of equipment for personal use. The State Department's Office of Foreign Missions has informed Customs that this number of exemptions has extended well beyond the intended limits of the program. Also contributing to the proposal to eliminate the exemption program is the unnecessary harm inflicted on the U.S. environment by these nonconforming imports and the unnecessary risk they pose to the public safety. Accordingly, §§ 12.73, 12.80, and 12.85 would be amended by removing the exemption available to employees of public international organizations.

To accommodate the rare instance in which a binding international commitment requires that such an exemption be granted, or special circumstances exist, it is proposed to add language to §§ 12.73, 12.80, and 12.85, permitting the State Department to designate individuals who are not foreign government diplomatic personnel, but who are otherwise entitled to import nonconforming motor vehicles, motor vehicle engines, boats or related equipment.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject

to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was John Doyle, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Air pollution control, Marine safety, Motor vehicle pollution, Motor vehicle safety, Motor vehicles.

PROPOSED AMENDMENTS

It is proposed to amend Part 12, Customs Regulations (19 CFR Part 12), as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624.

§ 12.73 also issued under 19 U.S.C. 1484, 42 U.S.C. 7522, 7601;
§ 12.85 also issued under 19 U.S.C. 1623, 46 U.S.C. 4302, 4306, 4310.
All other statutory authority remains unchanged.

2. It is proposed to revise § 12.73(b)(5)(iv) to read as follows:

§ 12.73 Federal motor vehicle air pollution control.

* * * * * * *

(b) * * *

(5) * * *

(iv) Such motor vehicle or motor vehicle engine is not covered by a certificate of conformity with Federal motor vehicle emission standards, and the importer or consignee is a member of the armed forces of a foreign country on assignment in the U.S., or is a member of the personnel of a foreign government on assignment in the U.S., or other individual who comes within the class of persons for whom free entry of motor vehicles has been authorized by the Department of State in accordance with general principles of international law, and that such vehicle or engine will not be sold in the U.S.; or

* * * * * * *

3. It is proposed to revise § 12.80(b)(1)(vi) to read as follows:

§ 12.80 Federal motor vehicle safety standards.

* * * * * * *

(b) * * *

(1) * * *

(vi) The importer or consignee is a member of the armed forces of a foreign country on assignment in the U.S., or a member of the personnel of a foreign government on assignment in the U.S., or other individual who is within the class of persons for whom free entry of vehicles has been authorized by the Department of State in accordance with general principles of international law, is importing the vehicle or equipment item for purposes other than resale; and a copy of his official orders, if any, is attached to the declaration (or, if a qualifying member of the personnel of a foreign government on assignment in the U.S., the name of the Embassy to which he is accredited is stated on the declaration).

* * * * * * *

4. It is proposed to revise § 12.85(c)(5) to read as follows:

§ 12.85 Coast Guard boat and associated equipment safety standards.

* * * * * * *

(c) * * *

(5) *Products owned by certain foreign governments.* In the case of an importer or consignee employed in one of the capacities set forth in this subparagraph, a declaration will be filed in accordance with paragraph (d) of this section. The declaration shall state that the importer or consignee is either a member of the armed forces of a foreign country on assignment in the U.S., is a member of the personnel of a foreign government on assignment in the U.S., or other individual who comes within the class of persons for whom free entry of boats has been authorized by the Department of State in accordance with general principles of international law, and that he is importing the product for purposes other than resale.

* * * * * * *

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: January 22, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 7, 1986 (51 FR 4760)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-2166)

ON MOTION

ALLIED CORP., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, NIPPON STEEL CORP. AND NIPPON STEEL U.S.A., INC., INTERVENORS, HITACHI METALS, LTD. AND HITACHI METALS INTERNATIONAL, LTD., INTERVENORS, VACUUMSHMELZE GMBH, INTERVENOR

William J. Gilbreth, Fish & Neave, of New York, New York, represented appellant.

Phyllis N. Smithey, Lyn M. Schlitt and *Michael P. Mabile*, Office of the General Counsel, U.S. International Trade Commission, represented appellee.

Robert T. Tobin, Kenyon & Kenyon, *Thomas L. Creel, Daniel J. Plaine, Jane C. Luxton, Jeanne E. Davidson, Bradley E. Lerman*, and *Mark D. Whitener*, Steptoe & Johnson, of Washington, D.C., represented intervenor Nippon Steel, et al.

Steven H. Noll, Hill, Van Stanten, Steadman & Simpson, of Chicago, Illinois, *John D. Simpson, Tom M. Schaumberg* and *Alice A. Kipel*, Plaia & Schaumberg, of Washington, D.C., represented intervenor Vacuumschmelze GmbH.

Thomas J. Macpeak, Sughrue, Mion, Zinn, Macpeak & Seas, of Washington, D.C., and *Waddell A. Biggart, Alan J. Neuwirth* and *Richard A. Nescon*, Kassel, Neuwirth & Geiger, of New York, New York, represented intervenor Hitachi.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85-2166)

ON MOTION

ALLIED CORP., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, NIPPON STEEL CORP. AND NIPPON STEEL U.S.A., INC., INTERVENORS, HITACHI METALS, LTD. AND HITACHI METALS INTERNATIONAL, LTD., INTERVENORS, VACUUMSCHMELZE GMBH, INTERVENOR

Before MARKEY, *Chief Judge*, FRIEDMAN and DAVIS, *Circuit Judges*.

ORDER

This is a joint motion of ITC and the intervenors (movants) for a decision on certain jurisdictional questions before review on the merits. Movants argue that the court is without jurisdiction and the appeal should be dismissed because it was filed out of time.

Allied filed its notice of appeal on February 13, 1985. The appeal is from a July 6, 1984 determination of the International Trade Commission (ITC) adopting the findings of an administrative law judge (ALJ) regarding the importation of certain amorphous metal alloys alleged to infringe three of Allied's patents. The ALJ determined that two of the patents were invalid, but that the third patent was valid and infringed by the imported articles.

On October 15, 1984, the ITC issued an order excluding those articles which infringed the one patent held valid and infringed. On December 17, 1984, the Presidential review period for that exclusion order expired. Because Allied prevailed in respect of that patent and the exclusion order, it could not appeal from that order. Similarly, if the President had disapproved the exclusion order, Allied would have had no basis for appeal, the President's action having rendered the ITC determination of no force or effect. *Duracell, Inc.* v. *U.S. International Trade Commission,* 718 F.2d 1578 (Fed. Cir. 1985).

The ITC argues that its July 6, 1984 order adopting the ALJ's determination constituted the final order from which Allied was required to appeal. The only determination by which Allied is aggrieved is that holding two of its patents invalid. That determination was final as of July 6, 1984, there being no provision for Presidential review, or for other administrative proceedings, following a determination that does not lead to an exclusion order.

Allied asserts that a § 337(c) proceeding is a single entity and that it was waiting for expiration of the Presidential review period. The argument is without merit. *Cf. Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206 (1952). Further, it is contrary to Allied's interests here. As above indicated, Allied was without an appeal from the determination that its one patent was valid and infringed, regardless of the result of Presidential review. The July 6, 1984 determination, on the other hand, meant that the goods challenged by Allied as infringements of its other two patents could continue to be imported. Allied has cited no reason for continuing to suffer importation of those goods for seven months, while awaiting an action of the President that could not possibly effect its right to appeal from the July 6, 1984 determination.[1]

[1] Intervenors whose products were subject to the exclusion order could not appeal the July 6, 1984 determination that the one patent was valid and infringed, the finality of that determination being dependent on Presidential action. If the President declined to disapprove the exclusion order, that order would then become final and subject to timely appeal by intervenors.

Allied's notice of appeal was filed more than 60 days after the July 6, 1984 determination of the ITC *and* more than 60 days after the November 11, 1984 reimposition by Congress of the 60-day limitation. Technical Amendments to the Federal Court Improvements Act of 1982, Pub. L. No. 98-620, § 413, 98 Stat. 3362 (1984) (the Act). Allied's appeal is thus untimely and must be dismissed.[2]

Accordingly, IT IS ORDERED THAT:

The joint motion for determination of whether this court has jurisdiction of the appeal is granted, the question is answered in the negative, and the appeal is dismissed.

Dated: January 21, 1986.

For the Court.

HOWARD T. MARKEY,
Chief Judge.

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[2] In *Union Manufacturing Co., Inc.* v. *U.S. International Trade Commission*, Appeal No. 85-2473, this court held that the 60-day limitation of the Act should not be mechanically applied to causes of action arising prior to its effective date where, as in that case, an appellant had been actively pursuing its rights in other courts. However, as indicated in the text, Allied has demonstrated no basis on which its delay might be justified.

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T 17.6/3-4:

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 86-19)

Quarterly Rates of Exchange

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: January 1, 1986 through March 31, 1986.

Country	Name of currency	U.S. dollars
Australia	Dollar	0.68200
Austria	Schilling	.058140
Belgium	Franc	.020036
Brazil	Cruziero	.000095
Canada	Dollar	.713776
China, P.R	Renminbi yuan	.311575
Denmark	Krone	.112284
Finland	Markka	.185305
France	Franc	.133574
Germany	Deutsche mark	.410172
Hong Kong	Dollar	.128057
India	Rupee	.082988
Iran	Rial	N/A
Ireland	Pound	1.2420
Italy	Lira	.000601
Japan	Yen	.005021
Malaysia	Dollar	.413565
Mexico	Peso	N/A
Netherlands	Guilder	.363702
New Zealand	Dollar	.50200
Norway	Krone	.132433
Philippines	Peso	N/A

Country	Name of currency	U.S. dollars
Portugal	Escudo	.006329
Republic of South Africa	Rand	.39500
Singapore	Dollar	.473037
Spain	Peseta	.006527
Sri-Lanka	Rupee	.036460
Sweden	Krona	.132083
Switzerland	Franc	.487805
Thailand	Baht (tical)	.037594
United Kingdom	Pound	1.4505
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-20)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 1, 1985	$0.006536
Israel shekel:	
November 1, 1985	N/A
South Korea won:	
November 1, 1985	.001118
Taiwan N.T. dollar:	
November 1, 1985	.024925

(LIQ-03-01 S:COM CIE)
Dated: November 1, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-21)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 4, 1985	$0.006545
November 5, 1985	.006510
November 6, 1985	.006519
November 7, 1985	.006540
November 8, 1985	.006462
Israel shekel:	
November 4-8, 1985	N/A
South Korea won:	
November 4-5, 1985	.001119
November 6, 1985	.001118
November 7-8, 1985	.001119
Taiwan N.T. dollar:	
November 4, 1985	.024938
November 5-6, 1985	.024963
November 7, 1985	.024988
November 8, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: November 8, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-22)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others con-

cerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

November 11, 1985, holiday.

Greece drachma:	
November 12, 1985	$0.006464
November 13, 1985	.006498
November 14–15, 1985	.006485
Israel shekel:	
November 12–15, 1985	N/A
South Korea won:	
November 12–13, 1985	.001118
November 14–15, 1985	.001119
Taiwan N.T. dollar:	
November 12, 1985	N/A
November 13, 1985	.024994
November 14, 1985	.025000
November 15, 1985	.025006

(LIQ–03–01 S:COM CIE)

Dated: November 15, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–23)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 18, 1985	$0.006483
November 19, 1985	.006523
November 20, 1985	.006502
November 21, 1985	.006545
November 22, 1985	.006557
Israel shekel:	
November 18–22, 1985	N/A

South Korea won:	
November 18–19, 1985	.001119
November 20–22, 1985	.001120
Taiwan N.T. dollar:	
November 18, 1985	.025019
November 19, 1985	.025025
November 20, 1985	.025031
November 21, 1985	N/A
November 22, 1985	.025044

(LIQ-03-01 S:COM CIE)

Dated: November 22, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-24)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

November 28, 1985, holiday.

Greece drachma:	
November 25, 1985	$0.006592
November 26, 1985	.006609
November 27, 1985	.006605
November 29, 1985	.006702
Israel shekel:	
November 25–29, 1985	N/A
South Korea won:	
November 25, 1985	.001121
November 26, 1985	.001121
November 27, 1985	.001120
November 29, 1985	.001121
Taiwan N.T. dollar:	
November 25, 1985	.025063
November 26, 1985	.025069

November 27, 1985	.025082
November 29, 1985	.025100

(LIQ-03-01 S:COM CIE)

Dated: November 29, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-25)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 2, 1985	$0.006739
December 3, 1985	.006647
December 4, 1985	.006676
December 5, 1985	.006662
December 6, 1985	.006667
Israel shekel:	
December 2-6, 1985	N/A
South Korea won:	
December 2, 1985	.001122
December 3-5, 1985	.001121
December 6, 1985	.001120
Taiwan N.T. dollar:	
December 2, 1985	.025113
December 3, 1985	.025100
December 4, 1985	.025075
December 5-6, 1985	.025050

(LIQ-03-01 S:COM CIE)

Dated: December 6, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-26)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 9, 1985	$0.006645
December 10, 1985	.006620
December 11, 1985	.006601
December 12-13, 1985	.006640
Israel shekel:	
December 9-13, 1985	N/A
South Korea won:	
December 9, 1985	.001120
December 10-11, 1985	.001119
December 12, 1985	.001118
December 13, 1985	.001119
Taiwan N.T. dollar:	
December 9, 1985	.025063
December 10, 1985	.025082
December 11, 1985	.025075
December 12, 1985	.025063
December 13, 1985	.025069

(LIQ-03-01 S:COM CIE)

Dated: December 13, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-27)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published

for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 16, 1985	$0.006631
December 17, 1985	.006658
December 18, 1985	.006631
December 19, 1985	.006636
December 20, 1985	.006623
Israel shekel:	
December 16–20, 1985	N/A
South Korea won:	
December 16–19, 1985	.001119
December 20, 1985	.001118
Taiwan N.T. dollar:	
December 16, 1985	.025044
December 17, 1985	.025038
December 18, 1985	.025025
December 19–20, 1985	.025031

(LIQ–03–01 S:COM CIE)

Dated: December 20, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–28)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

December 25, 1985, holiday.

Greece drachma:	
December 23, 1985	$0.006636
December 24–26, 1985	.006645
December 27, 1985	.006711

Israel shekel:	
December 23–27, 1985	N/A
South Korea won:	
December 23–27, 1985	.001119
Taiwan N.T. dollar:	
December 23, 1985	.025044
December 24, 1985	.025031
December 26, 1985	.025044
December 27, 1985	.025050

(LIQ–03–01 S:COM CIE)

Dated: December 27, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–29)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 30, 1985	$0.006725
December 31, 1985	.006757
Israel shekel:	
December 30–31, 1985	N/A
South Korea won:	
December 30–31, 1985	.001120
Taiwan N.T. dollar:	
December 30, 1985	.002647
December 31, 1985	.002664

(LIQ–03–01 S:COM CIE)

Dated: December 31, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-30)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

January 1, 1986, holiday.

Greece drachma:	
January 2, 1986	$0.006780
January 3, 1986	.006711
Israel shekel:	
January 2-3, 1986	N/A
South Korea won:	
January 2, 1986	.001120
January 3, 1986	.001120
Taiwan N.T. dollar:	
January 2-3, 1986	N/A

(LIQ-03-01 S:COM CIE)

Dated: January 3, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-31)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
January 6, 1986	$0.006743
January 7, 1986	.006780

January 8, 1986	.006734
January 9, 1986	.006676
January 10, 1986	.006700
Israel shekel:	
January 6–10, 1986	N/A
South Korea won:	
January 6–7, 1986	.001120
January 8, 1986	.001121
January 9–10, 1986	.001120
Taiwan N.T. dollar:	
January 6, 1986	.025082
January 7, 1986	.025094
January 8, 1986	N/A
January 9, 1986	.025119
January 10, 1986	.025132

(LIQ–03–01 S:COM CIE)

Dated: January 10, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–32)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
January 13, 1986	$0.006645
January 14, 1986	.006662
January 15, 1986	.006676
January 16, 1986	.006662
January 17, 1986	.006676
Israel shekel:	
January 13–17, 1986	N/A
South Korea won:	
January 13, 1986	.001120
January 14–15, 1986	.001119
January 16–17, 1986	.001120

Taiwan N.T. dollar:	
January 13, 1986	.025227
January 14, 1986	.025183
January 15, 1986	.025202
January 16, 1986	.025208
January 17, 1986	.025221

(LIQ-03-01 S:COM CIE)

Dated: January 17, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-33)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

January 20, 1986, holiday.

Greece drachma:	
January 21, 1986	$0.006664
January 22, 1986	.006693
January 23, 1986	.006689
January 24, 1986	.006725
Israel shekel:	
January 21-24, 1986	N/A
South Korea won:	
January 21-23, 1986	.001119
January 24, 1986	.001120
Taiwan N.T. dollar:	
January 21, 1986	.025246
January 22, 1986	.025265
January 23, 1986	.025278
January 24, 1986	.025291

(LIQ-03-01 S:COM CIE)

Dated: January 24 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-34)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
January 27, 1986	$0.006793
January 28, 1986	.006793
January 29, 1986	.006807
January 30, 1986	.006821
January 31, 1986	.006812
Israel shekel:	
January 27-31, 1986	N/A
South Korea won:	
January 27, 1986	.001120
January 28-29, 1986	.001121
January 30-31, 1986	.001122
Taiwan N.T. dollar:	
January 27, 1986	.025342
January 28, 1986	.025374
January 29, 1986	.025387
January 30, 1986	.025400
January 31, 1986	.025407

(LIQ-03-01 S:COM CIE)

Dated: January 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-35)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
November 1, 1985	$0.000116
China P.R. renminbi yuan:	
November 1, 1985	.311575
Mexico peso:	
November 1, 1985	.002041
New Zealand dollar:	
November 1, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: November 1, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-36)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
November 5, 1985	$0.66830
November 6, 1985	.66150
November 7, 1985	.66450
November 8, 1985	.67300

Brazil cruzeiro:	
November 4, 1985	.000116
November 5, 1985	.000116
November 6–7, 1985	.000115
November 8, 1985	.000114
China P.R. renminbi yuan:	
November 4–8, 1985	.311575
Mexico peso:	
November 4, 1985	.002024
November 5, 1985	.002008
November 6–8, 1985	N/A
New Zealand dollar:	
November 6, 1985	.58600
November 7, 1985	.58550
November 8, 1985	.58500
Republic of South Africa rand:	
November 8, 1985	.36750

(LIQ–03–01 S:COM CIE)

Dated: November 8, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–37)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

November 11, 1985, holiday.

Australia dollar:	
November 12, 1985	$0.66100
November 13, 1985	.66320
November 14, 1985	.66980
November 15, 1985	.67300

Brazil cruzeiro:	
November 12, 1985	.000114
November 13–15, 1985	.000113
China P.R. renminbi yuan:	
November 12–15, 1985	.311575
Japan yen:	
November 13, 1985	.004902
November 14, 1985	.004918
November 15, 1985	.004895
Mexico peso:	
November 12–15, 1985	N/A
Republic of South Africa rand:	
November 12, 1985	.36950
November 13, 1985	.37100
November 14, 1985	.37150
November 15, 1985	.37000

(LIQ–03–01 S:COM CIE)

Dated: November 15, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–38)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
November 18, 1985	$0.67350
Brazil cruzeiro:	
November 18–19, 1985	.000112
November 20, 1985	.000111
November 21–22, 1985	.000110
China P.R. renminbi yuan:	
November 18, 1985	.313283
November 19–22, 1985	.311575

Japan yen:	
November 18, 1985	.004915
November 19, 1985	.004926
November 20, 1985	.004915
November 21, 1985	.004948
November 22, 1985	.004966
Mexico peso:	
November 18–22, 1985	N/A
Republic of South Africa rand:	
November 18–20, 1985	.37100
November 21, 1985	.37250
November 22, 1985	.37350

(LIQ–03–01 S:COM CIE)

Dated: November 22, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–39)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

November 28, 1985, holiday.

Austria schilling:	
November 29, 1985	$0.056625
Belgium franc:	
November 29, 1985	.019577
Brazil cruzeiro:	
November 25–26, 1985	.000109
November 27, 1985	.000108
November 29, 1985	.000107
China P.R. renminbi yuan:	
November 25–29, 1985	.311575
Denmark krone:	
November 27, 1985	.108879
November 29, 1985	.109769

Finland markka:	
November 29, 1985	.183993
France franc:	
November 29, 1985	.130463
Germany deutsche mark:	
November 29, 1985	.398010
Ireland pound:	
November 29, 1985	1.2290
Japan yen:	
November 25, 1985	.004980
November 26, 1985	.004975
November 27, 1985	.004974
November 29, 1985	.004948
Mexico peso:	
November 25–29, 1985	N/A
Netherlands guilder:	
November 29, 1985	.353732
Republic of South Africa rand:	
November 25, 1985	.37500
November 29, 1985	.37000
United Kingdom pound:	
November 29, 1985	1.4890

(LIQ-03-01 S:COM CIE)

Dated: November 29, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-40)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currenty into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 2, 1985	$0.056465
December 4, 1985	.056529

Belgium franc:	
December 4, 1985	.019547
Brazil cruzeiro:	
December 2–3, 1985	.000106
December 4–6, 1985	.000105
China P.R. renminbi yuan:	
December 2–6, 1985	.311575
Denmark krone:	
December 2, 1985	.109469
December 3, 1985	.109081
December 4, 1985	.109661
December 5, 1985	.109397
December 6, 1985	.109254
France franc:	
December 2, 1985	.13003[illegible]
December 4, 1985	.13012[illegible]
December 5, 1985	.13012[illegible]
Germany deutsche mark:	
December 2, 1985	.39[illegible]558
December 4, 1985	.39[illegible]6904
December 5, 1985	.397062
December 6, 1985	.395961
Japan yen:	
December 2, 1985	.004901
December 3, 1985	.004884
December 4, 1985	.004935
December 5, 1985	.004926
December 6, 1985	.004916
Mexico peso:	
December 2–6, 1985	N/A
Netherlands guilder:	
December 2, 1985	.352423
December 4, 1985	.352734
December 5, 1985	.352858
December 6, 1985	.351865
Republic of South Africa rand:	
December 2, 1985	.35500
December 3, 1985	.36150
December 4, 1985	.35750
December 5, 1985	.36000
December 6, 1985	.36250
United Kingdom pound:	
December 2, 1985	1.4875
December 4, 1985	1.4860

(LIQ–03–01 S:COM CIE)

Dated: December 6, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-4[1])

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 12, 1985	$0.056529
December 13, 1985	.056433
Brazil cruzeiro:	
December 9, 1985	.000104
December 10-11, 1985	.000103
December 12, 1985	.000102
December 13, 1985	.000101
China P.R. renminbi yuan:	
December 9-13, 1985	.311575
Denmark krone:	
December 9, 1985	.109033
December 12, 1985	.109673
December 13, 1985	.109337
France franc:	
December 12, 1985	.130039
Germany deutsche mark:	
December 12, 1985	.397614
December 13, 1985	.396511
Ireland pound:	
December 12, 1985	1.2270
Japan yen:	
December 9, 1985	.004914
December 10, 1985	.004912
December 11, 1985	.004904
December 12, 1985	.004949
December 13, 1985	.004931
Mexico peso:	
December 9-13, 1985	N/A

Netherlands guilder:	
December 12, 1985	.352983
December 13, 1985	.352051
New Zealand dollar:	
December 13, 1985	.52100
Republic of South Africa rand:	
December 9, 1985	.37500
December 10, 1985	.37200
December 11, 1985	.37250
December 12, 1985	.37800
December 13, 1985	.37500

(LIQ-03-01 S:COM CIE)

Dated: December 13, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-42)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 17, 1985	$0.056657
December 18, 1985	.056561
December 19, 1985	.056561
December 20, 1985	.056633
Brazil cruzeiro:	
December 16, 1985	.000101
December 17-18, 1985	.000100
December 19, 1985	.000099
December 20, 1985	.000098
China P.R. renminbi yuan:	
December 16-20, 1985	.311575
Denmark krone:	
December 16, 1985	.109158

December 17, 1985	.109637
December 18, 1985	.109218
December 19, 1985	.109242
December 20, 1985	.109439
France franc:	
December 17, 1985	.130132
December 20, 1985	.129786
Germany deutsche mark:	
December 16, 1985	.396275
December 17, 1985	.398168
December 18, 1985	.397140
December 19, 1985	.397298
December 20, 1985	.398089
Ireland pound:	
December 17, 1985	1.2293
Japan yen:	
December 16, 1985	.004936
December 17, 1985	.004952
December 18, 1985	.004922
December 19, 1985	.004927
December 20, 1985	.004933
Mexico peso:	
December 16–20, 1985	N/A
Netherlands guilder:	
December 16, 1985	.351679
December 17, 1985	.353419
December 18, 1985	.352423
December 19, 1985	.352609
December 20, 1985	.353482
New Zealand dollar:	
December 16, 1985	.47950
December 17, 1985	.50100
December 18, 1985	.50350
December 19, 1985	.50400
December 20, 1985	.49600
Republic of South Africa rand:	
December 16, 1985	.37750
December 17, 1985	.37150
December 18, 1985	.37100
December 19, 1985	.37250
December 20, 1985	.37500

(LIQ–03–01 S:COM CIE)

Dated: December 20, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-43)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

December 25, 1985, holiday.

Austria schilling:	
December 23, 1985	$0.056754
December 24, 1985	.056818
December 26, 1985	.056818
December 27, 1985	.057491
Belgium franc:	
December 24-26, 1985	.019550
December 27, 1985	.019794
Brazil cruzeiro:	
December 23-26, 1985	.000098
December 27, 1985	.000096
China P.R. renminbi yuan:	
December 23-27, 1985	.311575
Denmark krone:	
December 23, 1985	.109769
December 24, 1985	.109830
December 26, 1985	.109769
December 27, 1985	.110865
France franc:	
December 23, 1985	.130081
December 24, 1985	.130293
December 26, 1985	.130124
December 27, 1985	.131752
Germany deutsche mark:	
December 23, 1985	.399202
December 24, 1985	.399122
December 26, 1985	.399202
December 27, 1985	.404367
Ireland pound:	
December 27, 1985	1.2350
Italy lira:	
December 27, 1985	.000593
Japan yen:	
December 23, 1985	.004939

December 24, 1985	.004932
December 26, 1985	.004931
December 27, 1985	.004946
Mexico peso:	
December 23–27, 1985	N/A
Netherlands guilder:	
December 23, 1985	.354233
December 24, 1985	.353982
December 26, 1985	.354610
December 27, 1985	.358873
New Zealand dollar:	
December 23, 1985	.50000
December 24–26, 1985	.50200
December 27, 1985	.50150
Republic of South Africa rand:	
December 23, 1985	.37320
December 24, 1985	.37400
December 26, 1985	.37500
December 27, 1985	.37750

(LIQ–03–01 S:COM CIE)

Dated: December 27, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–44)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85–169 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
December 30, 1985	$0.057670
December 31, 1985	.058109
Belgium franc:	
December 30, 1985	.019841
December 31, 1985	.019980

Brazil cruzeiro:	
December 30–31, 1985	.000095
China P.R. renminbi yuan:	
December 30–31, 1985	.311575
Denmark krone:	
December 30, 1985	.111266
December 31, 1985	.111919
Finland markka:	
December 30, 1985	.183993
December 31, 1985	.185048
France franc:	
December 30, 1985	.132363
December 31, 1985	.133200
Germany deutsche mark:	
December 30, 1985	.405680
December 31, 1985	.408664
Ireland pound:	
December 30, 1985	1.2405
December 31, 1985	1.2470
Italy lira:	
December 30, 1985	.000595
December 31, 1985	.000600
Japan yen:	
December 30, 1985	.004974
December 31, 1985	.004994
Mexico peso:	
December 30–31, 1985	N/A
Netherlands guilder:	
December 30, 1985	.360101
December 31, 1985	.363108
New Zealand dollar:	
December 30–31, 1985	.50050
Portugal escudo:	
December 30, 1985	.006289
December 31, 1985	.006301
Spain peseta:	
December 30, 1985	.006485
December 31, 1985	.006498
Sweden krona:	
December 30, 1985	.131579
December 31, 1985	.132013
Switzerland franc:	
December 31, 1985	.485437

(LIQ–03–01 S:COM CIE)

Dated: December 31, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-45)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to covert such currency into currency of the United States, conversion shall be at the following rates.

January 1, 1986, holiday.

Brazil cruzeiro:
January 3, 1986 ..... N/A

(LIQ-03-01 S:COM CIE)

Dated: January 3, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-46)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Republic of South Africa rand:
January 10, 1986 ..... $0.41900

(LIQ-03-01 S:COM CIE)
Dated: January 10, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-47)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
January 14, 1986	N/A
January 15, 1986	$0.000089
January 16, 1986	.000089
January 17, 1986	.000089
Republic of South Africa rand:	
January 13, 1986	.42050
January 14, 1986	.42400
January 15, 1986	.42600
January 16, 1986	.43300
January 17, 1986	.43500
Spain peseta:	
January 17, 1986	N/A

(LIQ-03-01 S:COM CIE)
Dated: January 17, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-48)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New

York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

January 20, 1986, holiday.

Brazil cruzeiro:	
January 21-22, 1986	$0.000087
January 23-24, 1986	.000086
Republic of South Africa rand:	
January 21, 1986	.43700
January 22, 1986	.44000
January 23, 1986	.43730
January 24, 1986	.44150

(LIQ-03-01 S:COM CIE)

Dated: January 24, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-49)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
January 27, 1986	$0.000085
January 28-29, 1986	.000084
January 30, 1986	.000083
January 31, 1986	.000082
New Zealand dollar:	
January 27, 1986	.53150
January 29, 1986	.52900

January 30, 1986	.53900
January 31, 1986	.53550
Republic of South Africa rand:	
January 27, 1986	.44750
January 28, 1986	.43450
January 29–31, 1986	.43750

(LIQ–03–01 S:COM CIE)

Dated: January 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-1873)

OAK LAMINATES D/O OAK MATERIALS GROUP, APPELLANT *v.* UNITED STATES, APPELLEE

David O. Elliott, Barnes, Richardson and Colburn, of New York, New York, argued for appellant. With him on the brief was *Richard Haroian*.

Veronica A. Perry, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With her on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: United States Court of International Trade.

Chief *Judge* RE.

(Appeal No. 85-1873)

OAK LAMINATES D/O OAK MATERIALS GROUP, APPELLANT *v.* UNITED STATES, APPELLEE

(Decided February 11, 1986)

Before KASHIWA,* SMITH and NIES, *Circuit Judges*.

Per curiam.

Oak Laminates d/o Oak Materials Group (Oak Laminates) appeals from the decision in *Oak Laminates d/o Oak Materials Group v. United States*, No. 84-105 (September 25, 1984), *reh'g denied*, 601 F. Supp. 1031 (Ct. Int'l Trade 1984), in which Chief Judge Re of the United States Court of International Trade held that Oak Laminates had not overcome the presumption of correctness that attached to the Customs Service's classification of the merchandise imported by Oak Laminates. We affirm on the basis of these decisions.

AFFIRMED

*Judge Kashiwa retired on 7 January 1986. Before his retirement he participated in the consideration and decision of this case. Before Judge Kashiwa's retirement all members of the panel joined in this opinion.

498-400 O - 86 - 3

(Appeal Nos. 85-2246 and 85-2286)

ZENITH RADIO CORP., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE INDEPENDENT RADIONIC WORKERS OF AMERICA, ET AL., APPELLANTS *v.* UNITED STATES, ET AL., APPELLEES

Frederick L. Ikenson, of Washington, D.C., argued for appellants Zenith. With him on the brief was *J. Eric Nissley*, of counsel.

Paul D. Cullen, Collier, Shannon, Rill & Scott, of Washington, D.C., argued for appellants IBEW. With him on the brief were *Paul C. Rosenthal* and *Lawrence J. Lasoff*.

Lawrence R. Walders, Graham & James, of Washington, D.C., argued for certain appellees. With him on the brief were *H. William Tanaka* and *Patrick O'Leary*. *Thomas P. Ondeck*, Baker & McKenzie, of Washington, D.C., for Hitachi, *Rodney F. Page* and *Robert H. Huey*, Arent, Fox, Kintner, Plotkin & Kahn, of Washington, D.C., for Toshiba, *Gail T. Cumins*, Sharretts, Paley, Carter & Balauvelt, of New York, New York, for Sanyo, *Robert D. Piliero* and *Peter J. Garland*, Wender, Murase & White, of New York, New York, for Sharp Electronics, *Stuart M. Rosen*, *A. Paul Victor*, *Charles H. Bayar* and *Bret E. Suval*, Weil, Gotshal & Manges, of New York, New York, for Matsushita Elec., and *Brian S. Goldstein* and *Edward B. Ackerman*, Siegel, Mandell, et al., for General Corp., etc., also on brief.

Sheila N. Ziff, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee U.S. With her on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrencis*, Assistant Director.

Appealed from: U.S. Court of International Trade.

Judge WATSON.

(Appeal Nos. 85-2246 and 85-2286)

ZENITH RADIO CORP., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE INDENPENDENT RADIONIC WORKERS OF AMERICA, ET AL., APPELLANTS *v.* UNITED STATES, ET AL., APPELLEES

(Decided February 10, 1986)

Before FRIEDMAN, RICH and NIES, *Circuit Judges*.

NIES, *Circuit Judge*.

The subject of this suit is a final determination of the United States Department of Commerce, International Trade Administration (ITA), under § 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673 *et seq.* (1982), which assessed antidumping duties on certain television receiving sets, monochrome and color, imported from Japan.[1] Zenith and other parties to this action[2] challenged

[1] The Final Determination is reported at 46 Fed. Reg. 30163-67 (1981).

[2] Suits were filed by Zenith Radio Corporation and by the Committee to Preserve American Color Television (a/k/a COMPACT), and Imports Committee, Tube Division, Electronic Industries Association. Those suits were consolidated before the CIT, and additional parties have subsequently been added. In the present appeals, No. 85-2246 is by Zenith and No. 85-2286 is by International Brotherhood of Electrical Workers, Independent Radionic Workers of America, and International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO. Appellants will be collectively referred to as "Zenith."

ITA's determination by filing a civil action in the United States Court of International Trade (CIT), alleging that, because of computation errors, ITA's determinations of dumping margins for various Japanese manufacturers were significantly understated. The CIT granted the government's motion for summary judgement, thus upholding ITA's determination, relying in part on this court's opinion in *Smith Corona Group Consumer Products Division, SCM Corp.* v. *United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 104 S. Ct. 1274 (1984). This appeal is from the final judgment of the CIT, Watson, J., reported at 606 F. Supp. 695 (1985). We affirm.

OPINION

In this appeal, Zenith challenges two aspects of the CIT's decision: (1) the CIT's holding that the exporter's sales price (ESP) offset provision, 19 C.F.R. § 353.15(c) is lawful, and (2) the CIT's holding that the foreign market value may be adjusted by discounts and rebates which are not available to all purchasers at wholesale in the home market.

I

The validity of the ESP offset regulation was exhaustively considered by this court in *Smith Corona, supra.* There, the court addressed and rejected arguments comparable to those presently advanced by Zenith. In upholding the offset, this court stated:

> In view of the discretion accorded the Secretary under the statute to make adjustments to foreign market value, we conclude that the exporter's sales price offset, 19 C.F.R. § 353.15(c) is a proper and reasonable exercise of the Secretary's authority to administer the statute fairly. Thus, insofar as it is challenged here, 19 C.F.R. § 353.15(c) is valid.

Id. at 1579. Thus, the CIT properly upheld the ESP offset in light of this precedent. This panel has considered Zenith's attack on that aspect of the *Smith Corona* decision. However, even if the panel were not bound by its precedential effect, we would reach the same conclusion.[3] The decision of the CIT upholding the regulation is, therefore, affirmed.

II

Zenith next asserts that Judge Watson erred in allowing the FMV to be adjusted downward by discounts and rebates that were not offered to all purchasers at wholesale. Zenith argues that discounts and rebates are related to price, and, as a consequence, must meet the requirements of § 1677b(a)(1)(A) if they are to be used in calculating the foreign market value (FMV). Under that

[3] Recognizing that under the operating procedures of this court, a decision by a prior panel is binding precedent on another panel, Zenith suggested that this case be considered in banc. This opinion has been circulated to the entire court prior to issuance, and no judge endorsed the suggestion.

section, the FMV calculation begins with the price at which the goods are sold or offered for sale in the foreign market. Section 1677(14)(A) further specifies that a qualifying price must be one that was offered to *all purchasers*. Therefore, Zenith concludes, discounts and rebates can only enter the FMV calculation if they are available to all purchasers. The subject discounts and rebates admittedly were not offered to all. Although the CIT opined that Zenith's interpretation of the statute is a plausible one, if correctly rejected Zenith's argument, again, on the basis of this court's decision in *Smith Corona*. On that point, it was held that discounts and rebates were properly deductible from FMV as "differences in the circumstances of sale." *Smith Corona, supra*, at 1580. Under § 1677b(a)(4)(B), an adjustment arising from a difference in circumstances of sale does not depend on availability to all purchasers. *See* 606 F. Supp. at 701.

Unlike the "ESP offset" issue, which Zenith concedes was decided by the court in *Smith Corona*, Zenith argues that *Smith Corona* did not decide the "differences in circumstances of sale" issue, which, it says, was not briefed by the parties in that case. Even though the court in *Smith Corona* clearly upheld the making of adjustments for rebates on the FMV side of the equation, Zenith maintains that the parties in that case focused only on the issue of whether the rebates were "directly related" to the sales, and did not otherwise challenge their deductability. Judge Watson was correct, however, in ruling that the question *was* necessarily decided in *Smith Corona*. The result reached by the court is clear, and resolution of the threshold question of whether adjustments for rebates could be made under § 1677b(a)(4)(B) was a necessary predicate to the court's analysis of the "directly related" issue. Moreover, we note that Zenith Radio Corporation (one appellant here) filed a brief as *amicus curiae* in the *Smith Corona* appeal, in which Zenith argued that the discounts or rebates there involved could not give rise to difference in circumstances of sale adjustments.[4] In any event, the issues revolved by a court are defined by the facts in the case and the law applied; they are not necessarily limited to those briefed by the parties.

The questions presented in this appeal are controlled by this court's decision in *Smith Corona*. Because Judge Watson correctly interpreted and applied that precedent to the facts of the present case, we affirm.

AFFIRMED

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[4] That Zenith argued the issue in the prior case is not controlling on our decision here. The authority cited by International Brotherhood of Electrical Workers strongly supports the proposition that the filing of an amicus brief is insufficient to bind a nonparty to the result of a proceeding. However, that principle simply has no application here, where *stare decisis*, not *res judicata*, is implicated. Zenith's amicus brief is noted simply as another indication that the issue was one which was present in *Smith Corona* and necessarily ruled on.

(Appeal No. 85-2271)

NORTH AMERICAN FOREIGN TRADING CORP., APPELLANT *v.* UNITED STATES, APPELLEE

James Caffentzis, Fitch, King & Caffentzis, of New York, New York, argued for appellant.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of Department of Justice, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General *David M. Cohen,* Director and *Jerry P. Wiskin.*

Appealed from: United States Court of International Trade.

Judge RESTANI.

(Appeal No. 85-2271)

NORTH AMERICAN FOREIGN TRADING CORP., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided February 10, 1986)

Before BALDWIN, *Circuit Judge,* MILLER, *Senior Circuit Judge,* and NEWMAN, *Circuit Judge.*

NEWMAN, *Circuit Judge.*

This appeal is from the judgment of the United States Court of International Trade holding that certain imported LCD digital alarm and/or melody watches were properly classified under item 688.36 of the Tariff Schedules of the United States and not eligible for duty-free treatment under 19 U.S.C. § 2463(c)(1) (B) and (C). The decision is affirmed on the basis of the opinion of the Court of International Trade, *North American Foreign Trading Corp.* v. *United States,* 600 F. Supp. 226 (1984), *reh'g denied,* 607 F. Supp. 1471 (Ct. Int'l Trade 1985).

OPINION

This is not a case of retroactive imposition of duty, because the goods in question had not been finally liquidated. Executive Order 12371 by its terms applied only to watches that had not been liquidated prior to the Order. 47 Fed. Reg. 30449, 30450 (1982). No vested right to a particular classification or rate of duty or preference is acquired at the time of importation. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 318 (1932); *United States* v. *Yoshida International, Inc.,* 526 F.2d 560, 580 (CCPA 1975).

In the case before us, the watches were not eligible for the benefits of the Generalized System of Preferences (GSP) at the time of

their importation, in accordance with 19 U.S.C. § 2463(c)(1) (B) and (C). The Court of International Trade correctly held that the duty classification resulting from the decision in *United States* v. *Texas Instruments*, 673 F.2d 1375 (CCPA 1982), did not affect the GSP treatment of the watches, whether of mechanical or solid state movement. Any doubt in this regard was clarified by Executive Order 12371.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul R. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-10)

ANSALDO COMPONENTI, S.P.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, WESTINGHOUSE ELECTRIC CORP., DEFENDANT-INTERVENOR

Court No. 84-9-01234

Before MORGAN FORD, *Senior Judge.*

PLAINTIFF'S MOTION FOR REVIEW OF ADMINISTRATIVE DETERMINATION UPON AN AGENCY RECORD; DEFENDANT'S CROSS-MOTION TO AFFIRM THE AGENCY DETERMINATION

[Judgment for defendant; case dismissed.]

(Decided January 17, 1986)

Coudert Brothers (Sherman E. Katz, Robert A. Lipstein, Deborah A. Lewis) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Platte B. Moring, III); Gaylin Spoonis,* U.S. Department of Commerce; for the defendant.

Steptoe & Johnson (Richard O. Cunningham, W. George Grandison, Kevin J. Brosch and *Barbara A. Pollack)* for the defendant-intervenor.

FORD, *Senior Judge:* This action contests the final results of administrative review of an antidumping finding involving *Large Power Transformers from Italy* (49 Fed. Reg. 31313, August 6, 1984), conducted by the U.S. Department of Commerce, International Trade Administration (ITA), pursuant to section 751a of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a). Before the Court is plaintiff's (Ansaldo) motion, under Rule 56.1, for Judgment Upon Agency Record. Defendant and intervenor (Westinghouse) oppose said motion and seek affirmance of the administrative review under challenge. Jurisdiction is pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581c.

A review of the extensive background of this matter is essential to its disposition and warranted under the circumstances presented in this case. In 1970, Westinghouse filed an antidumping complaint

with the Department of Treasury [1] alleging that large power transformers from six countries were being sold in the United States at less than fair value and that a U.S. industry was being injured by those sales. The class or kind of merchandise was defined as all large power transformers rated 10 MVA or above, classified under items 682.0755, 682.0765 and 682.0775 of the Tariff Schedules of the United States. After conducting an investigation, the Department of Treasury found that large power transformers from Italy were being sold at less than fair value and ordered antidumping duties assessed against such entries. 37 Fed. Reg. 11772 (June 14, 1972). Among the companies affected by the dumping order was ASGEN, an Italian manufacturer and corporate predecessor of plaintiff Ansaldo.

In the early 1970's the transformer manufacturing assets of ASGEN were merged into Italtrafo, S.p.A. On July 1, 1976, the Customs Service sent a letter to Italtrafo requesting specific information on all transformers shipped to the United States after October 22, 1971, and for all home market and third country transformers for which it had accepted orders during the time period covered by dates of purchase of the United States units. On April 1, 1977, Italtrafo reported it had concluded only one contract with a United States customer since 1972, a 1973 order placed by Bonneville Power Administration (BPA I), and stated that records on identical or similar units ordered by third countries or by domestic customers could not be located. As a result, the Customs Service requested that Italtrafo supply information to enable it to appraise BPA I on the basis of constructed value.

On March 12, 1979, the U.S. Embassy in Rome notified the Customs Service of two Italtrafo transformer sales in 1974 to an importer in Puerto Rico. The Customs Service proceeded to request all pertinent information from Italtrafo during the period covering the Puerto Rican sales. Concurrent with this inquiry, the Customs Service determined that, as other Italtrafo transformers had been sold in Italy and to third countries, constructed value would not be an appropriate basis for appraisal of the U.S. entries. On November 15, 1979, Italtrafo provided information on the two 1974 sales in Puerto Rico and three home market sales.

Following the transfer of authority for administering the antidumping laws from the Treasury Department, the Commerce Department, in March, 1980, initiated a section 751(a) review of Large Power Transformers from Italy. On August 13, 1980, Commerce sent Italtrafo an antidumping questionnaire covering the period September 1, 1977 through June 30, 1980. A reply was requested within thirty days, and Italtrafo was cautioned that any undue delays or lack of response could result in the agency's proceeding on the basis of best information available.

[1] Prior to the enactment of the Trade Agreements Act of 1979, the Department of Treasury had responsibility for the administration of U.S. antidumping duty laws.

On April 14, 1981, counsel for Italtrafo entered a notice of appearance in connection with the administrative review and informed Commerce that Italtrafo had become a division of Ansaldo, S.p.A. On May 19, 1981, more than nine months after the initial request for information by Commerce, counsel for Ansaldo submitted information concerning the 1973 BPA I sale and certain third country sales in 1973–74. No information or data on home market sales was contained in the submission. Ansaldo maintained it made no home market sales to unrelated purchasers within the meaning of 19 C.F.R. § 353.22(b) since all home market customers were related to Ansaldo through a complex chain of government ownership. Instead, Ansaldo argued the review should proceed on the basis of third country sales. A subsequent submission provided a list of Ansaldo's home market and third country customers for the 1972–74 period, but contained no price information and offered no explanation of the relationship between Ansaldo and its home market customers.

On July 1, 1981, Commerce requested information from Ansaldo for the period July 1, 1980 to May 31, 1981, including information on shipments entered before these dates if not previously supplied, and requested a response within thirty days. Three months later, on October 5, 1981, Ansaldo reported it had made no U.S. sales during the period covered by the questionnaire and provided no home market information.

Commerce published a notice of preliminary results of administrative review on April 13, 1982. This notice covered the period from May 2, 1974 through June 10, 1980. The notice stated the ITA was postponing appraisement pending receipt of additional information from Ansaldo. In written comments to the preliminary results, submitted on May 12, 1982, Ansaldo asserted that "the Department has had since June 9, 1981, a complete listing of *all* Ansaldo/Italtrafo sales of *all* markets, *home* and export, for the period of time the Department deemed relevant."

On June 17, 1982, Commerce requested information from Ansaldo for the period June 1, 1981 to May 31, 1982. Again, Commerce sought information on shipments entered before these dates if not furnished in a previous response. Similarly, the questionnaire requested a reply within 30 days and cautioned that undue delay or insufficient response could result in the agency's use of the best information available. On September 22, 1982, Ansaldo, as in the preceding review, reported no sales for the period covered by the questionnaire.

Ansaldo was notified, on September 15, 1982, that the ITA has not resolved the issue of whether home-market sales or third country sales would be used to determine foreign value. Ansaldo was requested to submit further data on home market sales, even if the sales were between related parties. In response, Ansaldo argued that all its home-market sales were to related parties. Ansaldo con-

tended the only comparable transformer sales were of units with a rating of 100 MVA or higher, and that all home market sales in this category were to related parties. Ansaldo did submit data for home-market sales for the 1972–74 period, but limited its submission to the category of sales it deemed comparable.

On February 25, 1983, Commerce advised Ansaldo its response had been inadequate insofar as it related to data on all transformers with a rating of 10 MVA or above. In addition Ansaldo should have provided sales information for the periods subsequent to 1974. Ansaldo, on March 11, 1983, submitted a list of home-market sales for the period 1975–79, but the listing did not include the price information necessary for Commerce to analyze price comparability. The ITA casehandler notified Ansaldo, on March, 1983, that its submission was deficient and Commerce was proceeding on the basis of best information available.

Twice thereafter, on April 8 and again on April 22, 1983, Commerce requested more detailed information on specific home-market sales from Ansaldo. A deadline of May 9, 1983 was extended to July 8, 1983. In the interim, Commerce announced it had established a procedure for selecting home-market units for comparison with units sold to the United States.

Ansaldo's reply to Commerce on July 7, 1983, stated, in part:

> As the information requested * * * cannot legally serve as a basis for the Department's administrative review, requiring that such information be developed by Ansaldo and provided to the Department would impose an unreasonable and unnecessary burden on the company.

Commerce continued to obtain information concerning U.S. imports of transformers sold by Ansaldo from both the Customs Service and Westinghouse. At the same time, Commerce commenced a large-scale study to refine its methodology for use in analyzing U.S. price and foreign market value in all the administrative reviews of large power transformers. The ITA wrote letters, received briefs, and conducted hearings involving all the parties in the transformer proceedings. After analysis of the information received, Commerce, on December 14, 1983, announced the methodology it would use for its determinations and initiated a revised preliminary review of transformers sold by Ansaldo.

By letter dated December 12, 1983, Commerce indicated to Ansaldo its intention to review the four Ansaldo/Italtrafo sales to the United States: BPA I, the two sales in Puerto Rico, and another sale to the Bonneville Power Administration in 1979, BPA II. The agency outlined the information it had received on the first three sales and noted it had received no information on the 1979 BPA II transformer sale. Specific information was requested for a number of Ansaldo home market sales deemed similar to the U.S. sales, and Ansaldo was invited to submit information on other sales it deemed comparable. The ITA had decided that sales between Ital-

trafo and its customers in the home market were sales between unrelated parties in light of the relationship between them. Ansaldo was asked to provide the requested information no later than December 30, 1983, and cautioned that:

> We will not accept partial submissions and failure to provide * * * complete information may result in our not using other information submitted.

On January 10, 1984, counsel for Ansaldo requested a two-month extension of time to prepare a response to the Commerce letter of December 12, 1983. The ITA reply to this request indicated the information was past due and that failure to submit the information by January 27, 1984, would result in Commerce using the best information otherwise available to complete the review.

The information sought from Ansaldo was not provided by the January 27, 1984 deedline. On March 9, 1984, Commerce supplied Ansaldo with an advance copy of the Federal Register notice to be published March 16, 1984. The notice stated:

> Italtrafo failed to provide an adequate response to requests for information. For this firm the Department used the best information available to determine the assessment and estimated antidumping duties cash deposit rates.

A disclosure conference was held on March 19, 1984, at the request of counsel for Ansaldo. At that meeting, the ITA explained the best information available was derived from three sources: (1) information obtained during the Treasury Department's fair value investigation; (2) information provided by the petitioner, Westinghouse; and (3) information supplied by the U.S. Customs Service.

Commerce scheduled a hearing on the revised preliminary results for May 8, 1984, again at Ansaldo's request. Prior to the hearing, Ansaldo submitted documents which, for the first time, provided the contract and specifications for the 1979 BPA II transformer sale. At the hearing Ansaldo accepted some of Commerce's margin calculations while objecting to others and requesting certain additional adjustments.

After considering Ansaldo's objections and comments, the ITA consulted a technical expert on the BPA II unit and the Italian home market unit selected for comparison on the best information available analysis. The technical expert confirmed that data obtained directly from the Bonneville Power Administration substantially corroborated the information submitted to Commerce by Westinghouse in its March 24, 1983 best information submission.

In the final results of administrative review of *Large Power Transformers from Italy,* 49 Fed. Reg. 31313 (August 6, 1984), the ITA declined to make several of the adjustments proposed by both Ansaldo and Westinghouse but submitted after publication of the revised preliminary results. Ultimately the U.S. Customs Service was instructed to assess dumping duties and require a cash deposit

of estimated antidumping duties, at the rate specified by Commerce,[2] on entries of large power transformers manufactured by Ansaldo. In defending its use of the best information available, the agency stated, at Comment 1:

> The statute and regulations provide for the use of best information otherwise available in the context of investigations and section 751 reviews. We must resort to use of best information otherwise available when a party refuses or is unable to supply the Department with adequate information in a timely manner. We agree with Italtrafo that the Department is not required to rely exclusively on information supplied by the petitioner; in fact, we did not rely solely on information provided by Westinghouse. Here, we used certain information provided by the Treasury Department during the fair value investigation in this case and other information provided by the petitioner and the Customs Service. We did not use new information submitted by Italtrafo after publication of the revised preliminary results. Our refusal to use Italtrafo's information is based on Italtrafo's failure to submit adequate information in a timely manner in this review. The fact that the Department's regulations do not specify absolute time limits for submission of information does not nullify the Department's authority to refuse to use selected new information submitted after publication of preliminary results of our review. Clearly the Department, which must make a determination on the administrative record, must, at some time prior to a final determination, establish a point at which information submitted by parties can no longer be considered for purposes of reaching that final determination. Otherwise, we could not fully and properly take into account all the information submitted, or ensure a reasonable opportunity to comment by all interested parties. Parties could effectively delay and frustrate the review process by repeated, untimely piecemeal submissions.
>
> Further, the Department must be able to use the best information otherwise available when a respondent chooses to provide only selected new information at a time so late in the review process that its consideration would cause serious delay and expense to the Department and interested parties. Despite repeated requests, Italtrafo did not furnish the requested information until one week before the hearing, and then furnished only selected new information to supplement the Department's best information.
>
> Accordingly, the Department has properly declined to take such information into account. Specifically, the Department has not considered new information submitted concerning physical characteristics of the transformers, testing, supply of oil, escalation payments, shipment dates, warranties, payment schedules, and packing expenses.

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[2] Commerce determined the BPA I unit and the two units sold in Puerto Rico had been sold at less than fair value by a margin of 9 percent, and the BPA II unit had been sold at less that fair value by a margin of 92.47 percent.

It is from this determination and agency record that plaintiff presently moves for judgment under Rule 56.1.

Plaintiff has challenged the Commerce determination of the dumping margin with respect to the BPA II transformer sale covered by the third review period. Ansaldo attacks the final results of administrative review on four bases: (1) Commerce erred when it determined Ansaldo and its principal home-market customer (ENEL) were unrelated; (2) Commerce's calculation of foreign market value by reference to an Ansaldo sale to ENEL was erroneous as a matter of law and unsupported by substantial evidence on the record; (3) Commerce acted arbitrarily and capriciously, and not in accordance with law, when it rejected information submitted by Ansaldo after publication of the preliminary determination; and (4) the refusal of Commerce to verify the information submitted by Ansaldo was incorrect as a matter of law.[3]

Defendant and intervenor, Westinghouse, oppose plaintiff's motion on several grounds. Defendant maintains Ansaldo refused to produce information in a timely manner and the ITA thus properly refused to consider plaintiff's submissions after publication of the revised preliminary results. Consequently, defendant argues, the ITA acted in accordance with law in reaching its determination of final results on the basis of the best information available. Westinghouse augments defendant's position and argues further that home market sales to ENEL were properly used in determining the foreign market value for Ansaldo transformers.

As framed by plaintiff, the principal issue presented by this review is the question of whether related party sales in the home-market should be used in determining foreign market value in an administrative antidumping proceeding. While this premise is not determinative in the outcome of this case, its importance merits elucidation, if not resolution, in the present analysis.

Although certain conclusions can be drawn from the record of this proceeding, it is significant that, at this late date, the exact nature of the relationship between Ansaldo (and its predecessor, Italtrafo) and ENEL, Ansaldo's principal home-market customer, remains unclear. Ansaldo, formerly Italtrafo, is controlled by Finmeccanica, S.p.A., which in turn is held by the Institute for Industrial Reconstruction (IRI). IRI is owned by the Italian Government. ENEL, Italtrafo's major purchaser, is the state electric utility and is administered by the Italian Ministry of Industry.

During the course of the underlying review, plaintiff submitted statements which, if accepted as fact, outline a pattern of common ownership and control between Italtrafo and ENEL. Both companies were financially controlled, under various entities, by the Italian Government. There was no competitive bidding between Ansaldo and other home-market manufacturers for sales to ENEL.

[3] The "best information rule" is an explicit exception to the verification requirement. 19 U.S.C. § 1677e(a).

Future contracts were allocated, and prices were established, on a predetermined basis. Taken together, plaintiff's statements allege a related party relationship between Italtrafo and ENEL within the meaning of 19 CFR § 353.22(b) and section 771(13) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(13).

Under 19 CFR § 353.22(b), sales between related parties "ordinarily will not be used in the determination of foreign market value unless such sales are demonstrated to the satisfaction of the Secretary to be at prices comparable to those at which such or similar merchandise is sold to persons unrelated to the seller."

A dispute concerning whether to use related party home-market sales in determining foreign market value ordinarily arises in a different context. It is usually the domestic petitioner who objects to the use of such data in agency formulations. Related party home-market sales tend to be lower in price because related companies generally decrease prices to each other to the advantage of the principal entity. The present situation reflects the opposite scenario. Westinghouse seeks inclusion of the related party home-market sales data, alleging Ansaldo uses home-market sales at very high prices to subsidize exports to the United States at sharply lower prices. For its part, Ansaldo maintains its relationship with ENEL permitted Ansaldo to charge artificially high, nonmarket prices to ENEL in order to permit the government of Italy, through its various divisions and holdings, to implement national and regional social policies.[4]

The respective parties have advanced several arguments involving the use of related party home-market sales data in the antidumping schema. However, a definitive resolution of this issue need not be reached in the case at bar. Instead, the Court is compelled to resolve this matter on a more fundamental basis, the grounds for which are clearly evident upon review of the administrative record.

Under 19 U.S.C. § 1673, if the price for goods in the United States is less than the foreign market value of the goods, the difference between the two is the margin of dumping in the United States and antidumping duties must be paid to offset it. The determination of foreign market value begins with price in the producer's home market. 19 U.S.C. § 1677b(a)(1)(A). If home-market sales are inadequate for comparison, the foreign market value can be determined using either sales to third countries other than the United States (19 U.S.C. § 1677b(a)(1)(B)) or a non-price method known as constructed value, in which the value is determined from the costs of materials, the cost of production, general expenses and profit. 19 U.S.C. § 1677b(a)(2) and (e). *Zenith Corp.* v. *United States*, 9 CIT ——, Slip Op. 85–30 (March 13, 1985).

[4] For example, Ansaldo claims ENEL was willing to pay a premium for transformers manufactured in southern Italy in order to alleviate regional unemployment.

The U.S. Department of Commerce, specifically the ITA, is charged, under the Trade Agreements Act of 1979, with the administration of the antidumping laws. In conducting reviews under section 751(a), the ITA requests pertinent information from those who will be affected by the results of the review. In order to comply with the requirements of the statute, the ITA provides participants a specified period in which to provide the information requested. After this period expires, the ITA must refuse to consider untimely submitted information and instead rely on the best information available. *Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556 (1984); *UST, Inc.* v. *United States,* 9 CIT ——, Slip Op. 85-78 (July 31, 1985).

19 U.S.C. § 1677e(b) provides:

> (b) Determinations to be made on best information available. In making their determinations under this title [19 USCS § 1671 et seq.], the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

Review of the administrative record reveals a consistent pattern of unresponsive, insufficient, and untimely submissions by Ansaldo to repeated attempts by Commerce to elicit information pertinent to the underlying reviews. Based on the evidence before the Court, Ansaldo's failure to furnish the information requested completely justified the Commerce Department's use of the best information available under 19 U.S.C. § 1677e(b). Accordingly, for the reasons set forth below, the Court finds for the defendant and affirms the results of the administrative review.

As previously noted, plaintiff has limited its challenge to the dumping margin determination pertaining to the 1979 BPA II transformer sale. Commerce first learned of the BPA II sale from Westinghouse in February of 1980. Thereafter, beginning on August 13, 1980, Commerce requested, on three separate occasions, information pertinent to the BPA II and any other sales during the relevant periods. In response to these requests, Ansaldo asserted it made no home-market sales to unrelated parties. Ansaldo did submit (untimely) information on the 1973 BPA I sale and certain third country sales in 1973-74. However, neither home-market sales data nor price information of any kind was provided in these submissions. Finally, on May 1, 1984, Ansaldo provided information intended to supplement Commerce's best information available determination on the BPA II sale. As the revised preliminary results of administrative review had already been published (March 16, 1984), Commerce rejected Ansaldo's submission as untimely and instead relied on the data accumulated on the basis of best information available.

The administrative record indicates Ansaldo was either conspicuously uncooperative with Commerce during the course of the underlying reviews or laboring under severe misconceptions as to the administrative procedure involved in the administration of U.S. antidumping law. Initially, the Court observes that neither the Treasury Department nor Commerce ever received a response from Ansaldo by the requested date. This fact, in and of itself, provides sufficient basis to sustain Commerce's use of the best information available. Section 751 reviews are conducted and must be completed within specific time-frames. The procedures involved in these reviews make it imperative the requested information be submitted within a period that allows Commerce sufficient time for adequate analysis and comment while still meeting statutory deadlines. As in the present case, when the information requested is not timely provided, Commerce has no choice but to proceed with its review and reach its determinations using the best information available. *UST, Inc.* (supra).

Of equal concern to the Court is plaintiff's propensity to draw conclusions of both factual and legal significance on matters properly within Commerce's domain. The administrative record discloses several instances in which Ansaldo chose not to submit the information requested because Ansaldo had concluded such information could not serve as a basis for Commerce's administrative review. It was Ansaldo that concluded all its home-market customers were related parties and thus refused to submit home-market sales data. It was Ansaldo that concluded the administrative review should proceed on the basis of third country sales. It was Ansaldo that concluded the only comparable transformer sales were of units with a rating of 100 MVA or higher when Commerce requested information on units with a rating of 10 MVA or higher. Finally, it was Ansaldo that concluded furnishing home-market and U.S. sales price data imposed an "unreasonable and unnecessary burden on the company." Such conclusions, reached unilaterally with no foundation in statute or administrative practice, are inherently flawed. It is Commerce, not the respondent, that determines what information is to be provided for an administrative review.

The net effect of Ansaldo's failure to submit the requested information, based on its own conclusory assertions, was to preclude Commerce's analysis and consideration of the merits of Ansaldo's arguments. Ansaldo provided no information upon which Commerce could have determined the U.S. price of the BPA II transformer. Similarly, the ITA had insufficient information to determine the foreign market value of BPA II, which necessarily begins with the price in the producer's home market. Although Ansaldo did provide third country sales data for the review period covering the BPA I sale and the two sales in Puerto Rico, the data submitted for the period covering the BPA II sale was inadequate, and

Commerce was unable to determine the foreign market value using third country sales methodology. Additionally, Ansaldo provided no independent evidence of the exact nature of its relationship with its home-market customers. In the event Commerce had accepted the argument that Ansaldo was "related" to its home-market customers, Ansaldo provided no home-market sales data which Commerce could have used in an evaluation of price comparability of sales to related and unrelated parties. These facts indicate a failure, on Ansaldo's part, "to produce information requested in a timely manner and in the form required", and under the circumstances Commerce's resort to the best information available was entirely justified. 19 U.S.C. § 1677e(b).

In so ruling, the Court seeks to encourage the cooperation of participants to the reviews conducted at the administrative level. The relationship between administrative participants and the agency involved ought not be adversarial in nature. This is particularly true where, as in this case, the role of the agency is administrative rather than quasi-judicial. Indeed, as the result in this case demonstrates, the information sought by the agency must be provided in order to assure its full consideration before both the agency and the reviewing court. The Court is aware that information sought in section 751 reviews may have a significance wholly independent from its proffered use, and respondents may be reluctant to share material they deem irrelevant to such reviews. However, the consequence of failing to provide adequate and timely information is to leave Commerce with no alternative but to proceed with its review relying upon the best information available. Simply stated, to ensure the agency's full consideration of their position and rights under the antidumping law, respondents must comply with procedural guidelines and thereby afford themselves the opportunity to respond and participate in the review in a meaningful manner.

Accordingly, the Court finds the Commerce determination to conduct the review using the best information available to be fully supported by substantial evidence on the record and otherwise in accordance with law. The final results of the administrative review involving *Large Power Transformers from Italy* (49 Fed Reg. 31313, August 6, 1984) are therefore affirmed, and this action is hereby dismissed. Judgment will be so entered.

(Slip Op. 86-11)

UNITED STATES, PLAINTIFF *v.* ROCKWELL INTERNATIONAL CORP., DEFENDANT

Court No. 82-12-01744

Before DICARLO, *Judge.*

Defendant moves for summary judgment on both charges in action alleging merchandise was entered (1) by means of material and false statement and (2) by means

of material omissions in negligent violation of 19 U.S.C. § 1592. Plaintiff cross-moves for summary judgment on charge alleging entries based upon material and false statement.

Defendant's motion for summary judgment on material omissions charge is precluded by the existence of a genuine issue of material fact. On the material and false statement charge, the Court holds that defendant filed a false statement and that the statement is material within the meaning of section 1592. A genuine issue of material fact precludes a finding on the question whether the material and false statement was filed as a result of negligence.

[Defendant's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted in part.]

(Decided January 22, 1986)

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*A. David Lafer*) for plaintiff.

Glad & Ferguson (Edward N. Glad) for defendant.

Memorandum Opinion and Order

DiCarlo, *Judge:* The United States brings this action against defendant Rockwell International Corporation (Rockwell) to recover a civil penalty for alleged negligent violations of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982). The complaint alleges that 223 entries of nickel cadmium batteries imported from Mexico over a one year period were entered by means of material and false statement and by means of material omissions.

Rockwell moves under Rule 56 of the Rules of this Court for summary judgment on material and false statement and material omission charges. The government opposes Rockwell's motion and cross-moves for summary judgment on the material and false statement charge. Rockwell's motion is denied and plaintiff's motion is granted in part.

Uncontroverted Facts

The following facts are not in dispute:

Beginning in late 1977, Rockwell imported at Calexico, California, pin ball machine control boards assembled in Mexico, each containing a small nickel cadmium battery. The control boards were imported under item 807.00, Tariff Schedules of the United States (TSUS), as "[a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States * * *." Item 807.00, TSUS, imposes a duty upon the full value of the imported article, less the cost or value of United States components. The entries listed in the complaint contained a total of 51,995 batteries, each having a dutiable value of $2.30.

The estimated duties deposited by Rockwell in connection with the control board entries were calculated on the basis of an estimated declaration of assembly costs filed by Rockwell with the United States Customs Service (Customs) on November 21, 1977. The estimated declaration listed the components of the control

boards and indicated whether they were United States or foreign origin.[1] The declaration listed the batteries as components of United States origin. The batteries had actually been manufactured in Mexico and sold to defendant by the General Electric Company.

Each battery was marked "assembled in Mexico." Rockwell never physically inspected the batteries prior to their exportation to Mexico for assembly into the control boards. Rockwell never received, or does not recall receiving, an executed origin of manufacturing declaration from General Electric.

The country of origin of the batteries was not made known to Customs until on or about March 27, 1979, when Rockwell filed a revised estimated declaration of assembly costs in which the batteries were shown to be of foreign origin.[2]

Discussion

The complaint alleges that the batteries were entered in violation of 19 U.S.C. § 1592(a)(1)(A)(i) by means of material and false statements on the estimated declaration of assembly costs and entry documents. The complaint also alleges that the batteries were entered by means of material omissions in violation of section 1592(a)(1)(A)(ii) on the grounds than the batteries were dutiable separately from the control boards and should have been listed on a separate line on the entry papers.

On its motion for summary judgment, Rockwell argues (1) the action is barred by the applicable statute of limitations because it was commenced more than five years after the filing of the estimated declaration of assembly costs on November 21, 1977, (2) the entry documents contain no false statements and the false statement contained in the declaration of estimated assembly costs is not material within the meaning of section 1592, (3) the entries were not made by means of material omissions since the control boards and batteries were entireties, and (4) the false statement was not filed as a result of negligence.

The government opposes Rockwell's motion of summary judgment on the material and false statement charge and the material omissions charge, and cross-moves for summary judgment on the material and false statement charge. On its cross-motion for summary judgment, the government argues (1) the timeliness of the action is governed by the entry dates, (2) Rockwell's motion for

[1] 19 C.F.R. § 10.24 (1977) provides that in connection with the entry of assembled articles claimed to be subject to exemption under item 807.00, TSUS, the assembler of the articles must file a declaration setting forth the components which are products of the United States. The declaration must be accompanied by an endorsement by the importer attesting to the correctness of the information provided on the declaration. *Id.* § 10.24(2). 19 C.F.R. § 10.24(g) states:

Responsibility of correctness. Subject to the civil and criminal sanctions provided by law for false or fraudulent entries, the importer has the ultimate responsibility for supplying all information needed by the Customs Service to process an entry, and for the completeness and truthfulness of such information. If certain information cannot be supplied by the assembler, it must be provided by the importer.

[2] Rockwell does not claim to have disclosed the circumstances of the alleged violations in accordance with the prior disclosure provisions of section 1592. *See* 19 U.S.C. § 1592(c)(4) (1982).

summary judgment on the material omissions charge is precluded by the existence of a genuine issue of material fact, (3) the entries were made by means of a false statement because the value of the batteries was listed as nondutiable in the estimated declaration of assembly costs, (4) the false statement is material, and (5) Rockwell was negligent in filing the material and false statment.

The timeliness of this action is governed by 19 U.S.C. § 1621 (1982), which in relevant part states:

> That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed.

Under this section, the five year limitations period begins to run upon the commission of the alleged violation of section 1592. Section 1592 prohibits, *inter alia*, the entry of merchandise into the commerce of the United States by means of any document which is material and false. 19 U.S.C. § 1592(a)(1)(A). Therefore, the timeliness of the action is determined not be the date on which the estimated declaration of assembly costs was filed, but rather by the dates on which Rockwell entered the merchandise.

This action is timely since the entries which are the subject of the complaint occurred less than five years prior to commmencement of the action.

With respect to Rockwell's motion for summary judgment on the material omissions charge, both parties have submitted affidavits as to whether the batteries were soldered into the control boards. This question is material to whether the control boards and batteries were entireties, and the entireties issue is material to whether the batteries were negligently omitted from a separate line on the entry documents. Since the affidavits raise a genuine issue of material fact, Rockwell's motion for summary judgment on the material omissions charge is denied.

The Court next turns to the parties' cross-motions for summary judgment on the government's allegation that Rockwell, by negligence, entered the batteries by means of a material and false statement. Rockwell admits that it filed a document containing a false statement with Cutoms, saying: "The only false statement that appears in any paper filed with U.S. Customs is contained in the initial estimated declaration of dutiable costs filed with U.S. Customs by defendant on November 21, 1977, wherein the recharageable batteries were stated to be of U.S. origin when in fact these batteries were foreign." [3] Since estimated duties on the entries were calculated based upon the estimated declaration of assembly costs, and the estimated declaration listed the battery components as nondutiable, the batteries were entered by means of false statement.

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[3] Defendant's Memorandum in Support of its Motion for Summary Judgment, at 1.

The Court now addresses whether genuine issues of material fact preclude resolution of the questions (1) whether the false statement was material, and (2) whether the false statement was negligently filed.

A question of materiality involves a legal issue to be decided by the Court. *See, e.g., Sinclair* v. *United States,* 279 U.S. 263, 298–99 (1929); *United States* v. *Ackerman,* 704 F.2d 1344, 1347, *reh'g denied,* 719 F.2d 1283 (5th Cir. 1983). "In determining whether a false statement is material, the test is whether it has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *United States* v. *Krause,* 507 F.2d 113, 118 (5th Cir. 1975) (citing *Blake* v. *United States,* 323 F.2d 245, 246 (8th Cir. 1963); *Gonzales* v. *United States,* 286 F.2d 118, 122 (10th Cir. 1960)). The Court also notes that in 1984 Customs issued a definition of materiality under section 1592, which states in part: "A document, statement, act, or omission is material if it has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty * * *." 19 C.F.R. App. B to Pt. 171 (1984).

In this case, the Court holds that the measurement of the materiality of the false statement is its potential impact upon Customs determination of the correct duty for the imported merchandise. *Cf. United States* v. *Taylor,* 574 F.2d 232, 235. *reh'g denied,* 576 F.2d 931 (5th Cir.), *cert. denied,* 439 U.S. 893 (1978). Under this standard, a statement is material which identifies components to be of United States origin and nondutiable, when in fact the components are foreign and had an aggregate dutiable value of over $119,000.

Rockwell argues its false statement is not material because the only purpose for listing country of origin data is to arrive at a sum that represents the estimated dutiable cost. The Court disagrees. While the dutiable values of components listed in estimated declarations may reasonably be expected to represent only estimations, *see* 19 C.F.R. § 10.21 (1977), the primary purpose of filing documentation in connection with foreign assembly operations is to ascertain which components are dutiable and which are not.[4] Although Rockwell argues that the false statement is not material because it overestimated its duties on the control boards, section 1592 is expressly applicable "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby." 19 U.S.C. § 1592(a)(1).

The final issue is whether there exists a genuine issue of material fact on the question of negligence. 19 U.S.C. § 592(c) states in part:

> if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator

[4] *See* 19 C.F.R. § 10.24 (1977); *supra,* note 1.

> shall have the burden of proof that the act or omission did not occur as a result of negligence.

Since the act alleged to constitute a violation of section 1592 has been established, section 1592(c)(4) places upon Rockwell the burden of proving that the filing of the false statement did not occur as a result of negligence.

Rockwell contends that it was not negligent since it adopted reasonable procedures in order to comply with Customs requirements applicable to foreign assembly operations. Rockwell states that its internal regulations require the furnishing of country of origin certificates to suppliers so that accurate country of origin information can be received. Rockwell argues that in this case it did not receive country of origin certification, but since its supplier was located in the United States, it could reasonably assume that the batteries were of United States origin.

The Court does not comment on the merit of Rockwell's contentions, but finds that it has raised a genuine issue of material fact on the question of negligence.[5] "Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Albert* v. *Kevex Corp.*, 729 F.2d 757, 762, *reh'g granted,* 741 F.2d 396 (Fed. Cir. 1984). Summary judgment on the question of negligence is denied.

Conclusion

Rockwell's motion for summary judgment on the material omissions charge is precluded by the existence of a genuine issue of material fact.

On the material and false statement charge, Rockwell's motion for summary judgment is denied and the government's cross-motion for summary judgment is granted in part. The Court finds that Rockwell filed the false statement giving rise to the alleged violations, and holds that the false statement is material within the meaning of section 1592. Under Rule 56(e) of the Rules of this Court, the uncontroverted facts set forth in this opinion shall be deemed established with respect to the triable issue of negligence. A conference will be held within ten days to discuss the manner in which the action shall proceed. So ordered.

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[5] The Court is aware of no case which defines negligence under section 1592. However, negligence has been defined in the context of another federal penalty statute as "lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances." *Marcello* v. *Comm'r,* 380 F.2d 499, 506 (5th Cir. 1967) (penalty of negligence underpayment of taxes, § 6653(a) of the Internal Revenue Code of 1954, [current version at 26 U.S.C. § 6653(a) (1982)]), *cert. denied,* 389 U.S. 1044 (1968); *see Zmuda* v. *Comm'r,* 731 F.2d 1417, 1422, (9th Cir. 1984). In 1984, a definition of negligence under section 1592 was published in an appendix to the Customs Regulations. Customs definition states in part: "As a general rule, a violation is determined to be negligent if it results from the the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct." 19 C.F.R. App. B to Pt. 171 (1984).

(Slip Op. 86-12)

WILLIAM D. BAILEY & FRANK WASSON, D/B/A BAILEY & WASSON TRADING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-10-01437

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff contended that Rolex watches imported from Switzerland and Hong Kong were improperly appraised on the basis of export value, and should have been appraised on the basis of United States value.

Held: Plaintiff has not introduced evidence to show that the merchandise was improperly appraised, and, therefore, failed to rebut the presumption of correctness that attaches to the government's determination.

[Judgment for defendant.]

(Decided January 23, 1986)

John R. Heard, at the trial and on the brief, for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Jerry P. Wiskin,* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper valuation, for customs duty purposes, of certain Rolex watches and watch bracelets imported from Switzerland and Hong Kong. The watches are comprised of three components: the watch case, the watch movement, and the watch band or strap.

The Customs Service appraised the merchandise on the basis of export value, in accordance with section 402(b) of the Tariff Act of 1930, 19 U.S.C. § 1401a(b) (1976) (amended 1979). Plaintiff contends that export value was an improper basis of valuation, and that the imported merchandise should have been appraised on the basis of United States value, pursuant to 19 U.S.C. § 1401a(c). Plaintiff also contends that the valuation was based on an inappropriate allocation of value among the various components of the imported merchandise.

The Tariff Act defines export value as:

> the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

Tariff Act of 1930 § 402(b), 19 U.S.C. § 1401a(b) (1976) (amended 1979).

The portion of the Act which pertains to United States value provides that:

> For the purposes of this section, the United States value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal market of the United States for domestic consumption, packed ready for delivery, in the usual wholesale quantities and in the ordinary course of trade, with allowances made for—
>
> (1) any commission usually paid or agreed to be paid, or the addition for profit and general expenses usually made, in connection with sales in such market of imported merchandise of the same class or kind as the merchandise undergoing appraisement;
>
> (2) the usual costs of transportation and in surance and other usual expenses incurred with respect to such or similar merchandise from the place of shipment to the place of delivery, not including any expenses provided for in subdivision (1) of this subsection; and
>
> (3) the ordinary customs duties and other Federal taxes currently payable on such or similar merchandise * * * for which vendors at wholesale in the United States are ordinarily liable.

Tariff Act of 1930 § 402(c), 19 U.S.C. § 1401a(c) (1976) (amended 1979).

Upon liquidation, the imported merchandise was appraised at the actual price by plaintiff. Plaintiff asserts that the United States value of the merchandise would be 39 percent of the United States retail price of the watches.

The question presented is whether, within the meaning of the pertinent statutory provisions, the proper basis for violation of the imported merchandise is export value, as determined by Customs, or United States value, as claimed by plaintiff.

After a careful examination of the evidence adduced at trial, the arguments of the parties, and the relevant case law, it is the determination of the Court that plaintiff has not overcome the presumption of correctness that attaches to the government's determination. *See* 28 U.S.C. § 2639(a)(1) (1982); *Diamax Hawaii, Ltd.* v. *United States*, 4 CIT 162, 165–66 (1982). Therefore, the valuation of the imported merchandise by the Customs Service is affirmed.

At trial, the Court heard the testimony of plaintiff's only witness, Mr. William D. Bailey, an owner of Bailey and Wasson Trading Company (Bailey & Wasson). Mr. Bailey testified that Bailey & Wasson imported Rolex watches from 1978 through 1981. Since Bailey & Wasson was not a licensed franchise dealer of Rolex watches, it could not purchase watches from Rolex's exclusive distributors. Consequently, Bailey & Wasson purchased the watches from businesses that had obtained them from an exclusive distribu-

tor. In turn, Bailey & Wasson would sell the watches to domestic retailers.

Mr. Bailey also testified that Customs' allocation of value to the watch case, movement, and band was incorrect. However, he was unable to suggest an alternative allocation, and stated that Bailey & Wasson relied on the allocations provided by the seller of the watches in Switzerland.

During the course of Mr. Bailey's testimony, plaintiff introduced five exhibits into evidence. Plaintiff's exhibits pertained to the importation of Rolex watches purchased from Bucherer Co., Ltd., of Lucerne, Switzerland, a licensed dealer of Rolex watches. One of plaintiff's exhibits consisted of an invoice for 10 watches sold by Bucherer to Bailey & Wasson. Mr. Bailey, on cross-examination, testified that the invoice provided by Bucherer did not reflect the actual price paid by Bailey & Wasson, but undervalued or understated the price actually paid for the watches. On cross-examination, Mr. Bailey also stated that Bailey & Wasson, during 1978 to 1980, resold imported watches to retail jewelers. In addition, he admitted that Bailey & Wasson was a substantial importer of watches from Hong Kong during the relevant period.

At trial, defendant introduced into evidence a copy of a request for admissions, which were deemed admitted pursuant to Rule 36 of the Rules of this Court. The admissions stated:

> 1. For each of the entries covering merchandise exportations from Hong Kong * * * the country of exportation for purposes of appraisement is Hong Kong rather than Switzerland.
> 2. At the time of exportation of the merchandise covered by the entries * * * such or similar merchandise was freely sold or offered for sale in Hong Kong for exportation to the United States.
> 3. Sales by Bucherer to Bailey & Wasson were sales to purchasers at the wholesale level.

In its post-trial brief, plaintiff devotes its entire arguments to its contention that it "encountered substantial difficulties in obtaining necessary factual information to support the exact amount of additional [duties it] paid." Hence, as an alternative to a judgment granting the relief sought, it requests post-trial discovery.

The defendant submits that plaintiff's request for post-trial discovery is without foundation in law and is improper. It also contends that plaintiff has failed to sustain its burden of proving that the appraisements were incorrect.

Plaintiff has not shown any basis for its request for post-trial discovery. In its brief, plaintiff states that "discovery was sought from the Government in this matter, without success," and that its request for documents under the Freedom of Information Act (FOIA) was denied by the Customs Service. Plaintiff's proper remedy to an objection to discovery is to move to compel pursuant to Rule 37(a) of the Rules of this Court. *See J.M. Cleminshaw & Co.* v. *City of*

Norwich, 93 F.R.D. 338, 345 n.2 (D. Conn. 1981). In its response to defendant's request for trial, plaintiff stated that it had not completed discovery, and that it would "promptly file a discovery motion." Plaintiff, however, chose not to move to compel discovery, nor did it challenge the denial of the FOIA request. Since plaintiff had ample time and opportunity before trial to develop its case, its request for post-trial discovery is denied.

Under the Tariff Act of 1930, export value is the preferred statutory basis for valuation of imported merchandise. 19 U.S.C. § 1401a(a)(1)–(4); *see, e.g., Magnesium Elektron Inc.* v. *United States*, 64 Cust. Ct. 728, 735, R.D. 11709 (1970). Moreover, it is well-established that in order to prove United States value plaintiff must first negate the existence of an export value for such or similar merchandise. *See Boyle & Co.* v. *United States*, 2 CIT 222, 225 (1981); *Glenside Steel Co.* v. *United States*, 71 Cust. Ct. 23, 32, C.D. 4466, 364 F. Supp. 1398 (1973), *aff'd*, 62 CCPA 1, C.A.D. 1133, 503 F.2d 563 (1978).

From the record, it appears that plaintiff's chief argument in attacking export value as the proper basis for valuation is that the merchandise could not be purchased directly from Rolex or its exclusive distributors, and, therefore, was not sold or offered for sale in the usual wholesale quantities. The cases, however, hold that, in certain instances, sales by wholesalers outside of the manufacturer's normal channels of distribution may be appropriate to determine the proper basis of value. *See, e.g., Maher-App & Co.* v. *United States*, 64 Cust. Ct. 598, 605–06, R.D. 11690 (1970); *Glanson Co.* v. *United States*, 31 Cust. Ct. 473, 475, A.R.D. 33 (1953); *see also United States* v. *H.W. Robinson & Co.*, 19 CCPA 274, 276, T.D. 45436 (1932). Thus, it is clear that merchandise may be offered for sale in the usual wholesale quantities by sellers other than the manufacturer or exclusive distributor of the manufacturer.

Plaintiff in this case argues that its purchases of the Rolex watches were retail purchases, and that the merchandise was not freely sold or offered for sale in the usual wholesale quantities. This argument, however, is without merit. Although plaintiff's witness sought to establish that the purchases were retail purchases, his testimony, on direct and cross-examination, shows clearly that the purchases by Bailey & Wasson were wholesale purchases. The record leaves no doubt that Bailey & Wasson purchased wholesale quantities of the watches, and, in turn, sold them to retail jewelers. The record also shows that plaintiff admitted that Bucherer's sales to Bailey & Wasson were sales "at the wholesale level." At trial, although plaintiff was given the opportunity, it was not able to refute this admission. Plaintiff's witness also stated that Bailey & Wasson was a "substantial importer" of watches from Hong Kong. Therefore, the Court finds that plaintiff purchased the imported watches in the usual wholesale quantities for exportation to the United States.

Although plaintiff is dissatisfied with the basis of appraisement of its merchandise, it has not introduced any evidence that would show that the merchandise was improperly appraised by the Customs Service. The record shows that the Rolex watches were purchased in the usual wholesale quantities for exportation to the United States, and that Bailey & Wasson resold the watches to retail jewelers. Therefore, it is the determination of the Court that plaintiff has not rebutted the presumption of correctness that attaches to the government's determination. Accordingly, the appraised values are affirmed, and the action is dismissed.

(Slip Op. 86–13)

NATIONAL JUICE PRODUCTS ASSOCIATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANT

Court No. 85–11–01611

OPINION

(Decided January 30, 1986)

[Defendant's motion to dismiss denied. Plaintiffs' motion for preliminary injunction denied. Plaintiffs' motion for declaratory relief granted in part.]

Collier, Shannon, Rill & Scott (Lauren R. Howard, Paul C. Rosenthal, Michael R. Kershow), for plaintiffs.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, *Barbara M. Epstein*, Civil Division, United States Department of Justice, for defendants.

RESTANI, *Judge:* This case involves a United States Customs Service (Customs) ruling that country-of-origin marking requirements apply to frozen concentrated orange juice and reconstituted orange juice that contain imported concentrated orange juice for manufacturing. 19 U.S.C. § 1304 (1982 & West Supp. 1985) (country-of-origin marking requirements); C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21 (Sept. 4, 1985) (Ruling No. 728557). This ruling is being challenged by plaintiffs, the National Juice Products Association (NJPA) [1] and

[1] The following is a list of the National Juice Products Association members of 1985–86:
Alcona Packing Company*
Allsun Pure Juice Corporation
American Agronomics Corporation*
B.C. Cook & Sons Enterprises
Ben Hill Griffin Citrus Company
Berry Citrus Products, Inc.*
Biaceglia Brothers Wine Company
Bordo Citrus Products Cooperative
Butland Industries, Inc.
California Citrus Producers, Inc.
Cargill Citro-America, Inc.
Caulkins Indiantown Citrus Company*
Citram, Inc.
Citrus Belle
Citrus Central, Inc.
Citrus Products, Inc.
Citrus Service, Inc.
Citrus World, Inc.
Clermont Fruit Packers, Inc.
Coca-Cola Foods

Continued

Citrus World, Inc., Coca-Cola Foods, a Division of the Coca-Cola Company, Lykes Pasco Packing Company, and TreeSweet Products, individually and as members of NJPA. Two motions are currently before the court. Plaintiffs have moved for a preliminary injunction to delay the implementation of Customs' ruling, or, in the alternative, for declaratory relief. Defendants have moved for dismissal of the case for lack of jurisdiction, and in the alternative, for judgment on the administrative record.

The controversy underlying this action began on January 16, 1985, when Customs national import specialist, Officer W.J. Springer of the New York Seaport, sent a directive to various Customs ports advising them of his opinion that orange juice products using the imported ingredient of concentrated orange juice for manufacturing (manufacturing concentrate) be marked to indicate foreign

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CTC North America
Cumberland Farms Dairy, Inc.
Delano Growers Grape Products
Dell Products Corporation
Del Monte Corporation
Dole Processed Food Company
Farmland Dairies, Inc.
Flavor Fresh Foods Corporation
Flavors From Florida*
Golden Gem Growers, Inc.
Grande Citrus Corporation
Great Northern Juice Company
Guild Wineries & Distilleries
Holiday Juice, Ltd.
Holly Hill Fruit Products Company, Inc.
Home Juice Company
H.P. Hood, Inc.
Imperial Flavors, Inc.
JB Food Industries, Inc.
Johanna Farms, Inc.
Juice Bowl, Inc.
Juice Farms Incorporated
Juice Services, Inc.
Knudsen Corporation
Kraft, Inc.
Libby, McNeill & Libby
Lincoln Foods, Inc.
Ludford Fruit Products, Inc.
Lykes Pasco Packing Company
MCP Foods, Inc.
New England Apple Products Company
Ohio Pure Foods, Inc.
Orange Company of Florida*
Paramount Citrus, Inc.
Paris Food Corporation
Parman-Kendall Corporation
Peninsular Products Company
Pepsico, Inc.
Red Creek
Riverbend Products, Inc.
Seven-Up Foods, Citrus Division
Silver Springs Citrus Cooperative
Southern Fruit Distributors, Inc.
Sucocitrico Cutrale, S.A.
Sunbase USA, Inc.
Sunkist Growers, Inc.
Sun Pac Foods, Inc.
Sun Rype Products, Ltd.
Texas Citrus Exchange
The Kroger Company
The Southland Corporation
Thomas J. Lipton, Inc.
TreeSweet Products Company
Tropicana Products, Inc.
Vie-Del Company
Vita-Pakt Citrus Products Company
Volvic (France)
Washington State Juice
Zumos Argentinos, S.A.

* These members of the NJPA are not participating in this suit.

origin. Officer Springer's opinion was based on a recent Customs determination that found country-of-origin marking requirements applicable to processed honey. C.S.D. 84–112, 18 Cust. Bull. 1106 (July 2, 1984). In his directive, Officer Springer advised Customs officers at the various ports to notify importers of manufacturing concentrate of this contemplated change in policy.

On April 22, 1985, plaintiffs requested that Customs issue a binding ruling, pursuant to 19 C.F.R. § 177.2 (1985), as to the applicability of the country-of-origin marking requirements of 19 U.S.C. § 1304 to frozen concentrated orange juice and reconstituted orange juice that contain imported manufacturing concentrate. On September 4, 1985, Customs issued a ruling in response to plaintiffs' April 22 request. C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21. Customs held that imported manufacturing concentrate is not substantially transformed in the process that converts the manufacturing concentrate into frozen concentrated orange juice or reconstituted orange juice. Consequently, Customs held that the country-of-origin certification requirements of 19 C.F.R. § 134.25 (1985) apply to final repacked orange juice products that contain any foreign manufacturing concentrate entered for consumption or withdrawn from warehouse on or after January 1, 1986. Specifically, the importer must certify to Customs either that the retail package will be properly marked with the country of origin or that the importer will notify the repacker of the marking requirements. All retail packages of orange juice subject to the ruling must be marked with either the country of origin of the manufacturing concentrate or the phrase "This product contains foreign concentrate from ————————." If the product contains concentrate from more than one foreign country, the package must list all such countries. *Id.* at 28. Customs also noted that this decision overruled a 1979 ruling, C.S.D. 80–88, 14 Cust. Bull. 865 (Aug. 17, 1979) (Ruling No. 710823), which held that the reconstitution of orange juice is a substantial transformation of the frozen concentrate. C.S.D. 85–47, 19 Cust. Bull. No. 39 at 28.

In a letter dated October 21, 1985, the NJPA requested that Customs postpone the implementation date of the September 4 ruling until January 1, 1987. The NJPA based this request on the need of the domestic orange juice industry for additional time to secure packaging in compliance with Customs' ruling and to reduce existing packaging inventory. A similar request was made by the Florida Citrus Commission and the State of Florida Department of Citrus in a letter dated October 25, 1985. Customs subsequently extended the effective date of the marking ruling from January 1 to March 1, 1986. 19 Cust. Bull. No. 50 at 15 (Dec. 11, 1985).

Plaintiffs have moved for pre-importation review of the September 4 rulings, claiming that this court has jurisdiction over the matter pursuant to 28 U.S.C. § 1581(i)(4) (1982) or, in the alterna-

tive, 28 U.S.C. § 1581(h) (1982).[2] Defendant contends that the court lacks jurisdiction under either of those provisions.

Defendant argues that this case has been brought prematurely and should only be reviewable following protest proceedings under 19 U.S.C. §§ 1514 and 1515 (1982 & West Supp. 1985); *see* 28 U.S.C. § 1581(a) (1982) (Court of International Trade jurisdiction following protest and denial). The customary and generally preferred avenue of review is the traditional protest route. In this case, however, currently plaintiffs cannot pursue section 1581(a) review. C.S.D. 85-47 will not be in effect until March 1, 1986. Therefore, plaintiffs cannot import a shipment to test the ruling at this time. In addition, under certain circumstances a plaintiff need not complete the protest procedure before bringing a civil action. One of those circumstances is when the action falls within the jurisdiction of section 1581(h).[3]

The Court of Appeals for the Federal Circuit has defined the requirements for invoking this court's declaratory judgment jurisdiction: [4]

> (1) judicial review must be sought prior to importation to goods;
>
> (2) review must be sought of a ruling, a refusal to issue a ruling, or a refusal to change such ruling;
>
> (3) the ruling must relate to certain subject matter; and
>
> (4) it must be shown that irreparable harm will occur unless judicial review is obtained prior to importation.

American Air Parcel Forwarding Co. v. *United States,* 718 F.2d 1546, 1551-52 (Fed. Cir. 1983), *cert. denied,* 104 S. Ct. 1909 (1984) (cited in *718 Fifth Avenue Corp.* v. *United States,* 7 CIT ——, Slip Op. 84-39 at 3-4 (April 13, 1984)). Since defendant challenges jurisdiction under section 1581(h), plaintiffs have the burden of demonstrating that jurisdiction exists. *718 Fifth Avenue* at 3; *Lowa, Ltd.*

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[2] As a preliminary matter, the court observes that § 1581(i) is the residual jurisdiction of this court. *United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 182-83, 687 F.2d 467, 471-72 (1982); *Ass'n of Food Indus., Inc.* v. *von Raab,* 9 CIT ——, Slip Op. 85-128 at 4 (Dec. 17, 1985); *Vivitar Corp.* v. *United States,* 7 CIT ——, 585 F. Supp. 1419, 1424-25 (1984), *aff'd,* 761 F.2d 1552, 1559 (1985). As such, it may only be invoked when other available avenues of jurisdiction are "manifestly inadequate or necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies." *Manufacture de Machines du Haut-Rhin* v. *von Raab,* 6 CIT ——, 569 F. Supp. 877, 882-83 (1983). *Accord American Ass'n of Exporters and Importers—Textile and Apparel Group* v. *United States,* 751 F.2d 1239, 1246 (Fed. Cir. 1985); *Uniroyal,* 69 CCPA at 187, 687 F.2d at 475 (Nies, J., concurring); *United States Cane Sugar Refiners' Ass'n* v. *Block,* 69 CCPA 172, 175 n.5, 683 F.2d 399, 402 n.5 (1982); *Vivitar,* 7 CIT at ——, 585 F. Supp. at 1425. Consequently, the two bases of jurisdiction asserted by plaintiffs must be addressed in reverse order from the priorities given them by plaintiffs. Section 1581(i) will only be a basis of jurisdiction if § 1581(h) is manifestly inadequate or otherwise entirely inappropriate.

[3] The legislative history of § 1581(h) outlines its relationship to § 1581(a):

> It is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions. Such review, however, is exceptional and is authorized only when the requirements of subsection (h) are met.

H.R. Rep. No. 1235, 96th Cong., 2d Sess. 46, 47, *reprinted in* 1980 U.S. Code Cong., & Ad. News 3729, 3758.

[4] 28 U.S.C. § 1581(h) (1982) reads in relevant part:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury . . . relating to * * * marking * * *, but only if the party commencing the action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

v. *United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984); *United States* v. *Biehl & Co.*, 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1982).

Defendant contends that plaintiffs fail to meet two of the requirements for section 1581(h) review. First, defendant contends that C.S.D. 85–47 is not the type of ruling that can be reviewed under section 1581(h). Second, defendant argues that plaintiffs have failed to demonstrate that they will be irreparably harmed if they cannot secure section 1581(h) review.

The essence of defendant's argument regarding the type of ruling appropriate for section 1581(h) review is that C.S.D. 85–47 is insufficiently specific to be the subject of pre-importation review. The legislative history defines "ruling" as "a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 46, 47, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3758. This court has interpreted "the legislative history as speaking to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact with virtual certainty." *Pagoda Trading Co.* v. *United States*, 6 CIT ——, 577 F. Supp. 22, 24 (1983). Neither of the two cases cited by defendant in which jurisdiction was denied because the action involved an inappropriate ruling apply in this case. In *Pagoda Trading* the ruling involved was a "general interpretive ruling" that contained "guidelines 'set forth as an aid to Customs officers in classifying specific footwear constructed with foxing.' " *Pagoda Trading*, 6 CIT at ——, 577 F. Supp. at 23 (quoting 48 Fed. Reg. 22,910 (1983)). Likewise, in *American Air Parcel Forwarding Co.* v. *United States*, section 1581(h) could not be invoked because the ruling involved was an "internal advice" ruling. 5 CIT 8, 11, 557 F. Supp. 605, 608, *aff'd*, 718 F.2d 1546 (Fed. Cir. 1983).[5] Although not restricted to the facts of a single case, the ruling at issue is clearly distinguishable from internal advice and general interpretive rulings. *See Association of Food Industries, Inc. (Pistachio Group)* v. *von Raab*, 9 CIT ——, Slip Op. 85–128 at 3 (Dec. 17, 1985) (with regard to country-of-origin ruling pertaining to all imports of pistachio nuts, the court found the ruling "sufficiently related to a specific import transaction to obtain jurisidiction under [section 1581(h)]"). Customs based its ruling here on retail organge juice products that contain either 30 or 50 percent foreign manufacturing concentrate, and which have added ingredients for flavoring purposes. Plaintiffs represented these percentages of foreign concentrate to be standard in the industry, and plaintiffs clearly intend to produce products containing these percentages of foreign concentrate from the imported concen-

[5] In so finding, the *American Air Parcel* court relied on legislative history that expressly dealt with the subject. "In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review,' both of which relate to completed import transactions." *American Air Parcel* at 608, quoting H.R. Rep. No. 1235, 96th Cong., 2d Sess. 46, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3758.

trate referred to in the ruling. As to such products, plaintiffs will feel the impact of this ruling "with virtual certainty." Thus, although the ruling has interpretive aspects, it is adjudicative as to the products described and is sufficiently specific to be reviewed under section 1581(h).

In this case, plaintiffs' written request sought a binding ruling pursuant to 19 C.F.R. § 177.2 (1985) of the country-of-origin marking requirements to frozen concentrated orange juice and reconstituted orange juice that contain imported manufacturing concentrate. Defendant argues that the form of the ruling at issue was not that which was contemplated by section 1581(h). In response to plaintiffs' request, however, Customs issued a ruling that it considered final.[6] The court sees no reason to distinguish among various types of final, specific rulings in determining whether pre-importation review is proper. Thus, section 1581(h) review may be had of a ruling such as C.S.D. 85-47, provided the other requirements of section 1581(h) review are met.

The second requirement under dispute is whether plaintiffs will be irreparably harmed if they are unable to secure pre-importation review. The essence of "irreparable injury" is that it is harm that "cannot receive reasonable redress in a court of law." *Manufacture de Machines du Haut Rhin* v. *von Raab,* 6 CIT ——, 569 F. Supp. 877, 881-82 (1983) (quoting *Black's Law Dictionary* 706-07 (5th ed. 1979)). In making this determination, what is critical is not the magnitude of the injury, but rather its immediacy and the inadequacy of future corrective relief. *National Corn Growers Association* v. *Baker,* 9 CIT ——, Slip Op. 85-119 at 27 (Nov. 26, 1985) ("The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm.") (quoting *Sampson* v. *Murray,* 415 U.S. 61, 90 (1975), quoting *Virginia Petroleum Jobbers Association* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958)); *Hault-Rhin,* 6 CIT at ——, 569 F. Supp. at 381 (irreparable injury includes an injury "whether great or small"); *S.J. Stiles Associates* v. *Snyder,* 68 CCPA 27, 30, 646 F.2d 522, 525 (1981) (to demonstrate irreparable harm "[a] presently existing, actual threat must be shown"); *State of New York* v. *Nuclear Regulatory Commission,* 550 F.2d 745, 755 (2d Cir. 1977) (alleged threats of irreparable harm cannot be remote or speculative but must be actual and imminent). Plaintiffs have asserted several grounds in support of their claim of irreparable harm. These grounds must be analyzed to determine both their legal sufficien-

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[6] On August 16, 1985, prior to the issuance of Customs' ruling, NJPA sent a letter to then-Assistant Secretary of the Treasury, John Walker, requesting that the Treasury Department review any ruling issued by Customs in response to the ruling request prior to the time that such ruling was finalized. A response, written by Commissioner of Customs William von Raab, stated:

> In view of the various competing interests in this case and the significant policy questions raised, this matter was under review at the highest levels of Customs before a final decision was reached. We do not believe that additional review by the Department is warranted.

This letter was dated September 11, 1985, a week after the issuance of Customs' decision. Thus, although plaintiffs requested a ruling from the Secretary of the Treasury, defendant declined to issue one. Refusal to issue a ruling is a basis for § 1581(h) jurisdiction.

cy [7] and whether plaintiffs have offered sufficient documentation to support the claims. *718 Fifth Avenue Corp.* v. *United States,* 7 CIT ——, Slip Op. 84-39 at 7 (Apr. 13, 1984) ("documentation is essential to establishing irreparable harm"); *Tropicana Products, Inc.* v. *United States,* 3 CIT 171, 174-76, *modified,* 3 CIT 240 (1982) (bare allegations, not supported by facts and figures, are insufficient).

Plaintiffs offer the following reasons to support their claim that they will suffer irreparable harm if they are unable to secure pre-importation review. First, plaintiffs maintain that their packaging suppliers will be unable to provide the necessary labels and cans by the current effective date of March 1, 1986, and that the unavailability of such packaging will result in the inability to fill orders placed by retail customers. In support of this proposition, plaintiffs offer affidavits of three packaging campany representatives. These affiants estimate that the transition to packaging complying with the new ruling would take a year to two and one-half years.

As plaintiffs have noted, under the country-of-origin marking statute, Customs is required to withhold delivery of imported merchandise until it is properly marked or until proper certifications are filed. 19 U.S.C. § 1304(g) (1982 & West Supp. 1985). Therefore, to the extent that plaintiffs cannot comply with Customs' ruling by March 1, 1986, they will be unable to use foreign manufacturing concentrate and will not be able to satisfy all of their customer's orders for retail orange juice products. This court has recognized that severe disruption of business operations can constitute irreparable injury under certain circumstances. *718 Fifth Avenue Corp.,* Slip Op. 84-39 at 7 ("Business disruption resulting from administrative delay could be sufficient to demonstrate irreparable harm.") (citing *American Air Parcel Forwarding Co.* v. *United States,* 1 CIT 293, 300, 515F. Supp. 47, 54 (1981)); *Lois Jeans & Jackets, U.S.A., Inc.* v. *United States,* 5 CIT 238, 242, 566 F. Supp. 1523, 1527 (1983) (potential costs required for altering plaintiff's production methods in the event that plaintiff was compelled to comply with Customs' ruling as a factor demonstrating irreparable harm). Plaintiffs have provided undisputed documentation of the possibility of significant disruption of their business operations that will result if they are required to comply with the ruling.

Plaintiffs' second argument is that they will be forced to discard millions of dollars worth of noncomplying labels that are currently in inventory. Plaintiffs have provided documentation that demonstrates that if they are unable to secure pre-importation review they will be required to either warehouse this inventory or destroy the labels. Either way, plaintiffs will be required to expend funds that will not be recoverable should they ultimately prevail on the

[7] A substantial number of the cases dealing with irreparable harm ahve involved preliminary injunctive relief. This court has stated, however, that "[t]he standard for proving irreparable harm [in the declaratory judgment context] is essentially identical to that used to determine irreparable injury in cases where injunctive relief is sought." *718 Fifth Avenue Corp.* v. *United States,* 7 CIT ——, Slip Op. 84-39 at 4 n.3 (Apr. 13, 1984).

merits. This factor also applies to plaintiffs' third argument that they will be forced to spend millions of dollars to redesign packaging to comply with Customs' ruling. Plaintiffs support this argument with affidavits from a sampling of processors, whose estimates of their costs for new labels and packaging, even under normal conditions, proved to be substantial. These costs, also, could not be recouped if the court were to rule in plaintiffs' favor.[8]

The final consideration is whether there exists a viable temporary measure for providing the country-of-origin information without forcing plaintiffs to incur these nonrecoupable costs. The availability of such alternatives can reduce the impact of the change in the labeling and substantially mitigate the damage. *Association of Food Industries, Inc. (Pistachio Group)* v. *von Raab*, 9 CIT ——, Slip Op. 85–128 (Dec. 17, 1985). In the pistachio case, this court held that the plaintiffs failed to demonstrate that they would suffer irreparable injury if unable to secure pre-importaton review. In doing so, the court stated that it was not "persuaded that the use of adhesive labels to add the country of origin is an unacceptable or impractical interim measure. This method would allow the use of current label inventories until they are depleted." *Id.* at 5. In the present case, none of the temporary measures suggested by defendant is a feasible alternative. The first alternative, the use of adhesive stickers, although a possible solution in the pistachio case, is not a feasible alternative in this case. In the summer of 1985, Citrus World attempted to apply foreign language stickers to frozen concentrated orange juice cans. These attempts were unsuccessful because the cans are sprayed with water to wash off excess juice and the stickers will not stick to a wet surface. Similarly, Coca-Cola Foods tried to place stickers with a special cash prize offer onto their reconstituted orange juice containers. These containers, too, had wet surfaces and the stickers would not adhere to them. The evidence also shows that even if the stickers would adhere to the containers there is no guarantee of accurate placement of the stickers on the containers. The random placement of the stickers, which are blown from machines, could obscure existing text. Some of this information, such as product identity, net weight, and distributor's address, is required by the Fair Packaging & Labelling Act, 21 U.S.C. § 343 (e), (f) (1982) and the Food, Drug & Cosmetic Act, 15 U.S.C. § 1453(a) (1982). Other information has im-

[8] Plaintiffs also contend that to the extent that they mark their retail packages with a designation of origin, they will be commercially disadvantaged by loss of consumer acceptance of these products. Injuries to reputation have been recognized as irreparable and not readily recompensed in the trademark context. *Coca-Cola Co.* v. *Gemini Rising, Inc.*, 346 F. Suppl 1183, 1189 (E.D.N.Y. 1972); *Cutler-Hammer, Inc.* v. *Universal Relay Corp.*, 285 F. Supp. 636, 639 (S.D.N.Y. 1968). In these cases, however, the professed injuries would be the result of either a play on words or mislabeling. In this case, the labeling would be accurate, although potentially neither desirable nor required by law. Furthermore, the evidence offered by plaintiffs on this point is not conclusive. The survey conducted by Fine, Travis & Associates on Florida's Seal of Approval found that in general consumers reacted negatively to suggestions that orange juice ingredients are imported. However, the survey sample consisted of only 30 consumers and a caveat in the report cautions that the findings "are not necessarily replicable nor do they indicate how widespread a particular response may be." This factor, then, cannot be used to support a claim of irreparable harm under these circumstances.

portant commercial significance, such as brand name and the universal product coding, which enables scanners to "read" the price. Additionally, Customs regulations require that the marking statement be in close proximity to the United States address. 19 C.F.R. § 134.22(c) (1985). In any case, even if adhesive stickers were physically possible to apply, plaintifffs could not recoup the significant costs of acquiring the equipment and stickers.

Another alternative suggested by defendant is to lithograph the country-of-origin marking on the "ends" of the cans. This solution is also unsatisfactory. Orange juice is packaged in a variety of containers, many of which are not cans and do not have "ends" to be lithographed. Additionally, plaintiffs' exhibits demonstrate that marking of the container ends may not satisfy Customs' requirement, noted above, that the country-of-origin statement be "in close proximity" to the United States address. 19 C.F.R. § 134.22(c) (1985). The distributor's clause is generally located on the label that encircles the can, not on its end.

Defendant also suggests that plaintiffs can stockpile manufacturing concentrate imported before March 1, 1986, so that the orange juice processors can avoid the requirements of the marking ruling until their inventory is depleted and new labels can be made. Plaintiffs counter with evidence indicating that such stockpiling could be more costly to the industry than revising its labels. Undisputed evidence indicates that in the past year the price of imported manufacturing concentrate has dropped sharply and that this trend is expected to continue in the upcoming months. Affiant Steven R. Michael, representative of Ohio Pure Foods, stated that the price of foreign manufacturing concentrate dropped by thirty percent since January 1985. If U.S. processors stockpiled large quantities of imported manufacturing concentrate and the price of the commodity continued to decline, plaintiffs would suffer a substantial financial loss.[9] Another problem with the stockpiling solution is the need for storage space to hold the concentrate. Many of the processors do not have sufficient space on their premises to permit long-term storage of large quantities of manufacturing concentrate. Although plaintiffs did not provide facts or figures as to the potential cost of such storage, it is reasonable to assume that such cost would be significant.

The final suggestion offered by defendant is that the U.S. orange juice processing industry could rely exclusively on the supply of domestic manufacturing concentrate to avoid the requirements of the marking ruling. The evidence indicates that this, too, is not a realistic alternative. In four out of the last five seasons, severe freezes have substantially diminished the availability of U.S. oranges and

[9] Lykes Pasco Packing Company illustrated this point by calculating the impact of the stockpiling suggestion had it been implemented for eight months during 1985. If Lykes Pasco purchased the concentrate directly from Brazil, it would have lost $3.5 million. If the concentrate had been purchased on the futures market, the company would have lost $6.5 million. Affidavit of Talmage G. Rice.

their by-products, including manufacturing concentrate. In his affidavit, Dan L. Gunther, director of economic research for the Florida Department of Citrus, anticipates that, as in past seasons, "U.S. orange juice demand [for this season] is expected to exceed domestic orange juice production." He also notes the necessity of mixing early-season domestic juice with late-season imported juice, because of the differences in seasons between the northern and southern hemisphere, to ensure product consistency. Given these factors, Mr. Gunther concludes that domestic processors "will not be able to use domestic manufacturing concentrate to meet total market needs during the season or even the market needs in the early part of the season." Affidavit of Dan L. Gunther. Defendant offers no evidence to refute this conclusion.

In sum, plaintiffs have demonstrated by clear and convincing evidence [10] that they will suffer irreparable injury if they cannot procure pre-importation review. The cumulative impact of the factors stated by plaintiff, specifically, the business disruption likely to occur because of the inability of the industry packagers to satisfy the simultaneous demand for new labels, the cost of discarding or storing noncomplying labels, and the cost of redesigning packaging, would be substantial and none of these expenses could be recouped should plaintiffs ultimately prevail on the merits. The impact of these injuries would not be alleviated by any of the alternatives suggested by defendants. This showing of irreparable harm allows the court to exercise jurisdiction under section 1581(h) and to provide, if appropriate, declaratory relief.

Because the court finds that the declaratory relief awarded under section 1581(h) is adequate in this case to address any harm to plaintiff, jurisdiction may not be invoked under section 1581(i). *See supra* note 2 and discussion, *infra*. Furthermore, injunctive relief may not be granted under section 1581(h).[11] Therefore, plaintiff's motion for injunctive relief is denied.

Having established that the court has jurisdiction to review the merits of the case, the court turns to the facts at hand. A full appreciation of the controversy at bar requires an understanding of the two-step process that transforms oranges into the final retail products. The retail products involved in this case are reconstituted orange juice [12] and frozen concentrated orange juice.

The first level of production involves reducing fresh oranges to manufacturing concentrate. The oranges are tested for solid content and then run through an extractor and transferred to an evaporator, where the juice is reduced to approximately fourteen percent of its original volume and cooled. During this process, the es-

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[10] 28 U.S.C. § 2639(b) (1982) states: "In any civil action described in section 1581(h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence."

[11] 28 U.S.C. § 2643(c)(4) (1982) provides: "In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief."

[12] This product, orange juice in liquid form, is also called orange juice from concentrate.

sential oils and flavoring ingredients present in the juice also evaporate. The end result is a viscous substance with a brix level of approximately 65°.[13] Because the oils and flavoring ingredients are lost during this process, manufacturing concentrate lacks the characteristic flavor of oranges.

The second level of production involves blending this manufacturing concentrate with other ingredients (primarily water) to create an end product of either frozen concentrated orange juice or reconstituted orange juice. This process generally involves mixing the manufacturing concentrate with purified and dechlorinated water, orange essences, orange oil, and, in some cases, fresh juice. Once blended, the product is subjected to a variety of quality control and production tests. At this point, the frozen concentrated orange juice has a brix level of about 41.8°. It is then packaged in cans and frozen. Reconstituted orange juice has a brix level of 11.8°. It is pasteurized, retested, chilled, and packed in liquid form.

Section 304 of the Tariff Act of 1930, as amended, generally requires that every article of foreign origin that is imported into the United States be marked with its country of origin in such a manner that its ultimate purchaser will be aware of its country of origin. An ultimate purchaser is defined in Customs regulations as "the last person in the United States who will receive the article in the form in which it was imported." 19 C.F.R. § 134.1 (1985). Where a foreign article is subjected to manufacturing in the United States before reaching the consumer, the regulations provide some guidance as to when the manufacturer will be regarded as the ultimate purchaser. A manufacturer will be considered the ultimate purchaser *"if he subjects the imported article to a process which results in a substantial transformation of the article,* even though the process may not result in a new or different article." 19 C.F.R. § 134.1(d)(1) (1985) (emphasis added). On the other hand, if the manufacturing process is "merely a minor one which leaves the identity of the imported article intact," the consumer is regarded as the ultimate purchaser. *Id.* at § 134.1(d)(2). In the former case the product is not subject to the country of origin marking statutes; in the latter the country of origin must appear on the product.

The critical question in this case is whether the foreign manufacturing concentrate undergoes a "substantial transformation" in becoming frozen concentrated organce juice and reconstituted organge juice. Customs has recently promulgated 19 C.F.R. § 134.35 (1985), which defines "Articles substantially changed by manufacture" as follows:

> An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle

[13] Degree brix is a measurement of the percentage of the soluble solids (sugar) in a concentrate, as measured in air at 20° centigrade and adjusted for the acid correction of the solids. Thus, manufacturing concentrate with a brix value of 65° contains 65 pounds of fruit sugar solids in every 100 pounds of solution.

of the decision in the case of *United States* v. *Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), and the article shall be excepted from marking. The outermost containers of the imported articles shall be marked in accord with this part.[14]

The Customs' ruling at issue involved manfacturing concentrate processed from oranges grown in foreign countries. This manufacturing concentrate is then blended with domestic concentrate. Ratios of 50/50 or 30/70 (foreign/domestic) were represented to be "common." Customs ruled that for purposes of country of origin marking, the manufacturing concentrate is not "substantially transformed" after undergoing the further processing in the United States. Under Customs' ruling, retail packages of frozen concentrated orange juice and reconstituted orange juice must be marked to indicate that the products contain foreign concentrate.

This "name, character, or use" test was applied by Customs in finding that no substantial transformation occurs in the production of retail orange juice products from manufacturing concentrate. Customs' ruling must stand unless it is shown to be arbitrary, capricious or otherwise not in accordance with the law. 28 U.S.C. § 2640(d) (1982); 5 U.S.C. § 706(a)(2)(A) (1982).

In its ruling, Customs addressed each of the factors, name, character, and use, in turn. Plaintiffs argued that the name change

[14] In *Gibson-Thomsen*, the court indicated that substantial transformation occurs when an article acquires a "new name, character, *and* use." *Gibson-Thomsen*, 27 CCPA at 273 (emphasis added). This restrictive test was modified to require a "new name, character, *or* use." *Midwood Indus., Inc.* v. *United States*, 64 Cust. Ct. 499, 506, 313 F. Supp. 951, 959 (emphasis added), *appeal dismissed*, 57 CCPA 141 (1970). As modified, the test is similar to the tests for whether an article is a "manufacture or product" of a given country for drawback purposes and whether an article has been "[s]ubstantially transformed in [a] beneficiary developing country into a new and different article of commerce" for duty free treatment under the Generalized System of Preference (GSP). 19 C.F.R. § 10.177(a)(2) (1985). The drawback test states that for a manufacture to occur "[t]here must be a transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'" *Anheuser-Busch Brewing Ass'n* v. *United States*, 207 U.S. 556, 562 (1908) (cited in *United States* v. *Patel*, 762 F.2d 784, 792 (9th Cir. 1985), quoted in *Belcrest Linens* v. *United States*, 741 F.2d 1368, 1371 (Fed. Cir. 1984)). *Accord, United States* v. *International Paint Co.*, 35 CCPA 87, 93, C.A.D. 376 (1948); *Ishimitsu* v. *United States*, 11 Ct. Cust. App. 186, 191, T.D. 38,963 (1921). Likewise, for a substantial transformation to occur for GSP purposes, an article must "emerge from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process." *Torrington Co.* v. *United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985) (citing *Texas Instruments* v. *United States*, 681 F.2d 778, 782 (CCPA 1982)). The policies underlying the different statutes are similar but not identical. The GSP statute "represents the United States' participation in a multinational effort to encourage industrialization in lesser developed countries through international trade." *Torrington Co.*, 764 F.2d at 1565. Whereas "[t]he theory underlying the granting of drawback * * * is and always has been that it would encourage the development in the United States of the making of articles for export, thus increasing our foreign commerce and aiding domestic industry and labor." *International Paint*, 35 CCPA at 90. In contrast, the primary purpose of the country-of-origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." (Congress, of course, had in mind a consumer preference for American made goods.) *United States* v. *Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940) (quoted in *Globemaster, Inc.* v. *United States*, 68 Cust. Ct. 77, 79-80, 340 F. Supp. 975-76 (1972)). *Accord, United States* v. *American Sponge & Chamois Co.*, 16 Ct. Cust. App. 61, 65, T.D. 42,731 (1928) (quoting *Hobe Button Co.* v. *United States*, 12 Ct. Cust. App. 341, 344, T.D. 40,488 (1924)). Unlike the GSP and drawback statutes, the encouragement of the advancement of the industry of particular countries is one reason underlying the country-of-origin marking statute, not the only purpose. *American Sponge*, 16 Ct. Cust. App. at 65, *Hobe Button*, 12 Ct. Cust. App. at 344. Thus, although the language of the tests applied under the three statutes is similar, the results may differ where differences in statutory language and purpose are pertinent.

from "concentrated orange juice for manufacturing" to "frozen concentated orange juice" and "orange juice from concentrate" was significant to a finding of substantial transformation. The court agrees with Customs' conclusion that these names, derived from the FDA's standards of identity, "merely refer to the same product, orange juice, at different stages of production.[15] In any case, a change in the name of the product is the weakest evidence of a substantial transformation. *See Uniroyal, Inc.* v. *United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983) (fact that this imported product was called an "upper" and final product called a "shoe" did not affect the court's finding of no substantial transformation), *United States* v. *International Paint Co.*, 35 CCPA 87, 93–94, C.A.D. 376 (1948) ("Under some circumstances a change in name would be wholly unimportant and equally so is a lack of change in name under circumstances such as [in this drawback case].").

Customs also found that the fact that the imported concentrate is sold to producers whereas the retail product is sold to consumers does not constitute a sufficient change in character and use to render the concentrate substantially transformed. Plaintiffs rely on the *Midwood* decision, in which this court's predecessor, the Customs Court, emphasized this transition from producers' goods to consumers' goods in finding that steel forgings are substantially transformed into flanges and fittings. *Midwood Industries, Inc.* v. *United States*, 64 Cust. Ct. 499, 507, 313 F. Supp. 951, 957, *appeal dismissed*, 57 CCPA 141 (1970). As noted by Customs, however, the significance of this producers' good-consumers' good transformation in marking cases is diminished in light of this court's recent decision in *Uniroyal, Inc.* v. *United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983). In *Uniroyal*, the imported article was a leather shoe upper to which an outsole was attached in the United States. Although the upper is not a consumers' good in that it cannot be worn as a shoe, the court found that there was no substantial transformation. *Id.* at 227, 542 F. Supp. at 1031. Under recent precedents, the transition from producers' to consumers' goods is not determinative. Plaintiffs must demonstrate that the processing done in the United States substantially in-

[15] Plaintiffs make much of the fact that the imported and retail products at issue in this case have distinct standards of identity under Food and Drug Administration (FDA) regulations. Specifically, plaintiffs point out that the imported product is called "concentrated orange juice for manufacturing" and the retail products are known and labeled as "frozen concentrated orange juice" and "orange juice from concentrate." 21 C.F.R. §§ 146.145, 146.146, 146.153 (1985). This argument is not persuasive. First, Customs regulations and FDA regulations are promulgated under completely different statutes and hence one cannot be considered binding on the other. Second, the policies underlying the regulations are quite different and the interests of one would not be furthered by relying on the other. Specifically, the policy underlying the FDA standards of identity have been described by plaintiffs as chiefly designed to inform the consumer about ingredients in a product. Merrill & Collier, *"Like Mother Used to Make": An Analysis of FDA Food Standards of Identity*, 74 Colum. L. Rev. 561, 563 (1974). To policy underlying the country-of-origin marking statute, however, as noted in note 14, *supra*, is to facilitate consumer purchasing decisions and to protect American industry. The FDA standards of identity are intended to aid in identifying the contents of a product, not in identifying the origin of the product as a whole. The FDA standards are not binding on Customs in a determination of whether a substantial transformation has occurred.

creases the value of the product or transforms the import so that it is no longer the essence of the final product. *United States* v. *Murray*, 621 F.2d 1163, 1170 (1st Cir. 1980) (Chinese glue blended with other glues in Holland were not substantially transformed because although it was transformed from a processors' good to an end-users' good there was no evidence that the glue had increased in value);[16] *Uniroyal*, 3 CIT at 224 and 222, 542 F. Supp. at 1030 and 1028 (imported upper was "the very essence of the completed shoe", court also found the attachment of uppers to outsoles "significally less costly" than the process of manufacturing the upper).

Plaintiffs in the instant case offer evidence that they claim demonstrates that domestic manufacturing substantially increases the value of the product from the manufacturing concentrate stage to the retail product stage. Contrary to plaintiffs' claim, however, the evidence offered indicates that the manufacturing concentrate constitutes the majority of the value of the end products. In fact, according to plaintiffs' evidence, the values added to the products involved here by the addition and blending of the orange essences, orange oil, and water, and related production range from 6.68 to 7.57%. This increase in value may be significant with regard to other products, but here the sum of all of the activities contributing to the added value are relatively minor, much like the addition of the outsoles in *Uniroyal*. In fact, plaintiffs' evidence shows that the addition of the oils and essences, the primary basis for plaintiffs' claim that substantial transformation has occurred, contributes only 1.75 to 1.86% to the value of the end products.[17]

Plaintiffs also contend that the value of the closing costs (for example, packaging) should be independently considered because of the alleged role of the closing activities in preserving the retail product. (The closing costs add 11.81 to 12.35% to the value of the final products.) Plaintiffs, however, cite no support for this proposition and the court does not find persuasive the argument that such costs are a factor in determining whether an article has undergone substantial transformation. *Cf. Ishimitsu* v. *United States*, 11 Ct. Cust. App. 186, T.D. 38,963 (1921).[18]

It is unclear whether plaintiffs contend that the addition of water constitutes a substantial change.[19] The court believes it does

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[16] In *Murray*, the First Circuit, in interpreting 19 C.F.R. § 134.1(b), held that

> the sub-term "substantial transformation" means a fundamental change in the form, appearance, nature, or character of an article which adds to the value of the article an amount or percentage which is significant in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown.

Murray, 621 F.2d at 1169.

[17] It is not clear whether the addition of fresh orange juice is essential to the production of any of the retail orange juice products involved in this case. In any case, plaintiffs claim an added value of approximately 1% for situations in which such juice is used. This minimal factor does not alter the result here.

[18] Plaintiff does not appear to argue that mere blending of foreign with domestic concentrate is a substantial transformation. Thus, the value of the domestic concentrate is not considered in this analysis.

[19] The court notes that in the Caribbean Basin Economic Recovery portion of the Caribbean Basin Initiative, Pub. L. 98-67, 96 Stat. 388 (1983), Congress has provided that a new and different article of commerce is not produced or manufactured in a beneficiary country by the "mere dilution with water or mere dilution with another substance that does not materially alter the characteristics of the article." 19 U.S.C. § 2703(a)(2)(B) (1982 & Supp. 1983).

not, in and of itself, constitute such a change in the context of the products under discussion. The court, however, did consider the value added by the addition of water together with the oils, essences and the overall blending process. Considering the process as a whole, the court concludes that Customs could rationally determine that the major part of the end product, when measured by cost, value, or quantity, is manufacturing concentrate and that the processing in the United States is a minor manufacturing process.

The court also finds reasonable Customs' conclusion that the manufacturing concentrate "imparts the essential character to the juice and makes it orange juice." C.S.D. 85–47, 19 Cust. Bull. No. 39 at 26. Thus, as in *Uniroyal*, the imported product is "the very essence" of the retail product. *Uniroyal*, 3 CIT at 224, 542 F. Supp. at 1030. The retail product in this case is essentially the juice concentrate derived in substantial part from foreign grown, harvested, and processed oranges. The addition of water, orange essences, and oils to the concentrate, while making it suitable for retail sale, does not change the fundamental character of the product, it is still essentially the product of the juice of oranges. The court concludes that Customs' ruling that manufacturing juice concentrate is not substantially transformed when it is processed into retail orange juice products is not arbitrary or capricious, but is in accordance with applicable law.[20] The orange juice processors are not the ultimate purchasers of the imported product because consumers are the last purchasers to receive the product in essentially the form in which it is imported. In accordance with 19 U.S.C. § 1304, the retail packaging must bear an appropriate country-of-origin marking.

Having found that Customs' decision is not arbitrary and capricious and is thus substantively valid, the court must address the question of whether Customs was required to publish a notice in the Federal Register before publishing C.S.D. 85–47. Specifically, plaintiffs contend that such notice was required pursuant to Customs' regulation 19 C.F.R. § 177.10(c) (1985), which requires notice before publication of a ruling which has the effect of changing a practice or position of Customs.

The specific provision of this regulation that is the subject of dispute is section 177.10(c)(2).[21] As defendants have noted, section 177.10(c)(2) requires notice in the Federal Register if two conditions are met. First, the prospective ruling must have the effect of

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[20] Plaintiffs also argue that Customs' ruling is arbitrary and capricious because in the ruling it stated that the certification requirements of the country of origin regulations will apply "[i]f the final repacked product of orange juice contains *any* foreign concentrate." C.S.D. 85–47, 19 Cust. Bull. No. 39 at 23 (emphasis added). Customs did not specifically refer to any blends besides those containing 30 and 50% foreign concentrate. In any case, the court considers the scope of the reviewable aspects of the ruling to be limited to retail orange juice products containing 30 or 50% foreign manufacturing concentrate. This decision does not address whether it would be appropriate to apply the country-of-origin marking statutes to products that contain any other percentage of imported manufacturing concentrate.

[21] 19 C.F.R. § 177.10(c)(2) (1985) reads, in pertinent part, as follows:

> Before the publication of a ruling which has the effect of changing a position of the Customs Service and which results in a restriction or prohibition, notice that the position (or prior ruling on which the position is based) is under review will be published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change.

changing a Customs Service position. Second, the change must *result* in a restriction or prohibition.

The first question, then, is whether C.S.D. 85–47 constitutes a change of position. Defendant maintains that Customs had never taken an official position regarding the specific circumstances of this case, and that consequently they were relieved from the notice requirements. This argument fails because an examination of Customs' prior rulings in orange juice related situations clearly establishes its position that orange juice manufacturing concentrate is substantially transformed if it is completely reconstituted or is blended with orange oils, essences or fresh juice.

On several occasions Customs has been called upon to determine whether orange juice at one stage of production is substantially transformed, *i.e.*, undergoes a change in name, character, or use, in the manufacturing process leading to another stage of production. These cases have arisen in the drawback context as well as in the country-of-origin context. The drawback rulings are instructive because the definitions of "substantially transformed" in the country-of-origin context and "manufacture" in the drawback context are similar.[22]

In these rulings Customs had adopted a position that for imported orange juice manufacturing concentrate to be considered "manufactured" or "substantially transformed," a substance other than water or other manufacturing concentrate must be added. This position can be seen by contrasting a ruling in which Customs held that blending imported manufacturing concentrate with domestic manufacturing concentrate does not constitute manufacturing for drawback purposes with a ruling that blending imported manufacturing concentrate with orange peel oil does. C.S.D. 81–81, 15 Cust. Bull. 900, 901 (Sept. 4, 1979) (Ruling 210693) ("[T]he mere blending or commingling of one concentrate with another concentrate of the same kind and quality does not constitute a manufacturing process for drawback."); C.S.D. 83–90, 17 Cust. Bull. 921, 922 (March 29, 1983) (Ruling 215734) ("The blending of cold-pressed orange peel oil with a batch of concentrated orange juice for manufacturing to mask the 'cardboard off flavor' of the concentrate is a manufacture or production for drawback."). The critical factor in distinguishing these rulings is the introduction of the orange peel oil, a different substantive ingredient, into the concentrate. The significance of this distinction is demonstrated in dicta in the former ruling. After finding that the mere blending of concentrate does not consititute manufacturing, Customs offered two alternatives that would, in fact, satisfy the manufacturing requirement. First, Customs suggested that "[t]he addition by a blending process of essential oils and flavoring components to a concentrate that lacks them would be considered a manufacture or production for drawback." C.S.D.

[22] See note 14, *supra*, for a comparison of the country-of-origin "substantial transformation" test with the drawback "manufacturing" test and a comparison of the different policies underlying the statutes.

81-81, 15 Cust. Bull. at 901. Second, Customs noted that "[t]he use of fresh juice to cut back the degree brix of concentrated orange juice for manufacturing is another manufacturing process for drawback." *Id.*

Furthermore, in a country-of-origin ruling, Customs found that concentrate at 58° or 65° brix that is subsequently diluted with water to 42.5° brix, but not completely reconstituted is not substantially transformed. C.S.D. 80-230, 14 Cust. Bull. 1138, 1138 (Feb. 21, 1980) (Ruling 712184). In a similar ruling, Customs found that reducing the degree brix of a concentrate by the addition of water is not a manufacturing for drawback. C.S.D. 80-162, 14 Cust. Bull. 1002, 1003 (Nov. 27, 1979) (Ruling 211084). In the latter ruling Customs again offered alternatives that would reduce the degree brix and would change the character and use of the manufacturing concentrate. These suggestions were the use of the following:

1. Fresh orange juice;
2. Pasteurized orange juice;
3. Essential oils and flavoring components;
4. Essential oils, flavoring components and water;
5. Essential oils, flavoring components and other orange concentrate; and
6. A combination of any of the above.

Id. at 1004.

The most significant ruling involves the processing of frozen concentrate that is reconstituted in Canada. C.S.D. 80-88, 14 Cust. Bull. 865 (Aug. 17, 1979) (Ruling 710823). Although the ruling does not specify the degree brix of the concentrate that is reconstituted, the opinion clearly applies to manufacturing concentrate that is made into reconstituted orange juice.[23] In other words, the process that is the subject of C.S.D. 80-88 is apparently the same process that is occurring in this case—manufacturing concentrate becomes reconstituted orange juice with the addition of water and presumably orange essences or oils. In C.S.D. 80-88, however, Customs found that this process substantially transformed the manufacturing concentrate into reconstituted juice. C.S.D. 80-88, 14 Cust. Bull. at 866.[24] In C.S.D. 85-47, at issue here, Customs decided that this process failed to substantially transform the product. The latter ruling directly contradicts the former, and Customs noted this in C.S.D. 85-47 when it stated at the end of the ruling: "Customs Ruling No. 710823 [C.S.D. 80-88], dated August 17, 1979, which holds that reconstitution of orange juice is a substantial transformation of the frozen concentrate, is overruled." C.S.D. 85-47, 19 Cust. Bull. No. 39 at 28.[25]

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[23] One of the end products at issue is reconstituted orange juice from concentrate.

[24] If there is a difference between the processes at issue, the Canadian ruling, C.S.D. 80-88, is a worse case for substantial transformation than the one at hand, because oils and essences are undisputedly added here.

[25] The court cannot agree with defendent's position that the fact that the processing involved in C.S.D. 80-88 is that of Brazilian and American manufacturing concentrate in Canada and the processing involved in C.S.D.

Continued

C.S.D. 85–47 constitutes a change in Customs' former position that the complete reconstitution of orange juice or the addition of orange oils, essences, or juice effects a substantial transformation of manufacturing concentrate. To this extent it satisfies the first requirement of section 177.10(c)(2), that is, a ruling that will effect a change in a position of Customs.

The second requirement for section 177.10(c)(2) notice is that the ending must *result* in a restriction or prohibition. Defendant argues that the ruling does not result in a "restriction" or "prohibition" within the meaning of the regulation. In support of this position, it notes that section 1581(h) lists "marking" and "restricted merchandise" as separate categories over which this court has pre-importation jurisdiction. Defendant claims that because these categories are distinct in section 1581(h), the term "restriction or prohibition" in section 177.10(c)(2) cannot be construed to include a change in country-of-origin status. The separate listing in section 1581(h) of marking and restricted merchandise, however, is not determinative. The listing merely provides examples of the types of cases that might appropriately be brought for pre-importation review. (For example, total prohibition is not mentioned.) The list is more exemplary than definitional and the court cannot accept its categorization as definitive with regard to the inclusion of changes in marking requirements as resulting in a restriction under section 177.10(c)(2).

Furthermore, the reference in section 177.10(c)(2) to "restrictions and prohibitions" must be looked at in the context of section 177.10. Section 177.10 deals generally with the publication of decisions. 19 C.F.R. § 177.10 (1985). The provisions are presumably intended to keep the public and interested parties abreast of critical decisions made by Customs. Within this scheme, the regulations acknowledge that a change in a Customs Service position which results in a change in the amount of duty owed or in a restriction or prohibition may have a significant impact on the importing or other business practices of an industry. In such a case, it is important to warn the industry that changes may be necessary and to give interested parties an opportunity to respond. These policy considerations are fully applicable to a change in country-of-origin marking requirements. For instance, in this case, the retail orange juice processors will be required to change their labeling or drastically reduce their importation of manufacturing concentrate to avoid disruption from the imposition of the marking requirements. The transition to either of these practices cannot be instantaneous. Therefore, the imported manufacturing concentrate ruling will result in a restriction in the sense that products will not be released by Customs when the certification requirements cannot be

85–47 is that of imported manufacturing concentrate in America makes any material difference. The basic question addressed in both rulings is whether, for marking purposes, manufacturing concentrate which is processed into retail orange juice products is substantially transformed.

met. Clearly the rationale underlying section 177.10(c)(2) provides a basis for concluding that the importers and other interested parties should be forewarned and given an opportunity to comment before Customs publishes a change in position that results in restricted importation of this product.

C.S.D. 85–47, then, is appropriately considered to be a ruling that changes a position of Customs and results in a restriction. Customs was in fact reviewing its position as to whether orange juice manufacturing concentrate is substantially transformed when completely reconstituted or blended with oils, essences, or juices. As a result, Customs was required to publish notice of these circumstances and to allow interested parties to submit written comments "with respect to the correctness of the contemplated change." 19 C.F.R. § 177.10(c)(2) (1985).[26]

Although defendant failed to publish the required notice of its change in position, this omission will only affect the ruling if it results in prejudice to the plaintiff. *Gilmore Steel Corp.* v. *United States*, 7 CIT ——, 585 F. Supp. 670, 679 (1984); *American Motorists Insurance Co.* v. *United States*, 5 CIT 33, 43 (1983); *Timken Co.* v. *Regan*, 4 CIT 174, 180, 552 F. Supp. 47, 52 (1982); *Woodrum* v. *Donovan*, 4 CIT 46, 52, 544 F. Supp. 202, 207 (1982). In this case a harmless error determination must be made as to each of two parts of the ruling. The first part pertains to whether manufacturing concentrate undergoes a substantial transformation in being processed into frozen or reconstituted orange juice. Plaintiffs are not prejudiced by the failure to publish notice as to this issue because, as is obvious, plaintiffs fully participated in the administrative process. Furthermore, comments from the public at large cannot change the essentially legally correct result.

The second part of the ruling, however, involves the appropriate effective date of the ruling. Customs regulations relating to the type of ruling at issue here state that "*[e]xcept as otherwise provided for in the ruling itself,* all rulings published under the provision of this part shall be applied immediately." 19 C.F.R. § 177.10(e)

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[26] There is a dispute between the parties as to whether plaintiffs raised at the agency level the issue of publication of a change in position in the Federal Register and the possible effect this would have on plaintiffs' ability to raise the issue before the court. Under either scenario, however, plaintiffs' ability to raise the issue before the court has not been affected. If plaintiffs did suggest to defendant that notice of a change in position must be published in the Federal Register, then plaintiffs adequately exhausted their administrative remedies on this point. If plaintiffs did not make this suggestion, they still cannot be said to have waived the objection. Publication in the Federal Register is only required if Customs has decided to change its position. Although plaintiffs participated in discussions about whether a change in position was desirable, they did not know that Customs had decided to effect such a change before the new ruling was published in the Customs Bulletin. Once the ruling was published, there was no formal administrative procedure for challenging the failure to publish notice in the Federal Register. Prior to that time plaintiffs could not be certain that a ruling effecting a change in position would be published. *Cf. Lois Jeans & Jackets, U.S.A., Inc.* v. *United States*, 5 CIT 238, 243–44, 566 F. Supp. 1523, 1527–28 (1983) (plaintiff who received no notice (actual or constructive) of a change in ruling likely to succeed in raising § 177.10(c)(2) objection even though it learned of change before it was implemented). The fact that this notice provision involves a change in position affecting a wide variety of interests distinguishes this situation from the cases dealing with the effects of notice of an antidumping or countervailing duty investigation. *See, e.g., United States* v. *Elof Hansson, Inc.*, 296 F.2d 779, 48 CCPA 91 (1960), *cert. denied*, 368 U.S. 899 (1961) (antidumping); *Alberta Gas Chemicals, Inc.* v. *Blumenthal*, 82 Cust. Ct. 77, C.D. 4792 (1979) (antidumping) *Energetic Worsted Corp.* v. *United States*, 51 Cust. Ct. 55, C.D. 2413 (1963), *rev'd on different grounds*, 53 CCPA 36, C.A.D. 874 (1966) (countervailing duties).

(1985) (emphasis added). This caveat leaves to Customs' discretion the option to delay the effective date of a ruling.

In its initial ruling Customs chose an effective date of January 1, 1986, a four month lag time. C.S.D. 85-47, 19 Cust. Bull. No. 39 at 28. Customs offered no reasons for choosing this date. When Customs reconsidered and changed the effective date to March 1, 1986, it also failed to articulate the reasons underlying the change. 19 Cust. Bull. No. 50 at 15 (Dec. 11, 1985). Customs correctly recognized that this is a situation in which a lag time in the effective date is appropriate. Given the size of the industry and the limited services available to assist the industry in complying with the marking requirements, it would have been an abuse of discretion not to have delayed the effective date. From the record it is clear that Customs did not seek comments from all interested parties before reaching its decision. The problem with the original effective date chosen by Customs, as well as the subsequent amended effective date, is that there is nothing in the record or in the official statements by Customs that articulate what factors were considered in choosing the dates. " '[T]he failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible.' " *Public Media Center* v. *FCC*, 587 F.2d 1322, 1331-32 (D.C. Cir. 1978) (quoting *American Smelting & Refining Co.* v. *FPC*, 494 F.2d 925, 945, *cert. denied*, 419 U.S. 882 (1974)).

Defendant argues that it would be contrary to the statute to delay the effective date of the ruling and that Customs has nonreviewable discretion in this area. First, this is clearly an area in which there are no policy reasons for ignoring the usual rule that presumes judicial review of agency decisions. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967). Second, the marking statute is not written in absolute terms. There are statutory exceptions for commercial impracticability. *See*, 19 U.S.C. § 1304(a)(3) (1982). This case does not fall within any of the listed exceptions, but Customs has properly interpreted Congressional intent in promulgating 19 C.F.R. § 177.10(e), which allows a delay in the effective date of rulings, including rulings in this area. Surely Congress did not intend grievous commercial injury to occur as a result of too precipitous implementation of changes in rulings under the marking law.

The court concludes that Customs must reconsider the effective date for C.S.D. 85-47 and must articulate reasons for its choice. In so doing, Customs must adhere to the notice and comment provisions of section 177.10(c)(2) and carefully consider all possible issues relating to a reasonable time to implement its new ruling concerning country-of-origin marking requirements.

This case is remanded to Customs for further action in accordance with this decision.

ERRATA

(Slip Op. 86-5)

NEC CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

The above-noted slip opinion was originally published in CUSTOMS BULLETIN, Vol. 20, No. 6, dated February 12, 1986, starting on page 33. Delete the last paragraph on page 33 and the first two paragraphs on page 34. Replace with the following:

"The court initially notes that on December 4, 1985, prior to the filing of this motion, plaintiff filed a notice of appeal to the Federal Circuit of the November 19, 1985 judgment. Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as amended in 1979, the timely filing of a motion for new trail or to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure nullifies a previously filed notice of appeal, and the time for appeal runs from the district court's disposition of the motion. *See* Advisory Committee Note to 1979 Amendment to Fed. R. App. P. 4(a)(4); *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 59-61 (1982). Since Rule 59 of this court is patterned after Rule 59 of the Federal Rules of Civil Procedure, the court concludes that it has jurisdiction to dispose of the instant motion, the filing of which nullified the previously filed notice of appeal."

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
C86/2	Re, C.J. January 29, 1986	Bar-Zel Expediters	84-1-00129	Items 716.10-716.29 Various rates for module portion Items 720.20, 720.24, or 720.28 Various rates for case portion Item 740.35 Various rates for watch band portion	Item 688.36 4.9%	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	New York Electronic watches; an entirety
C86/3	Re, C.J. January 29, 1986	De Laval Separator Co.	80-10-01696	Item 661.35 4.8%	Item 870.40 Free of duty	Customs Service Ruling, 9-27-83 (No. CLA-2 CO:R:CV:G 070609 JLV)	Detroit Bulk milk coolers or farm tanks

C86/4	Re, C.J. January 29, 1986	Gator of Florida	80-1-00058, etc.	Items 380.00, 380.04, 380.81; 380.84, 382.00, 382.33 with an allowance under item 807.00, to the cost or value of some of the fabric components which were the product of the U.S. and which were utilized in assembling the imported merchandise. No allowance under item 807.00 was made for fabric components, the product of the U.S., which were subjected to buttonhole and/or pocket slit operations during assembly of the imported garments	Buttonhole and pocket slit components are subject to duty allowance afforded by item 807.00	United States v. Mast Industries, Inc., 668 F.2d 501 (1981)	Miami Fabric components of U.S. origin that were subjected to buttonhole and/or pocket slit operations during foreign assembly of the imported garments
C86/5	Re, C.J. January 29, 1986	Intergram	84-7-00950	Item 674.32 5.8%	Item A674.32 Free of duty under GSP	Agreed statement of facts	Los Angeles Drill presses with motors
C86/6	Re, C.J. January 29, 1986	Sanwa Foods Inc.	84-7-00951, etc.	Item 774.55 6.9%, 7.3% or 7.7%	Item 772.20 5.3%, 5.8% or 6.4%	Agreed statement of facts	Los Angeles Unassembled or unfinished plastic containers chiefly used for marketing merchandise

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/1	Re, C.J. January 29, 1986	The De Laval Separator Co.	79-9-01463	Export value	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous merchandise
V86/2	Re, C.J. January 29, 1986	The De Laval Separator Co.	79-11-01741	Export value	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous merchandise
V86/3	Re, C.J. January 29, 1986	The De Laval Separator Co.	80-5-00825	Export value	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous merchandise
V86/4	Re, C.J. January 29, 1986	The De Laval Separator Co.	80-9-01534	Export value	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Buffalo Miscellaneous merchandise
V86/5	Re, C.J. January 29, 1986	Puma USA, Inc.	83-12-01747	Transaction value	Represented by invoiced price paid to Y. Chen & Co. of Taiwan and Ormaco Ltd. of Hong Kong	Agreed statement of facts	Cleveland Styles 90109 and 90200W, athletic shoes
V86/6	Re, C.J. January 29, 1986	Starlight Trading, Inc.	83-11-01588	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.J.S. Imports Corp., C.D. 4739	New York Miscellaneous merchandise

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Treasury Decisions

(T.D. 86-50)

Reimbursable Service—Excess Cost of Preclearance Operation

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 2, 1986.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning February 2, 1986.

Installation	Biweekly excess cost
Montreal, Canada	$22,043
Toronto, Canada	33,125
Kindley Field, Bermuda	12,273
Nassau, Bahama Islands	18,800
Vancouver, Canada	16,372
Winnipeg, Canada	3,483
Freeport, Bahama Islands	16,356
Calgary, Canada	9,893
Edmonton, Canada	6,592

D. LYNN GORDON,
Acting Comptroller.

[Published in the Federal Register, February 24, 1986 (51 FR 6496)]

(T.D. 86-51)

Guidelines for Release of Seized and Forfeited Property to State and Local Law Enforcement Agencies

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of guidelines for disposition of seized and forfeited property.

SUMMARY: This document sets forth the Customs policy regarding the disposition of seized and forfeited property. This action is necessary to implement those provisions of the Comprehensive Crime Control Act of 1984 and the Trade and Tariff Act of 1984 concerning the transfer of seized and forfeited property to state and local law enforcement agencies that assisted Customs in the seizure of forfeiture. This action is consistent with Customs efforts to enhance and promote cooperation with state and local law enforcement agencies.

EFFECTIVE DATE: February 25, 1986.

FOR FURTHER INFORMATION CONTACT: Stuart P. Seidel, Assistant Chief Counsel (Enforcement and Operations), Office of the Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 ((202) 566-2482).

SUPPLEMENTARY INFORMATION:

Background

I. Statement of Policy.

Customs is authorized by various laws enforced or administered by the Customs Service to seize property for violations of the Customs, navigation and related laws. Pursuant to § 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), any person with an interest in the seized property may petition for relief and the Secretary of the Treasury may mitigate or remit any fine, penalty or forfeiture incurred with respect to the violation. Property which is not released in response to a petition under 19 U.S.C. 1618 or other provisions of law may be disposed of in accordance with the provisions of § 616, Tariff Act of 1930 (19 U.S.C. 1616, 1616a), which was added to the United States Code by the Comprehensive Crime Control Act of 1984 (P.L. 98-473) and the Trade and Tariff Act of 1984 (P.L. 98-573). The guidelines contained in this document implement the asset forfeiture provisions of § 616.

Customs statutory authority regarding releasing seized and forfeited property to state and local agencies is nearly identical to that of the Department of Justice. Customs participated in the drafting of the Department of Justice guidelines which were published in the Federal Register on June 7, 1985 (50 FR 24052), and the following guidelines and procedures correspond to the Justice guidelines and procedures as closely as possible.

Section 616 directs the Secretary of the Treasury to "ensure the equitable transfer * * * of any forfeited property to the appropriate state or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property."

This authority is consistent with Customs purpose of promoting cooperative law enforcement efforts. Custom intends to manage its asset forfeiture program in a manner designed to enhance this federal, state and local cooperation.

Customs is authorized to dispose of forfeited property by (1) retaining the property for official use; (2) transferring custody or ownership of the property to any federal, state or local agency pursuant to § 616 or (3) placing the forfeited cash or proceeds of sale of forfeited property in a special Customs forfeiture fund. A decision of the appropriate Customs official regarding placing the forfeited property into official use or transferring the property to another agency is not subject to judicial review.

Local Customs officials will inform state and local law enforcement agencies as to the procedures for requesting an equitable transfer of forfeited property, help facilitate the application for transfer of such property, and see that the spirit and letter of the forfeiture provisions of the Comprehensive Crime Control Act of 1984 and the Trade and Tariff Act of 1984 are implemented.

II. Definitions.

A. *"Commissioner"* means the Commissioner of Customs or his designee.

B. *"Local Customs official"* means the special agent in charge if the Customs officers participating in the seizure were assigned to the Office of Enforcement, or the district director if the Customs officers participating in the seizure were assigned to the Office of Inspection and Control. In rare cases, if the participating Customs officers are from offices which do not report to the special agent in charge or the district director, the term refers to the equivalent field office (if there is one) or the regional or Headquarters office which supervises the participating Customs officers. In cases of doubt, requests for equitable distribution may be submitted by other law enforcement agences directly to Customs Headquarters, but no action will be taken until the local Customs official has reviewed the request.

C. *"Regional Customs official"* means the Regional Commissioner of Customs or the individual designated by the Regional Commissioner (usually the Assistant Regional Commissioner (Enforcement)) to review requests for equitable distribution of seized property.

D. *"Appropriate Headquarters official"* means the Assistant Commissioner of Customs who supervises the Customs officers participating in the seizure. If the seizure involved Customs officers in dif-

ferent functional areas, the Assistant Commissioners for the concerned functional areas must jointly approve any transfer.

E. *"Property or assets"* means tangible property and cash.

F. *"Cash"* means currency, negotiable instruments and securities.

G. *"State and local agencies"* means law enforcement agencies of a state, the District of Columbia, Puerto Rico or any territory or possession of the U.S. or of any local government within the listed governments.

H. *"Appraised value"* means fair market value.

III. Transfer of Seized and Forfeited Property to State and Local Law Enforcement Agencies.

A. *Customs Service Seizures*

1. Commissioner's Authority for Equitable Transfer of Seized Property:

a. Section 616, Tariff Act of 1930, as amended, authorizes the Commissioner to transfer property seized by Customs officers to any other Federal agency, or to state or local law enforcement agencies that directly participated in the act which led to the seizure and forfeiture.

b. Tangible property not retained for official use by the federal seizing agency may be equitably transferred.

c. Where a participating law enforcement agency petitions for a share in the forfeited property, the Commissioner shall determine an equitable transfer of the property that generally reflects the relative contribution of the participating agencies.

2. Procedure for Determining Equitable Transfer:

a. Any state or local law enforcement agency that participates in the acts leading to a Customs seizure for forfeiture may file a request for an equitable transfer of the property.

b. The criteria for determining the equitable transfer of the property will be the same for all requests.

c. In all cases the final decision-making authority rests with the Commissioner.

3. Requests from Participating Law Enforcement Agencies:

a. Within 30 days following the seizure for forfeiture, the state or local agency shall submit a written request for an equitable transfer of the property subject to forfeiture to the local Customs official responsible for the Customs law enforcement effort resulting in the seizure for forfeiture.

b. If more than one local Customs office was involved in the law enforcement effort resulting in the seizure, the request should be forwarded by the local office receiving the request to the appropriate regional Customs official. If more than one region was involved, the request should be forwarded by the local office receiving the request through this regional office to the appropriate Customs Headquarters official.

c. The request must include the following information:

(1) Identification of the property against which the claim is made;

(2) Details regarding the requesting agency's participation, including the amount of money and manpower expended by the State or local agency in pursuing the case;

(3) A statement of the intended use for the property;

(4) A designation of the proper fiscal officer to whom cash or check disbursements can be made;

(5) A designation of the proper official to whom transfer documents should be delivered by the U.S.;

(6) A designation of the proper party to whom possession should be delivered;

(7) A statement indicating that the transfer is not prohibited under the applicable state or local law;

(8) In instances of a joint application by several state or local agencies, the relative share of each state or local agency;

(9) A statement that all fees and expenses necessary to effect transfer of title will be paid by or on behalf of the requesting agency not later than the time of transfer; and

(10) The extent to which transferred funds will be credited directly to the budget of the state or local agency involved, resulting in an increase of law enforcement resources for that state or local agency.

d. The requesting agency must certify that the information contained in items 3.c. (4) and (7) above is true and correct.

e. An information copy of the request for an equitable transfer will be forwarded by the local Customs official to the Fines, Penalties and Forfeitures Officer in the district office responsible for processing the forfeiture and a copy to the Seized Property Division in the Office of the Comptroller at Headquarters.

f. If a request for the property has been made, no report of seizure should be made by Customs to the General Services Administration.

4. Procedure for Processing Requests for Equitable Transfer:

a. In all cases, the local Customs official receiving the request will prepare a written report that will evaluate the degree of assistance provided by the requesting agency or agencies in the underlying law enforcement action resulting in the seizure for forfeiture. Where more than one local or regional office participated, the request should be expeditiously sent through the other Customs participants for their approval or comment.

b. The equitable share for a participating state or local agency should generally reflect the contribution of the agency participating directly in any of the acts which led to the seizure for forfeiture of the property including, but not limited to, the following factors:

(1) which agency initiated the case;

(2) which agency identified the asset;

(3) the amount of money and manpower expended by the state or local agency in pursuing the case;

(4) whether or not the state or local agency seized other assets during the course of the same investigation and whether such seizures were made pursuant to state or local law; and

(5) whether or not the state or local agency could have achieved forfeiture under state law, with favorable consideration given to a state or local agency which would have forfeited the asset(s) on its own but joined forces with the U.S. to make a more effective investigation.

c. In cases in which a state or local agency has filed a request for an equitable share of that property, the Commissioner may still decide to place property forfeited administratively or judicially into official use or transfer the property to any other federal agency.

(1) In making that decision, the following factors must be considered:

(a) the relative needs of the requesting law enforcement agency, Customs, and any other federal agency for the particular asset;

(b) the uniqueness of the asset and the likelihood of securing such an asset through other seizures in the near future;

(c) the relative significance of the requesting law enforcement agency's participation in the case, as well as all other factors pertinent to the determination of equitable distribution as set forth in item 4.b. above;

(d) the likelihood that the requesting agency will be eligible for an equitable share of property from additional seizures arising from the same investigation or from other seizures in the near future;

(e) the impact that a decision to place the property into official use might have on federal, state or local relations; and

(f) any extraordinary expenses associated with the seizure, including any informants awards which may be payable.

5. Decision-Making Authority for Determining Equitable Transfer:

a. Except as indicated in item 5.c. below, the equitable distribution of a forfeited asset with an appraised value of $250,000 or less will be determined by the appropriate Headquarters official.

(1) The local Customs official receiving a request shall forward his report and recommendation through the appropriate regional official to the appropriate Headquarters official.

(2) In making this decision, consideration will be given to the report and recommendation forwarded by the local Customs official, and a written ruling on the request will be issued by the appropriate Headquarters official through the appropriate regional official and the local Customs official to the requesting party.

(3) A copy of the written ruling will be forwarded to the district director having custody of the seized or forfeited asset and the

Seized Property Division in the Office of the Comptroller at Headquarters.

b. In the case of property valued at greater than $250,000, the evaluation and recommendation will be forwarded to the appropriate Headquarters official who will forward a final recommendation to the Commissioner. The Commissioner will determine the equitable distribution of those assets.

(1) In making this decision, the Commissioner will consider the reports and recommendations forwarded by the appropriate Headquarters official and, in the case of assets with an appraised value of $750,000 or greater, will consult with the Assistant Secretary of the Treasury (Enforcement and Operations). A written ruling on the request will be prepared by the Assistant Commissioner (Enforcement) and, after signature by the Commissioner, will be issued through the appropriate regional official and sent to the local Customs official for delivery to the requesting party.

(2) A copy of the written ruling will be forwarded to the district director having custody of the seized or forfeited asset and the Seized Property Division in the Office of the Comptroller at Headquarters.

c. The appropriate regional Customs official may make an equitable distribution of a forfeited conveyance with an appraised value of $25,000 or less if the participating Customs officers were assigned to his/her region.

(1) In making this decision, the regional Customs official will consider the reports and recommendations forwarded by the local Customs official and issue a decision through that official to the requesting party.

(2) A copy of the decision document will be forwarded to the district director having custody of the seized or forfeited asset and to the Seized Property Division in the Office of the Comptroller at Headquarters.

6. Proceeds Placed in the Customs Forfeiture Fund:

a. If the federal forfeiture action is not deferred, and the property is not placed into official use or transferred to a state or local agency, it will be sold and the proceeds of sale, after deducting expenses, etc., will be placed in the Customs Forfeiture Fund.

b. Forfeited cash will be placed in a suspense account pending deposit in the Customs Forfeiture Fund.

7. Disposition of Forfeited Property:

a. State or local agencies may share in seized and forfeited tangible property, and seized and forfeited cash. In the case of seized and forfeited cash, the equitable share of any state or local agency shall be determined after applying the criteria in items 4.b. and 4.c. above.

b. Any property that cannot be used for official Customs, federal, state or local purposes must be destroyed or sold or otherwise disposed of in accordance with law.

c. Where tangible property is transferred to qualifying state or local agencies, the Customs Forfeiture Fund and appropriated monies will not be used to pay liens or mortgages on the transferred property, to equip the property for law enforcement purposes, or to pay salaries.

d. The recipient state or local agency must pay the valid liens and mortgages on the forfeited tangible property prior to the transfer of such property.

e. The recipient state or local agency may be required to pay expenses pertaining directly to the seizure prior to the transfer of tangible property.

f. Prior to any interlocutory or immediate sale of property pending forfeiture, the district director having custody of the property must consult with any other involved local Customs official and the U.S. Attorney, Criminal Division section chief, or the Director of the Asset Forfeiture Office, Department of Justice, to determine the evidentiary status of the property and the status of any state or local law enforcement agency requests for equitable sharing.

g. All Customs officers will promptly notify the district director having custody of seized property of any facts affecting such seized property. Relevant facts would include bills, invoices, orders of mitigation and remission, orders of designation for official use, and appraisals. Based upon these and other factors, the district director's office should ensure the proper disposition of the property.

B. *Seizures involving the participation of other federal agencies*

1. Where a state or local agency requests equitable distribution of property which was seized through the participation of a federal agency other than Customs, the local Customs official shall send a copy of the request to the other agency for its review and recommendation.

2. Where a state or local agency requests equitable distribution of property which was seized as part of an OCDETF (Organized Crime/Drug Enforcement Task Force) or joint Customs/DOJ (Department of Justice) case, the request should be reviewed by the U.S. Attorney (or DOJ attorney-in-charge) and submitted to Customs Headquarters with their recommendations. If Customs Headquarters disagrees with the U.S. Attorney (or DOJ attorney-in-charge) recommendations, the matter shall be referred to the Assistant Secretary of the Treasury (Enforcement and Operations). If necessary, the Assistant Secretary and the appropriate Justice Department official shall review the recommendations and make the decision.

3. Where the only participating federal agency is an agency other than Customs (the Coast Guard, for example), and Customs is merely the custodian, the other agency shall review the request and make the recommendation to Customs Headquarters.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

This document provides guidelines concerning internal Customs procedures and is designed to promote efficient use of personnel, facilities, and resources and to promote cooperative law enforcement efforts. It has no effect on the general public. Accordingly, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), notice and solicitation of comments is unnecessary and good cause is found for dispensing with a delayed effective date for adoption of the new guidelines.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

JOHN P. SIMPSON,
Acting Commissioner of Customs.

Approved: January 14, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury,

[Published in the Federal Register, February 25, 1986 (51 FR 6608)]

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19 CFR Parts 12 and 178

(T.D. 86-52)

Customs Regulations Amendments Concerning Convention on Cultural Property Implementation Act

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding provisions to implement the Convention on Cultural Property Implementation Act. The Convention addressed the problem of illicit importing and exporting of items of cultural property, that is, items of importance for archaeology, prehistory, history, literature, art, or science. These regulations are designed to prohibit illicit traffic in cultural property while allowing the exchange of natural treasures for legitimate scientific, educational, and cultural purposes. The regulations are effective for all importations of cultural property, and archaeological and ethnological material, subject to the Convention.

EFFECTIVE DATE: March 31, 1986.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Samuel Orandle, Entry Procedures and Penalties Division (202-

566-5765); Operational Aspects: Louis Alfano, Duty Assessment Division (202-566-8651); U.S. Customs, Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Beginning in the late 1960's, the U.S. began participating in negotiations, sponsored by the United Nations Educational, Scientific and Cultural Organization (UNESCO), addressing the problem of illicit international trade in cultural property. Cultural property was defined as property which, on religious or secular grounds, is specifically designated by a country as being important in the archaeology, prehistory, history, literature, art, or science of that country.

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, clandestine excavation of archaeological sites and accompanying illegal importing and exporting.

There has been growing concern in the U.S. regarding the need for protecting endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been recent pillaging has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of the museum, archaeological, and scholarly communities, was recognized by the President and Congress. Codes of ethics and professional standards were formally developed by these communities. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in negotiations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Owernship of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub. L. 97-446, 96 Stat. 2329 at 2350). The spirit of the Convention was enacted into law to promote U.S. leadership in achieving greater international cooperation toward preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. In 1983 the U.S. became the first major art importing country to implement the 1970 Convention.

It was with these goals in mind that Customs issued interim regulations to carry out the policies of the Act. The interim regulations were published in the Federal Register as T.D. 85-107 on

June 25, 1985 (50 FR 26192), and took effect immediately. However, comments on the interim regulations were invited for consideration before final regulations were issued.

Analysis of Comments

One commenter conveyed strong support for the intent of the regulations while expressing a general concern for what he termed "weaknesses and ambiguities". However, the commenter stated the weakness was the result of the Convention and the implementing Act, and therefore, could not be corrected in the regulations. Customs does not believe the regulations are weak. However, we cannot address specifics since the commenter did not raise any specific points.

The remaining 4 commenters were more detailed in their submissions. Comments they raised and Customs replies are as follows.

Comment: The definition of "museum" in § 12.104(e) should be attributed to its source, the Museum Services Act (Pub. L. 94-462, 20 U.S.C. 968).

Reply: Customs agrees and has added the reference. Also, Customs is adopting a comment that clarifies the point that "recognized museum" under the Act is synonymous with "museum".

Comment: The regulations should clarify how the Secretary of the Treasury will select a museum or other institution to temporarily hold a seized article of archaeological or ethnological material, or article of seized cultural property. Also, the regulations should provide for reimbursement to a museum or institution holding such an article or piece of property if the object requires special care or more security than normal.

Reply: As written, § 12.104f contains reference to the two basic criteria the Secretary will use in determining which museum or institution, if any, will be given an article or material seized under these regulations, for temporary display. These factors are: the safety that will be provided the article or material, and the museum or institution's assurances, backed by a sufficient bond, that the article or material will be returned to the Secretary upon request. This decision is left to the Secretary's discretion and these regulations are not the proper forum for a listing of specifications concerning museums or institutions. The Secretary will consider such requests by museums or institutions on a case-by-case basis.

As to the comment requesting a regulation providing financial assistance to a museum or institution seeking to temporarily house a seized article or material, Customs is aware of no statutory authority requiring that such aid be made available. To the contrary, Customs believes such a provision is contraindicated by the Secretary's requirement of selecting a museum or institution that is financially able to assure the item's safe return.

Comment: Customs failure to prepare a regulatory impact statement is improper. The regulations will have the kind of impact which requires a regulatory impact statement.

Reply: Customs disagrees. These regulations will only have a minor impact on the general public. Persons who trade in archaeological and ethnological material, or in cultural property, will be more affected. Certain documentation or evidence will be required upon importation of articles or materials designated by agreements or emergency actions as coming under the protection of the Act. Customs would characterize this as a minor impact. Customs does not believe that these regulations will result in any significant economic costs, and no comments to the contrary were submitted.

Comment: Customs BACKGROUND statement in the interim regulations was unwarranted and improper. Although the text of the interim regulations correctly specifies which prohibitions pertain to which types of property, Customs BACKGROUND statement may lead to unnecessary confusion.

Reply: Customs agrees that the term, "cultural property", may have been used broadly in the BACKGROUND section of the interim regulations. We regret if any statements made may have appeared too strongly worded.

The intent of the BACKGROUND section was to convey the urgency of the problem the interim regulations were designed to address. We do not believe the wording was misleading or confusing to a degree requiring that these regulations be reissued with another opportunity to comment. In fact, the commenter raising these points also states the interim regulations themselves correctly set out the prohibitions pertaining to different types of articles or materials.

Comment: Portions of the interim regulations are inconsistent with the Act.

Reply: Customs agrees that there are some instances where the interim regulations diverged slightly from the Act. To correct this, the following changes have been made to the final regulations.

(1) In § 12.104(a)(1), the word, "and" is being added after paragraph (a)(1)(ii), and the phrase, "or in addition to paragraphs (a)(1)(i) and (ii) of this section" is being added after paragraph (a)(1)(iii).

(2) In § 12.104a(a), reference is made to articles of cultural property stolen from "such institution". The corrected phrase in the final regulations is "such museum, monument, or institution".

(3) In § 12.104a(b) in the interim regulations, a phrase was omitted. The proper wording of § 12.104a(b) as it appears in the final regulations is as follows: No archaeological or ethnological material designated pursuant to 19 U.S.C. 2604 and listed in § 12.104g, that is exported (whether or not such exportation is to the U.S.) from the State Party after the designation of such material under 19 U.S.C. 2604 may be imported into the U.S. unless the State Party

issues a certificate or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

(4) In § 12.104b, the introductory paragraph is changed to read, "The following is a list of State Parties and the date of entry into force for each State Party:". Also, Zambia is added in proper alphabetical order with a date of entry into force of September 21, 1985.

(5) In § 12.104c(a), the phrase, "is filed with the district director," is moved from the end of the paragraph to immediately after the word "Secretary".

(6) In § 12.104d, reference is made to the, "certificate or evidence". The corrected phrase in the final regulations is "certificate, documentation, or evidence".

(7) In § 12.104g, the word "Convention" is changed to "Convention on Cultural Property Implementation Act" to properly reflect the source of the protections provided items and categories of protected materials.

Comment: One commenter requested clarification of whether the documentation accompanying an importation of designated archaeological or ethnological material might also apply to importations of cultural property. The commenter, representing research libraries, was concerned over the burden a broad interpretation of these regulations would impose on research libraries obtaining rare manuscripts and incunabula from sources outside the U.S.

Reply: The documentation required for importations of designated archaeological and ethnological material does not apply to importations of rare manuscripts, incunabula, or other items of cultural property.

After consideration of all of the comments received in response to publication of the interim regulations, and further review of the matter, it has been determined to adopt the regulations in final form with the modifications previously discussed.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Pursuant to § 3 of the Regulatory Flexibility Act (Pub. L. 96-353, 5 U.S.C. 301 *et seq.*), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

LIST OF SUBJECTS IN 19 CFR PARTS 12, 178

PART 12

Customs duties and inspection, Imports, Exports.

PART 178

Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

Parts 12 and 178, Customs Regulations (19 CFR Parts 12, 178), were amended on an interim basis by the publication of T.D. 85-107, in the Federal Register on June 25, 1985 (50 FR 26193). These parts are now amended in final in the following manner:

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624.

§ 12.104 et seq. also issued under 19 U.S.C. 2612.

2. Part 12 is further amended by adding a new unit titled, "Cultural Property", designated §§ 12.104-12.104i to read as follows:

CULTURAL PROPERTY

Sec.

12.104 Definitions.

12.104a Importations prohibited.

12.104b State Parties to the Convention.

12.104c Importations permitted.

12.104d Detention of articles; time in which to comply.

12.104e Seizure and forfeiture.

12.104f Temporary disposition of materials and articles.

12.104g Specific items or categories designated by agreements or emergency actions.

12.104h Exempt materials and articles.

12.104i Enforcement.

§ 12.104 Definitions.

For purposes of §§ 12.104 through 12.104i:

(a) The term, "archaeological or ethnological material of the State Party" to the 1970 UNESCO Convention means—

(1) Any object of archaeological interest. No object may be considered to be an object of archaeological interest unless such object—

(i) Is of cultural significance;

(ii) Is at least 250 years old; and

(iii) Was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water; or in addition to paragraphs (a)(1) (i) and (ii) of this section;

(iv) Meets such standards as are generally acceptable as archaeological such as, but not limited to, artifacts, buildings, parts of buildings, or decorative elements, without regard to whether the particular objects are discovered by exploration or excavation;

(2) Any object of ethnological interest. No object may be considered to be an object of ethnological interest unless such object—

(i) Is the product of a tribal or nonindustrial society, and

(ii) Is important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development or history of that people;

(3) Any fragment or part of any object referred to in paragraph (a) (1) or (2) of this section which was first discovered within, and is subject to export control by the State Party.

(b) The term "Convention" means the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property adopted by the General Conference of the United Nations Educational, Scientific, and Cultural Organization at its sixteenth session (823 U.N.T.S. 231 (1972)).

(c) The term "cultural property" includes articles described in Article 1 (a) through (k) of the Convention, whether or not any such article is specifically designated by any State Party for the purposes of Article 1. Article 1 lists the following categories:

(1) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(2) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(3) Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(4) Elements of artistic or historical monuments or archaeological sites which have been dismembered;

(5) Antiquities more than 100 years old, such as inscriptions, coins and engraved seals;

(6) Objects of ethnological interest;

(7) Property of artistic interest, such as:

(i) Pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) Original works of statuary art and sculpture in any material;

(iii) Original engravings, prints and lithographs;

(iv) Original artistic assemblages and montages in any material;

(8) Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

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(9) Postage, revenue and similar stamps, singly or in collections;

(10) Archives, including sound, photographic and cinematographic archives;

(11) Articles of furniture more than 100 years old and old musical instruments.

(d) The term "designated archaeological or ethnological material" means any archaeological or ethnological material of the State Party which—

(1) Is—

(i) Covered by an agreement under 19 U.S.C. 2602 that enters into force with respect to the U.S., or

(ii) Subject to emergency action under 19 U.S.C. 2603 and

(2) Is listed by regulation under 19 U.S.C. 2604.

(e) The term "museum" means a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or esthetic purposes, which, utilizing a professional staff, owns or utilizes tangible objects, cares for them, and exhibits them to the public on a regular basis (Museum Services Act; Pub. L. 94-462; 20 U.S.C. 968). For the purposes of these regulations, the term "recognized museum" under the Cultural Property Implementation Act shall be synonymous with "museum".

(f) The term "Secretary" means the Secretary of the Treasury or his delegate, the Commissioner of Customs.

(g) The term "State Party" means any nation which has ratified, accepted, or acceded to the 1970 UNESCO Convention.

(h) The term "United States" or "U.S.", includes the customs territory of the United States, the U.S. Virgin Islands and any territory or area the foreign relations for which the U.S. is responsible.

§ 12.104a Importations prohibited.

(a) No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which was stolen from such museum, monument, or institution after April 12, 1983, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the U.S.

(b) No archaeological or ethnological material designated pursuant to 19 U.S.C. 2604 and listed in § 12.104g, that is exported (whether or not such exportation is to the U.S.) from the State Party after the designation of such material under 19 U.S.C. 2604 may be imported into the U.S. unless the State Party issues a certificate or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

§ 12.104b State parties to the convention.

(a) The following is a list of State Parties, and the date of entry into force for each State Party:

State Party	Date of entry into force
Algeria	Sept. 24, 1974.
Argentina	Apr. 11, 1973.
Bolivia	Jan. 4, 1977.
Brazil	May 16, 1973.
Bulgaria	Apr. 24, 1972.
Cameroon	Aug. 24, 1972.
Canada	June 28, 1978.
Central African Republic	May 1, 1972.
Cuba	Apr. 30, 1980.
Cyprus	Jan. 19, 1980.
Czechoslovakia	May 14, 1977.
Democratic Kampuchea	Dec. 26, 1972.
Democratic People's Republic of Korea	Aug. 13, 1983.
Dominican Republic	June 7, 1973.
Ecuador	Apr. 24, 1972.
Egypt	July 5, 1973.
El Salvador	May 20, 1978.
German Democratic Republic	Apr. 16, 1974.
Greece	Sept. 5, 1981.
Guatemala	Apr. 14, 1985.
Guinea	June 18, 1979.
Honduras	June 19, 1979.
Hungary	Jan. 23, 1979.
India	Apr. 24, 1977.
Iran	Apr. 27, 1975.
Iraq	May 12, 1973.
Italy	Jan. 2, 1979.
Jordan	June 15, 1974.
Kuwait	Sept. 22, 1972.
Mauritania	July 27, 1977.
Mauritius	May 27, 1978.
Mexico	Jan. 4, 1973.
Nepal	Sept. 23, 1976.
Nicaragua	July 19, 1977.
Niger	Jan. 16, 1973.
Nigeria	Apr. 24, 1972.
Oman	Sept. 2, 1978.
Pakistan	July 30, 1981.
Panama	Nov. 13, 1973.
Peru	Jan. 24, 1980.
Poland	Apr. 30, 1974.
Portugal	Mar. 9, 1986.
Qatar	July 20, 1977.
Republic of Korea	May 14, 1983.
Saudi Arabia	Dec. 8, 1976.

State Party	Date of entry into force
Senegal	Mar. 9, 1985.
Socialist People's Libyan Arab Jamahiriya	Apr. 9, 1973.
Spain	Apr. 10, 1986.
Sri Lanka	July 7, 1981.
Syrian Arab Republic	May 21, 1975.
Tunisia	June 10, 1975.
Turkey	July 21, 1981.
United Republic of Tanzania	Nov. 2, 1977.
United States of America	Dec. 2, 1983.
Uruguay	Nov. 9, 1977.
Yugoslavia	Jan. 3, 1973.
Zaire	Dec. 23, 1974.
Zambia	Sept. 21, 1985.

(b) Additions to and deletions from the list of State Parties will be accomplished by Federal Register notice, from time to time, as the necessity arises.

§ 12.104c Importations permitted.

Designated archaeological or ethnological material for which entry is sought into the U.S., will be permitted entry if at the time of making entry:

(a) A certificate, or other documentation, issued by the Government of the country of origin of such material in a form acceptable to the Secretary is filed with the district director, such form being, but not limited to, an affidavit, license, or permit from an appropriate, authorized State Party official under seal, certifying that such exportation was not in violation of the laws of that country, or

(b) Satisfactory evidence is presented to the district director that such designated material was exported from the State Party not less than 10 years before the date of such entry and that neither the person for whose account the material is imported (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than 1 year before that date of entry, or

(c) Satisfactory evidence is presented to the district director that such designated material was exported from the State Party on or before the date on which such material was designated under 19 U.S.C. 2604.

(d) The term "satisfactory evidence" means—

(1) For purposes of paragraph (b) of this section—

(i) One or more declarations under oath by the importer, or the person for whose account the material is imported, stating that, to the best of his knowledge—

(A) The material was exported from the State Party not less than 10 years before the date of entry into the U.S., and

(B) Neither such importer or person (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than 1 year before the date of entry of the material; and

(ii) A statement provided by the consignor, or person who sold the material to the importer, which states the date, or, if not known, his belief, that the material was exported from the State Party not less than 10 years before the date of entry into the U.S. and the reasons on which the statement is based; and

(2) For purposes of paragraph (c) of this section—

(i) One or more declarations under oath by the importer or the person for whose account the material is to be imported, stating that, to the best of his knowledge, the material was exported from the State Party on or before the date such material was designated under 19 U.S.C. 2604, and

(ii) A statement by the consignor or person who sold the material to the importer which states the date, or if not known, his belief, that the material was exported from the State Party on or before the date such material was designated under 19 U.S.C. 2604, and the reasons on which the statement is based.

(e) *Related persons.* For purposes of paragraphs (b) and (d) of this section, a person shall be treated as a related person to an importer, or to a person for whose account material is imported, if such person—

(1) Is a member of the same family as the importer or person of account, including, but not limited to, membership as a brother or sister (whether by whole or half blood), spouse, ancestor, or lineal descendant;

(2) Is a partner or associate with the importer or person of account in any partnership, association, or other venture; or

(3) Is a corporation or other legal entity in which the importer or person of account directly or indirectly owns, controls, or holds power to vote 20 percent or more of the outstanding voting stock or shares in the entity.

§ 12.104d Detention of articles; time in which to comply.

In the event an importer cannot produce the certificate, documentation, or evidence required in § 12.104c at the time of making entry, the district director shall take the designated archaeological or ethnological material into Customs custody and send it to a bonded warehouse or public store to be held at the risk and expense of the consignee until the certificate, documentation, or evidence is presented to such officer. The certificate, documentation, or evidence must be presented within 90 days after the date on which the material is taken into Customs custody, or such longer period as may be allowed by the district director for good cause shown.

§ 12.104e Seizure and forfeiture.

(a) Whenever any designated archaeological or ethnological material is imported into the U.S. in violation of 19 U.S.C. 2606, and the importer states in writing that he will not attempt to secure the certificate, documentation, or evidence required by § 12.104c, or such certificate, documentation, or evidence is not presented to the district director before the expiration of the time provided in § 12.104d, the material shall be seized and summarily forfeited to the U.S. in accordance with Part 162 of this chapter.

(1) Any designated archaeological or ethnological material which is forfeited to the U.S. shall, in accordance with the provisions of Title III of Pub. L. 97-446, 19 U.S.C. 2609(b):

(i) First be offered for return to the State Party;

(ii) if not returned to the State Party be returned to a claimant with respect to whom the designated material was forfeited if that claimant establishes—

(A) valid title to the material;

(B) that the claimant is a bona fide purchaser for value of the material; or

(iii) if not returned to the State Party under paragraph (a)(1)(i) of this section or to a claimant under paragraph (a)(1)(ii) of this section, be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws. No return of material may be made under paragraph (a)(1) (i) or (ii) of this section unless the State Party or claimant, as the case may be, bears the expenses incurred incident to the return and delivery, and complies with such other requirements relating to the return as the Secretary shall prescribe.

(b) Whenever any stolen article of cultural property is imported into the U.S. in violation of 19 U.S.C. 2607, such cultural property shall be seized and forfeited to the U.S. in accordance with Part 162 of this chapter.

(1) Any stolen article of cultural property which is forfeited to the U.S. shall, in accordance with the provisions of Title III of Pub. L. 97-446, 2609(c):

(i) First be offered for return to the State Party in whose territory is situated the institution referred to in 19 U.S.C. 2607 and shall be returned if that State Party bears the expenses incident to such return and delivery and complies with such other requirements relating to the return as the Secretary prescribes; or

(ii) if not returned to such State Party, be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws.

§ 12.104f Temporary disposition of materials and articles.

Pending a final determination as to whether any archaeological or ethnological material, or any article of cultural property, has been imported into the U.S. in violation of 19 U.S.C. 2606 or 19

U.S.C. 2607, the Secretary may permit such material or article to be retained at a museum or other cultural or scientific institution in the U.S. if he finds that sufficient safeguards will be taken by the museum or institution for the protection of such material or article; and sufficient bond is posted by the museum or institution to ensure its return to the Secretary.

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) [Reserved]

(b) A list of specific items or categories designated by agreements or emergency actions as coming under the protection of the Convention on Cultural Property Implementation Act will from time to time, as the necessity arises, be published in the Federal Register by means of a general notice.

§ 12.104h Exempt materials and articles.

The provisions of these regulations shall not apply to—

(a) Any archaeological or ethnological material or any article of cultural property which is imported into the U.S. for temporary exhibition or display, if such material or article is rendered immune from seizure under judicial process by the U.S. Information Agency, Office of the General Counsel and Congressional Liaison, pursuant to the Act entitled "An Act to render immune from seizure under judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition, and for other purposes", approved October 19, 1965 (22 U.S.C. 2459); or

(b) Any designated archaeological or ethnological material or any article of cultural property imported into the U.S. if such material or article—

(1) Has been held in the U.S. for a period of not less than 3 consecutive years by a recognized museum or religious or secular monument or similar institution, and was purchased by that institution for value, in good faith, and without notice that such material or article was imported in violation of these regulations, but only if—

(i) the acquisition of such material or article has been reported in a publication of such institution, any regularly published newspaper or periodical with a circulation of at least 50,000 or a periodical or exhibition catalog which is concerned with the type of article or materials sought to be exempted from these regulations,

(ii) such material or article has been exhibited to the public for a period or periods aggregating at least 1 year during such 3-year period, or

(iii) such article or material has been cataloged and the catalog material made available upon request to the public for at least 2 years during such 3-year period;

(2) If paragraph (b)(1) of this section does not apply, has been within the U.S. for a period of not less than 10 consecutive years and has been exhibited for not less than 5 years during such period in a recognized museum or religious or secular monument or similar institution in the U.S. open to the public;

(3) If paragraphs (b) (1) and (2) of this section do not apply, has been within the U.S. for a period of not less than 10 consecutive years and the State Party concerned has received or should have received during such period fair notice (through such adequate and accessible publication, or other means, as the Secretary or his designee shall prescribe) of its location within the U.S.; and

(4) If none of the preceding subparagraphs apply, has been within the U.S. for a period of not less than 20 consecutive years and the claimant establishes that it purchased the material or article for value without knowledge or reason to believe that it was imported in violation of law.

§ 12.104i Enforcement.

In the customs territory of the United States, and in the U.S. Virgin Islands, the provisions of these regulations shall be enforced by appropriate customs officers. In any other territory or area within the U.S., but not within such customs territory or the U.S. Virgin Islands, such provisions shall be enforced by such persons as may be designated by the President.

Part 178, Customs Regulations (19 CFR Part 178), was also amended by the interim regulations issued as T.D. 85-107. The Office of Management and Budget control number issued to these regulations remains the same and is retained in § 178.2.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 et seq.

§ 178.2

2. Section 178.2 is amended by inserting, in proper numerical order, the following entry:

19 CFR section	Description	OMB Control No.
12.104c 12.104e	Certificates and other documentation relating to the importation of items of cultural property.	1515-0147

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: February 3, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 26, 1986 (51 FR 6905)]

(T.D. 86-53)

Petitioner's Desire To Contest Decision Denying Domestic Interested Party Petition Concerning Reclassification of Operatic and Theatrical Costumes

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of petitioner's desire to contest decision on domestic interested party petition.

SUMMARY: This document advises the public of the desire of an interested party to contest Customs decision denying its petition requesting reclassification of certain imported operatic and theatrical costumes rented to U.S. opera and theater companies. The petitioner has advised Customs of its intention to file an action in the U.S. Court of International Trade.

DATE: February 25, 1986.

FOR FURTHER INFORMATION CONTACT: Harold Singer, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 23, 1984, a notice was published in the Federal Register (49 FR 46162) indicating that Customs had received a petition from a domestic interested party filed under § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), requesting that imported operatic and theatrical costumes rented to U.S. opera and theater companies be classified as dutiable under the appropriate provisions of Schedule 3, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), for wearing apparel.

The costumes are imported for the use of certain opera and theater companies in the U.S. They are rented by the U.S. companies for the duration of a particular production, and then returned to the foreign exporter. They are currently classifiable under the provision for "regalia" in item 851.30, TSUS, and entitled to entry free of duty. This provision exempts from duty any articles imported for the use of any public library, any other public institution, or any nonprofit institution established for educational, scientific, literary, or philosophical purposes, or for the encouragement of the fine

arts. It is Customs opinion that opera and theater companies are such nonprofit institutions established to encourage the fine arts.

In support of its position that imported operatic and theatrical costumes are not classifiable as "regalia" under item 851.30, TSUS, the petitioner made the argument that past Customs rulings do not support the use of item 851.30, TSUS, for the duty-free importation of the costumes. The petitioner stated that these rulings apply under item 851.30, TSUS, specifically to situations in which: (1) The costumes are the property of the non-profit institution using them; (2) only a nominal admission fee to defray expenses will be charged; or (3) the performers using the costumes are not reimbursed for their services. The costumes, it was claimed, cannot therefore be used in any commercial activity. The petitioner contended that the costumes are the property of the foreign rental companies, not the opera and theater companies using them, that more than nominal admission fees to defray expenses are charged for opera and theater performances, that the opera and theater performers are often handsomely reimbursed for their services, and that the costumes are used in a commercial activity. Petitioner therefore concluded that the importation of the costumes under the duty-free provisions of item 851.30, TSUS, was a misapplication of that provision.

Six comments were received in response to the November 23, 1984, notice. Three of the commenters supported the current classification of opera and theater costumes as regalia. The arguments of the other commenters, including the petitioner's, challenging Customs current classification, are as follows:

(1) Operatic and theatrical costumes do not meet the plain and ordinary definition of "regalia";

(2) The term "regalia" is defined by Headnote 2, Part 4, Schedule 8, TSUS, as "only such insignia of rank or office, emblems or other articles as may be worn upon the person or borne in the hand during public exercises of the institution * * *" and commercial performances of operas and plays, albeit by a nonprofit organization, for which substantial admission charges are made, cannot be equated with "public exercises";

(3) The legislative history of item 851.30, TSUS, indicates that regalia is to symbolize a given organization as an institution and costumes rented out to different organizations do not symbolize any particular organization;

(4) Most imported costumes are used in profit-making theatrical productions for which performers receive enormous salaries and for which ticket prices are very expensive; and

(5) The requirement under item 851.30, TSUS, that regalia may be imported as the property of a nonprofit institution is not met where the costumes are rented.

DECISION ON PETITION AND NOTICE OF PETITIONER'S DESIRE TO CONTEST

After careful analysis of the comments received in response to the notice and further review of the matter, by letter dated November 6, 1985 (CLA-2 CO:R:CV:V, 553575 HS), the petitioner was informed through its counsel that Customs is of the opinion that the current classification is correct, and that the petition was therefore denied.

Item 851.30, TSUS, provides for the duty-free treatment of regalia imported for the use of "any library, any other public institution, or any nonprofit institution established for educational, scientific, literary or philosophical purposes, or for the encouragement of the fine arts. In reaching its decision affirming the classification of the costumes as regalia, Customs found the petitioner's and the other commenters' arguments challenging the current classification to be unpersuasive. First, it was noted that the definition of regalia in Headnote 2, Part 4, Schedule 8, TSUS, rather than the plain and ordinary definition, governs the use of the term in item 851.30, TSUS. That headnote specifically includes articles other than insignia or emblems and, according to the Tariff Classification Study of 1960, "almost any article which is worn upon the person or borne in hand during public exercises of the institution is regalia if it is not an article of furniture or fixtures, regular wearing apparel, or personal property of individuals." While some performances may require clothing that is indistinguishable from ordinary wearing apparel, it is clear that these types of costumes should not be treated as regalia as the headnote specifically excludes regular wearing apparel.

Second, it is clear to us that a nonprofit opera or theatrical company is a nonprofit institution for the encouragement of the fine arts and that performances of such organizations are "public exercises" of such institutions. If performances of such organizations are not "public exercises" of such organizations, we are at a loss at determining what would be considered a public exercise of these organizations. The regalia provision would have no meaning for nonprofit theatrical and opera companies if their performances were not considered public exercises.

Thirdly, the cost of tickets for a performance and payments made by opera companies to outstanding performers who further the nonprofit objectives of the institution are irrelevant to the question of whether an institution is engaged in commercial activity as long as the institution is nonprofit. We do emphasize, however, that for an opera or theatrical company to take advantage of the regalia provision, it must be shown that the institution is registered as a nonprofit organization under § 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

Fourthly, regarding the argument that the legislative history of item 851.30, TSUS, indicates that regalia is to symbolize a given or-

ganization as an institution, we could find no language in the legislative history that supports this assertion.

Finally, regarding the comment that regalia that is rented is not the property of the nonprofit institution, the requirement set forth in the TSUS entitling regalia to duty-free treatment is that the articles be imported for the use of the nonprofit institution. It is our view that rental use is sufficient and purchase is not necessary as long as the importer acquires the proprietary economic interest in the articles.

In response to Customs decision to deny the petition, on December 5, 1985, the petitioner filed notice of its desire to contest the decision in accordance with § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.23, Customs Regulations (19 CFR 175.23).

Customs has reconsidered the matter in light of the petitioner's letter of notice of its desire to contest the November 6, 1985, decision. We remain of the opinion that the decision is correct. That decision will stand in the absence of a contrary judgment rendered by the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit.

AUTHORITY

This notice is published under the authority of § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.24, Customs Regulations (19 CFR § 175.24).

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 3, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 25, 1986 (51 FR 6611)]

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19 CFR Part 4

(T.D. 86-54)

Customs Regulations Amendment Adding Norway to List of Countries Whose Pleasure Vessels are Entitled To Be Issued U.S. Cruising Licenses

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Norway to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any resident of the U.S. are allowed to arrive at and depart from Norwegian ports and cruise in the waters of Norway without being subjected to formal entry and clearance procedures. Therefore, Customs is extending reciprocal privileges to pleasure vessels belonging to any resident of Norway.

EFFECTIVE DATE: These privileges became effective for Norway on December 18, 1985.

FOR FURTHER INFORMATION CONTACT: John Mathis, Carriers, Drawback and Bonds Division (202-566-5706), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. vessels documented as yachts, used exclusively for pleasure, not engaged in any trade, and not violating the customs or navigation laws of the U.S. may proceed from port to port in the U.S. or to foreign ports without entering and clearing, as long as they have not visited hovering vessels.

Generally, foreign-flag yachts entering the U.S. are required to comply with the laws applicable for foreign vessels arriving at, departing from, and proceeding between ports of the U.S. However, as provided in § 4.94(b), Customs Regulations (19 CFR 4.94(b)), pleasure vessels from certain countries may be issued cruising licenses which exempt them from formal entry and clearance procedures (e.g., filing manifests, obtaining permits to proceed and paying entry and clearance fees) at all but the first port of entry in the U.S. Yachts or pleasure vessels not carrying passengers or merchandise in trade are exempt from paying tonnage tax and light money in any case pursuant to § 4.21(b)(5), Customs Regulations (19 CFR 4.21(b)(5)). Cruising licenses are available to pleasure vessels of countries which extend reciprocal privileges to U.S. pleasure vessels. A list of these countries is set forth in § 4.94(b).

By diplomatic note dated November 29, 1985, the Norwegian Royal Ministry of Foreign Affairs informed the American Embassy in Olso, Norway, that the Government of Norway permits yachts used and employed exclusively as pleasure vessels and belonging to any resident of the U.S., to arrive at and depart from ports of Norway and cruise the waters of Norway without entering and clearing Norwegian Customs, and without the payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes,

or charges for cruising licenses. The embassy conveyed this information to the Department of State, which in turn informed Customs Headquarters by a letter dated December 13, 1985. The Carriers, Drawback and Bonds Division of Customs is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.94(b). Therefore, on January 14, 1986, the Director of that division determined that, effective retroactively to December 18, 1985, Norway should be added to the list of countries set forth in § 4.94(b).

By virtue of the authority vested in the President by § 5 of the Act of May 28, 1908, 35 Stat. 425, as amended (46 U.S.C. 104), the President has delegated the authority to issue these cruising licenses to the Secretary of the Treasury by E.O. 10289, September 17, 1951. By Treasury Department Order 165–25, the Secretary of the Treasury delegated authority to the Commissioner of Customs to prescribe regulations relating to § 4.94(b) and other sections of the Customs Regulations relating to lists of countries entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated authority to amend this section to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then redelegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Government of Norway and the Department of State, as described above, it has been determined that the U.S. is in possession of satisfactory evidence regarding the passage of U.S. pleasure vessels through the ports and waters of Norway without their being subjected to formal entry and clearance procedures. Therefore, Norway is added to the list of countries whose pleasure vessels may be issued U.S. cruising licenses.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely implements a statutory requirement and involves a matter in which the majority of the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

THE REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a major impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs inspection and duties, Imports, Vessels, Yachts.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103.

§ 4.94 also issued under 19 U.S.C. 1433, 1434, 1435, 1441; 46 U.S.C. 91, 104, 313, 314.

4.94 [Amended]

2. Section 4.94(b), Customs Regulations (19 CFR 4.94(b)), is amended by inserting, in appropriate alphabetical order, the word, "Norway", to the list of countries whose yachts or pleasure vessels may be issued U.S. cruising licenses.

Date: February 20, 1986.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, February 26, 1986 (51 FR 6904)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC.

The following are decisions of the United States Customs Service which are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 86-6)

This ruling holds that a foreign trade zone grantee or operator is not, in normal circumstances, responsible under 19 U.S.C. 81n for prospective charges for additional Customs services which involve a departed zone tenant and removed zone merchandise.

January 31, 1983
For-1-CO:R:CD:D
214744 L

Re: Decision on Application for Further Review of Protest Nos. 4105-2-000001 and 4105-1-000003

DEAR SIR: The above captioned protests and applications for further review were filed against demands for payment of certain charges for Customs supervision at the Toledo Foreign-Trade Zone, billed on a total of 11 invoices dated from July 21, 1981, through December 22, 1981. Our decision follows:

Issue: The basic issue raised is whether charges for additional Customs services required at a foreign-trade zone (FTZ) are chargeable to the operator of the FTZ when those services are performed outside of the precincts and limits of the FTZ.

Facts: The Protestants are the grantee of an FTZ and the former operator of the FTZ. The bills, or more accurately, portions of bills protested, relate to services provided by Customs with respect to a tenant of the FTZ but which were performed subsequent to termination of the tenant's tenancy at the FTZ and apparently subse-

150-146 O - 86 - 3

quent to the time protestant FTZ operator stopped operating the FTZ and was succeeded by another firm as operator.

The sequence of events, as set out by the Protestants, is as follows. For a period of years ending in October 1980, a company was a tenant in a FTZ, and maintained a sizable inventory of merchandise in the FTZ. The Protestant former operator of the FTZ was the operator of the FTZ during the tenancy of that company.

At some time in or prior to March 1978, it is stated, Customs officers apparently became concerned with the integrity of the inventory of the above company's merchandise at the FTZ and began an investigation, the nature and scope of which is unknown to the Protestants. The method of investigation included comparison of inventory records of the company's merchandise "lots" with subsequent inventories of the same "lots." As a result of the investigation, Customs commenced to issue a series of claims for liquidated damages for duty due on merchandise said to have been found missing from each lot. These claims were addressed to Protestant FTZ grantee, and although not so stated, apparently were against the grantee's foreign-trade zone bond.

The FTZ bond is voluntarily tendered and is conditioned upon the removal of FTZ guards for other than the FTZ's normal business hours and guarantees the payment of all duties and taxes on such merchandise as may be removed from the FTZ without a proper Customs permit or otherwise be missing from the FTZ.

The claims were forwarded by the grantee to the operator and by the operator to the tenant company. The tenant company has contested the claims, taking the position that none of its merchandise was in fact missing.

In any event, investigation of the tenant by Customs is said to have resulted in a substantial increase in Customs charges for services at the FTZ, which were periodically billed to the grantee. During the tenure of the tenant at the FTZ, these charges were paid to Customs by the FTZ operator, who was in turn reimbursed by the tenant for that portion of the charges attributable to the tenant. The amount of the charge to the tenant was based upon rate and hour information furnished to the FTZ operator by Customs.

In October of 1980, the tenant discontinued its operation in the FTZ and removed its goods from the FTZ. It appears that prior to its departure from the FTZ, the tenant asked Customs to take all necessary steps to expedite the removal of their inventory from the FTZ. It further appears that in order to expedite the removal of the merchandise from the FTZ, Customs agreed that, when feasible, the paperwork necessary to accomplish the lot reconciliation typically performed at the time of constructive transfer would be performed after the removal of the merchandise, and therefore after departure of the tenant from the FTZ.

It is at this point in the sequence of events that the facts fail us. The Protestants deny ever making any such agreement with Customs and that Customs has been unresponsive to its inquiries concerning with whom Customs did make the agreement. Customs, on the other hand, has acknowledged that there is no record of the agreement but submits that all parties at the time, including the Protestants, were aware that extensive inventory discrepancies existed with the tenant's merchandise.

Following the tenant's departure and removal of its goods from the FTZ, Customs continued to issue demands for liquidated damages for goods of the former tenant said to be missing from the FTZ and to bill the FTZ operator for zone services which included substantial sums in respect to the former tenant's affairs. These billings are said to commence with an invoice dated May 19, 1981, although the first invoice which is the subject of these protests is dated July 21, 1981.

In the meantime, the Protestant former FTZ operator had terminated its operations at the FTZ and began succeeded by another firm as FTZ operator; it continues, however, to be responsible to the FTZ grantee for Customs charges arising out of the tenant's tenure.

Initially, Protestants attempted to handle the Customs charges for zone services attributed to the tenant by paying Customs and seeking reimbursement from the former tenant. However, the former tenant refused to pay, claiming the charges were not proper.

All charges billed have been paid and Protestants now claim a refund of $15,070.71, said to be that portion of the charges for zone Customs services attributable to the former tenant after that tenant's departure from the FTZ. However, the charges, the subject of the protests, appear to total $12,639.87.

Law and analysis: In our opinion, the question to be decided is one of fact, not of law. Protestants claim that Customs' concurrence in removal of the tenant's goods was obtained without their knowledge or permission. Section 146.5, Customs Regulations (19 CFR 146.5), requires the written concurrence of the grantee (or its delegate) to remove merchandise from a zone except where there is provision for the making of applications by the grantee itself or where the grantee is permitted to file specific or blanket approvals.

We find no evidence in the file of the written concurrence or blanket approval of the grantee for the removal of the goods from the zone. Neither do we find any evidence in the file that Protestants explicitly or implicitly agreed to the cost of Customs zone services performed subsequent to removal of the merchandise and departure of the tenant from the zone, although certainly the Protestant zone operator, at least, knew or should have known that the merchandise was being removed from the zone and tacitly concurred in that removal.

Nevertheless, we cannot interpret that tacit approval to constitute an unwritten agreement on the part of the Protestants to be responsible for any prospective charges involving a departed tenant and removed merchandise.

This is not to say, of course, that Protestants could not have agreed to be responsible for such charges, nor that under different circumstances the charges protested would not be proper.

Indeed, although in view of the result we have arrived at we do not believe it necessary to consider Protestant's arguments on the propriety of the charges, we would note that nothing in the statutory provisions on foreign-trade zones limits the scope of the "additional Customs services required" to on-site service. Customs has broad discretion to determine what service is required to carry out its statutory mandate, and is statutorily authorized to be reimbursed for the cost of such service by the grantee of the zone. Thus, if Customs officers are performing functions relating to protection of the revenue or to admission of foreign merchandise into Customs territory or any other function required under the statutory provisions on foreign-trade zones, Customs has authority to assess zone grantees for the cost of those services.

Holding: For the foregoing reasons, you are instructed to allow Protest Nos. 4105-2-000001 and 4105-1-000003 in the amount attributable to charges for Customs services incurred in connection with the departed zone tenant subsequent to its departure from the zone. As it is not necessary to the result, we do not rule on the propriety of the disputed charges.

(C.S.D. 86-7)

This ruling holds, pursuant to 19 U.S.C. 1563(a) and 19 CFR 158.21, that merchandise in a foreign trade zone which is destroyed beyond recovery by act of God, explosion, or fire is not subject to the assessment of U.S. Customs duties as liability for duties only arises upon transfer to Customs territory.

October 17, 1983
FOR-1-CO:R:CD:D
216240 L

Issue: If, through an act of God, explosion, or major conflagration, merchandise being held in a foreign-trade zone (FTZ) were destroyed, would the destroyed material be subject to the assessment of U.S. Customs duties?

Facts: In the specific case high value merchandise carrying a relatively high rate of duty is admitted to a FTZ for subsequent removal. It is stored in a building constructed of steel framing, masonry walls to eight feet with steel siding to twenty-two feet. The building is fully sprinklered with an automatic alarm system connected directly to the fire department. Despite this, the possibility exists that an act of God, explosion, or major fire could occur.

It is suggested that should this happen, and as a result merchandise is damaged beyond recovery that, subject to inspection by Customs, the material would be declared destroyed and no duty assessed. Further, that if there is recoverable waste it would be taxed relevant to its condition when entered for consumption. A number of reasons are advanced to support this suggestion.

Law and analysis: Section 3 of the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81c), provides in part that:

> Foreign * * * merchandise of every description * * * may, without being subject to the Customs laws of the United States * * * be brought into a zone * * * but when foreign merchandise is * * * sent from a zone into Customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise.

General Headnote 1 of the Tariff Schedules of the United States provides that:

> All articles imported into the Customs territory of the United States from outside thereof are subject to duty or exempt therefrom as prescribed in general headnote 3.

Foreign merchandise in a FTZ is imported into the United States but is not in the Customs territory of the United States. Such merchandise is not subject to duty until it is brought into the Customs territory. The voluntary Bond of Foreign-Trade Zone Operators guarantees the payment of all duties and taxes on merchandise removed from a FTZ without a proper Customs permit or which is otherwise missing from the zone, but would not be exercised where merchandise was destroyed in a FTZ by an act of God, explosion, or fire so long as the merchandise destroyed could be suitably accounted for. Accordingly, while Customs inspection may be necessary to establish that merchandise in a FTZ was in fact destroyed, duty cannot be assessed on merchandise in a FTZ.

We believe it pertinent at this point to emphasize that "destroyed" is interpreted to mean destruction as an article of commerce. If articles are destroyed to such an extent that they are valuable in commerce only as scrap they are still articles in commerce and cannot be said to have been destroyed. A diminution in value is not sufficient. The article, to be destroyed, must have no value. This can present a difficult problem as some commodities cannot be economically destroyed and some other commodities cannot actually be destroyed within the judicial definition because they easily can be reclaimed. For example, some metal scrap easily can be reclaimed from a landfill by use of a crane and magnet.

Recoverable waste resulting from an act of God, etc., and attributable to merchandise in nonprivileged foreign status or which may be commingled with domestic merchandise which has lost its identity pursuant to 19 CFR 146.23(c), if entered for consumption, would be classifiable and subject to duty in its condition at time of

removal from the FTZ. With respect to such merchandise in privileged foreign status, 19 CFR 146.21(d) provides that status as privileged foreign merchandise and the consequent determination of duties cannot be abandoned. We note that an act of God can be defined as an occurrence that is due entirely to the forces of nature and that could not reasonably have been prevented. The explosion or fire mentioned is also considered to be a fortuitous occurrence. As such, we do not consider the damage or destruction of privileged foreign merchandise in a FTZ by such an occurrence to be a manufacture or manipulation resulting in recoverable waste within the meaning of 19 CFR 146.21(d) and 19 CFR 146.48(a)(3).

Where nonprivileged or privileged foreign merchandise that has been constructively transferred is destroyed by an act of God, etc., before physical removal from the FTZ the merchandise shall be considered to be in Customs territory, 19 CFR 146.47(c). As such, relief may be available pursuant to 19 U.S.C. 1563(a) and 19 CFR 158.21 *et seq.* Note, however, *Camilo E. Rosello, Inc.* v. *United States,* C.D. 3935 (1969), holding that merchandise that has been released is not in Customs custody and that no refund of duties may be allowed under 19 U.S.C. 1563(a). See also 19 CFR 146.47(f) and 19 CFR 142.19 concerning release of merchandise. Constructively transferred merchandise that has not been released may be restored to zone status pursuant to 19 CFR 146.47 (d) or (e).

Holding: Merchandise in a FTZ destroyed by an act of God, explosion, or fire is not subject to the assessment of U.S. Customs duties as liability for duties only arises upon transfer to Customs territory. Recoverable waste attributable to nonprivileged foreign merchandise, if entered for consumption, would be dutiable in its condition at the time of its removal from the FTZ. Recoverable waste attributable to privileged foreign merchandise, if sent into Customs territory, would be dutiable as determined at the time the privilege was requested.

(C.S.D. 86-8)

This ruling holds that imported merchandise entered for warehouse and thereafter withdrawn from warehouse and exported is not eligible for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3).

Oct 24, 1985
DAR-1-09-CO:R:DC:D
218032 RB

Issue: Is imported merchandise which is entered for warehouse eligible for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3), if it is thereafter withdrawn from warehouse and exported?

Law and analysis: The express provisions relating to drawback under 19 U.S.C. 1313 fundamentally do not apply to imported mer-

chandise until "after its release from the custody of the Government," (19 U.S.C. 1558 (a) and (a)(1)); 19 CFR 191.132(a); H. Rept. 7, 71st Cong., 161 (1929); S. Rept. 999, 96th Cong., 23 (1980); also see *Atlas Fibers Co.* v. *United States*, 30 Cust. Ct. 247, 254–255, C.D. 1528, aff'd 42 C.C.P.A. 65, C.A.D. 572). It is also acknowledged in this regard that same condition drawback, subsection (j), "would apply to (imported) articles entered, or drawback from warehouse, for consumption" (S. Rept. 999, supra).

In contrast to section 1313, 19 U.S.C. 1557(a) provides, in a general sense, for drawback, under certain conditions, on imported merchandise which has "remained continuously in bonded warehouse or otherwise in the custody and under the control of customs officers."

Imported merchandise entered for warehouse, and in the custody and under the control of Customs, does not, therefore, fall within the scope of section 1313, including, specifically, the provisions for same condition drawback under subsection (j).

Parenthetically, even if same condition drawback were applicable herein, the necessity that the claimant have "possession" of the substituted merchandise under section 1313(j)(3) would not be met while the merchandise remains in the warehouse subject to the control of the Government. In a recent ruling to be published in the Customs Bulletin (file DRA-1-09-CO:R:DC:D 218100, dated August 16, 1985), it is held that possession under section 1313(j)(3) "means *complete* control over the articles or merchandise on premises or locations where the possessor can put the articles or merchandise to any use chosen" (emphasis added).

Holding: Imported merchandise entered for warehouse is not eligible for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3), if it is thereafter withdrawn from warehouse and exported.

(C.S.D. 86-9)

This ruling holds that 15 U.S.C. 70b(i) (Textile Fiber Products Information Act), does not grant authority to U.S. Customs officers to seize or otherwise detain shipments of mail order catalogues or promotional materials for textile fiber products which fail to meet fair advertising standards as set forth in this law.

October 24, 1985
RES-3 CO:R:E:E
728062 SO

MR. PHILIP METZGER,
Assistant Area Director, Commercial Operations, New York Seaport, U.S. Customs Service, 6 World Trade Center, Room 423, New York, New York 10048

DEAR MR. METZGER: In your memo of November 28, 1984, you asked for advice regarding the responsibility, if any, imposed on Customs officers by a recent amendment to Section 4 of the Textile Fiber Products Identification Act (15 U.S.C. 70b). Pursuant to this amendment, textile fiber product advertising in any mail order catalog or in mail order promotional material shall be considered to be false or deceptive, unless the product description clearly states that the textile fiber product is processed or manufactured in the United States, or imported, or both. Particularly, you asked if Customs officers would be responsible for examining imported mail order catalogs and promotional material to determine if there are any textile fiber products advertised therein which are falsely described. You also asked if any action should be taken against shipments of such printed matter found to contain false or deceptive advertising, as now defined.

We are of the opinion that the amendment to Section 4 of the Textile Fiber Products Identification Act referred to above does not impose a legal obligation on Customs officers to review shipments of mail order catalogs or promotional material specifically to discover violations of this type. The law (15 U.S.C. 70b(i)), in our opinion, does not grant authority to Customs officers to seize or otherwise detain shipments of mail order catalogs or promotional material which fail to meet the standards of fair advertising set forth in the law. If, however, a violation is discovered by a Customs officer in the normal course of his/her duties, it would be prudent to warn the importer that penalties may be assessed by the Federal Trade Commission if the catalogs are distributed with the "false advertising" in place.

(C.S.D. 86-10)

This ruling holds that a certain woman's woven fabric dress and an accompanying substantial fabric tie-belt are separately classifiable in accordance with Headnote 3, Part 6, Schedule 3, Tariff Schedules of the United States.

February 12, 1986
CLA-2:CO:R:CV:G
077496 PR

This ruling concerns the tariff status of a certain dress.

Facts: The submitted sample is a woman's blue dress, stated to be a product of China, made from a woven fabric that is labelled to be 55 percent cotton and 45 percent man-made fibers. It has a stand collar; and 8-snap front opening that extends from the neckline to the elasticized waist; front and rear yokes that taper downward in a V-fashion and which are edged with burgundy-colored piping, the visible portion of which is less than ¼ inch wide; less than elbow-length sleeves with two-button cuffs, and similar burgundy-colored piping inserted in the cuff seam; two belt thread loops, one at each side seam; two inserted pockets, one at each side seam just below the waist; and a large box-pleat in front that extends from the elasticized waist to the hem. The fabric from the body of the garment is slightly gathered where it meets the yokes, imparting a shirred effect.

Accompanying the dress is a tie-belt that consists of three sections. The two outer or tie portions are burgundy woven fabric strips, each approximately ⅜ inch wide and 29 inches long. The center portion, which is burgundy on one side and blue on the other, is approximately 25 inches long and 2½ inches wide; the corners are rounded; and the burgundy side has four decorative-appearing, but otherwise nonfunctional, tucks that extend its length.

We assume both the dress and the tie-belt are in chief value of cotton.

Issue: Two principal issues are presented by the subject garment and belt—(1) is either ornamented for tariff purposes; and (2) are the belt and dress classifiable as a single entity or are they separately classifiable?

Law and analysis: Headnote 3, Schedule 3, Tariff Schedules of the United States Annotated (TSUSA), lists the type of features that constitute ornamentation. One of the features listed is tucking. Therefore, the belt is ornamented with the four rows of decorative nonfunctional tucking. The dress is not ornamented for tariff purposes since neither the gathered appearance at the yoke seams nor the expandable box pleat are mentioned in Headnote 3. Furthermore, Customs has consistently held that, because of the existence of a practice, piping, the visible portion of which is less than ¼ inch in width, inserted in the entire length of a seam, does not constitute ornamentation.

The Customs Service, in the past, has stated that there existed an established and uniform practice to classify fabric coordinated belts as entireties with the garments they accompanied, submerging the identity of those belts into the garments. However, subsequent to the practice finding and issuance of a number of rulings following the practice, Congress enacted Headnote 3 to Part 6, Schedule 3, TSUSA, which provides as follows:

> (a) Except as provided in (b) of this headnote, each garment is to be separately classified under the appropriate tariff item,

even if two or more garments are imported together and designed to be sold together at retail.

(b) The provisions of paragraph (a) of this headnote shall not apply to—

(i) suits,

(ii) pajamas and other nightwear,

(iii) playsuits, washsuits, and similar apparel,

(iv) judo, karate, and other oriental martial arts uniforms,

(v) swimwear, and

(vi) infant's sets designed for children who are not over 2 years of age.

In a ruling dated November 6, 1985, file 077013, Customs held that the comparatively recent enactment by Congress of Headnote 3, Part 6, Schedule 3, TSUSA, had, in effect, nullified past rulings and practices which were in conflict with that headnote. That ruling also interpreted Headnote 3 and concluded that the words "garment" and "garments" were intended to include accessories, such as neckwear, belts, and scarfs.

We have contracted the drafters of Headnote 3, who confirmed that Headnote 3 was intended to eliminate the entireties rule as it was being applied to belts and neckwear, in particular. However, it was not intended that all belt-like articles fall within the purview of the headnote. Only substantial belts or belt-like articles are meant to be affected by the application of Headnote 3. In this regard, we conclude that, generally, all belts with nontextile attachments for closures are substantial. Tie-type belts that are no more than mere string ties made from the same fabric as their accompanying garments are not substantial and are considered to be part of those garments. In this instance, the tie-belt accompanying the subject dress is a substantial belt and is, therefore, separately classifiable from the dress.

Holding: In accordance with the principles expressed above, the subject dress is classifiable under the provision for other women's dresses, of cotton, not ornamented and not knit, in item 384.4925, TSUSA, with duty at the 1986 rate of 12.8 percent ad valorem. This garment falls within textile and apparel category 336. The subject tie-belt is classifiable under the provision for other women's ornamented cotton apparel, not knit, in item 384.0996, TSUSA, with duty at the rate of 20 percent ad valorem. The applicable textile and apparel category designation is 359.

However, since we understand that most textile belts imported with articles of apparel are not invoiced separately and do not, when subject to visa, import license, or quota restriction requirements, have the necessary accompanying documentation, an importer of such merchandise may, for merchandise entered, or withdrawn from warehouse, for a period of ninety (90) days from the date of the publication of this ruling in the Customs Bulletin, continue to enter such merchandise as entireties, under one textile

and apparel category. Upon the expiration of that ninety (90) day period, all merchandise subject to this ruling will be classified in accordance with the principles set out above.

U.S. Customs Service

General Notice

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Draft notice; *The Aviation Groups, Inc.* v. *United States,* Slip Op. 85–82, Court No. 82–2–00248.

The United States Court of International Trade, by order dated November 13, 1985, vacated its opinion and order in Slip Op. 85–82, dated August 7, 1985, and dismissed said case. The order of vacation and dismissal has not been published, and the purpose of this notice is to advise all interested parties that the state of the law, with regard to item 800.00, Tariff Schedules of the United States, (19 U.S.C. 1202), and used aircraft, remains as it was prior to August 7, 1985.

HARVEY B. FOX,
Director,
Classification and Value Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 141 and 171

Proposed Customs Regulations Amendments Relating to Liens

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: The Tariff Act of 1930 authorizes Customs officers to refuse to permit delivery of certain merchandise when notified in writing of the existence of a lien for freight, charges or contribution in general average until proof has been produced that the lien has been satisfied or discharged. The Trade and Traiff Act of 1984 amended the Tariff Act of 1930 to allow licensed customs brokers to file a lien for freight, charges or contribution in general average to the same extent that a carrier may file such a lien. This document proposes to amend the Customs Regulations to implement the statutory provisions.

DATES: Comments must be received on or before April 28, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Entry, Licensing, and Restricted Merchandise Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229; 202-566-5765.

SUPPLEMENTARY INFORMATION:

Background

Section 564, Tariff Act of 1930, as amended (19 U.S.C. 1564), provides that whenever a Customs officer is notified in writing of the existence of a lien for freight, charges, or contribution in general average upon any imported merchandise sent to the appraiser's store for examination, entered for warehouse or taken possession of by him, he will refuse to permit delivery thereof from the public

store or bonded warehouse until proof is produced that the lien has been satisfied or discharged.

For purposes of § 564, § 141.112(a)(1), Customs Regulations (19 CFR 141.112(a)(1)), defines "freight" to mean the carrier's charge for the transportation of the goods from the place of shipment in the foreign country to the final destination in the U.S. "Charges" are defined in § 141.112(a)(2), Customs Regulations (19 CFR 141.112(a)(2)), to mean the charges due to or assumed by the claimant of the lien which are incident to the shipment and forwarding of the goods to the destination in the U.S., but does not include the purchase price, whether advanced or to be collected, nor other claims not connected with the transportation of the goods. Section 141.112(a)(3), Customs Regulations (19 CFR 141.112(a)(3)), defines "general average" as the liability to contribution of the owners of a cargo which arises when a sacrifice of a part of the cargo has been made for the preservation of the residue or when money is expended to preserve the whole. A lien for contribution in general average only arises from actions impelled by necessity.

A customs broker is a person licensed by Customs under the provisions of § 641, Tariff Act of 1930, as amended (19 U.S.C. 1641) and Part 111, Customs Regulations (19 CFR Part 111), to transact Customs business on behalf of importers and other persons. Section 212(b)(7), Trade and Tariff Act of 1984, Pub. L. 98-573, amended § 564 by adding a sentence to that provision which states that the section will apply to licensed customs brokers who otherwise possess a lien for the purposes stated in § 564 upon merchandise under the statutes or common law, or by order of any court of competent jurisdiction, of any state. By virtue of this provision Congress has authorized customs brokers possessing a lien for freight, charges or contribution in general average upon merchandise held by Customs to file that lien with the proper Customs officer so that the merchandise will not be released from Customs until the lien is satisfied or discharged.

Prior to the passage of the Trade and Tariff Act, § 564 had been limited to liens filed by carriers or their agents. By amending § 564, Congress specifically provided that brokers may file liens with Customs for the purposes stated in the law. Because brokers now stand in the same position as carriers with respect to filing liens, it is proposed to add a definition of the word "claimant" to § 141.112(a). It is proposed to define "claimant" in a new § 141.112(a)(4) as a carrier, customs broker or the successors or assigns of either. In addition, it is proposed to amend § 141.112(a)(1), which defines "freight", by removing the reference to the "carrier's charge" and substituting, in its place, the word "charges" without any reference to whose charges they might be. It is further proposed to amend § 141.112(b), relating to notice of lien, and § 141.112(d), relating to merchandise entered for immediate transportation, to remove the reference to the carrier signing the notice

of lien and filing the notice of lien and substitute a reference to the claimant.

Finally, it is proposed to correct certain clerical errors in § 171.44, Customs Regulations (19 CFR 171.44), relating to satisfaction of liens on forfeited property authorized for official use. Section 171.44 refers to the "satisfaction of liens for freight charges and contributions in general average." It is proposed to place a comma between the words "freight" and "charges" to reflect the statutory language and eliminate any confusion or limitation on the type of charges covered. It is further proposed to remove the "s" from the word "contributions."

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), it is certified that, if adopted, the proposed regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, the proposed regulation is not subject to the regulatory analysis requirement of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 141 AND 171

Brokers, Customs duties and inspection, Imports, Liens.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Parts 141 and 171, Customs Regulations (19 CFR Parts 141, 171), as set forth below.

PROPOSED AMENDMENTS

PART 141—ENTRY OF MERCHANDISE

1. It is proposed that the general authority citation for Part 141 continue to read as set forth below:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to amend § 141.112(a)(1) by removing the words "carrier's charge" and inserting, in their place, the word "charges".

3. It is proposed to further amend § 141.112(a) by adding a new paragraph (4) to read as follows:

§ 141.112 Liens for freight, charges, or contribution in general average.

(a) * * *

(4) *Claimant.* "Claimant" means a carrier, customs broker or the successors or assigns of either.

4. It is proposed to amend §§ 141.112 (b) and (d) by removing the word "carrier" and, in each instance, inserting, in its place, the word "claimant".

PART 171—FINES, PENALTIES, AND FORFEITURES

1. It is proposed that the general authority citation for Part 171 continue to read as set forth below:

AUTHORITY: 19 U.S.C. 66, 1592, 1618, 1624.

2. It is proposed to amend § 171.44 by placing a comma after the word "freight" in the second sentence of the paragraph and by removing the letter "s" from the word "contributions".

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 3, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 25, 1986 (51 FR 6555)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

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Bernard Newman

Samuel M. Rosenstein

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-14)

BINGHAM & TAYLOR, DIVISION VIRGINIA INDUSTRIES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85-07-00909

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Appeal from International Trade Commission's preliminary negative injury determination remanded.]

(Decided February 14, 1986)

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal and Kathleen T. Weaver*) for the plaintiffs.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile*, Assistant General Counsel, and *John C. Kingery*, United States International Trade Commission, for the defendant.

CARMAN, *Judge:* In this countervailing duty action plaintiffs contest the preliminary determination of the United States International Trade Commission (Commission) that there is no reasonable indication the domestic light iron construction castings industry is materially injured or threatened with material injury by reason of subsidized imports from Brazil. *Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China*, 50 Fed. Reg. 27,498 (1985). Defendant opposes plaintiffs' Rule 56.1 motion for judgment upon the agency record, contending that the Commission's preliminary determination is not arbitrary, capricious, nor an abuse of discretion, and is in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(A) (1982) (standard of review). For the reasons that follow, the Court remands this action to the Commission for redetermination.

BACKGROUND

This controversy arises out of five simultaneously initiated investigations involving iron construction castings. Four of the investigations are antidumping investigations in which the Commission

found that there is a reasonable indication that the domestic industry is materially injured or threatened with material injury by reason of sales at less than fair value of light and heavy construction castings imported from Brazil, Canada, India and the People's Republic of China. Plaintiffs in this case challenge the Commission's preliminary determination in the fifth investigation, which is a countervailing duty investigation of iron construction castings from Brazil. The Commission's determination in the countervailing duty investigation, published in the same notice as the determinations for the antidumping investigations, was that a domestic industry is materially injured by Brazilian imports of heavy iron construction castings, while there is no reasonable indication that a domestic industry is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of Brazilian light iron construction castings. *See* 50 Fed. Reg. 27,498.

In reaching its preliminary affirmative injury determinations in the antidumping investigations, the Commission cumulated the impact of the imports from the four countries on the domestic industry. In reaching the preliminary determination in the countervailing duty investigation, however, the Commission refused to cumulate the impact of imports subject to the antidumping investigations with the impact of imports subject to the Brazilian countervailing duty investigation. *See Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China*, U.S.I.T.C. Public. 1720, at 12, Investigation No. 701-TA-249 (Preliminary) (June 1985).

OPINION

The primary issue is whether section 612(a)(2) of the Trade and Tariff Act of 1984 (the 1984 Act), Pub. L. No. 98-573, 98 Stat. 3033 (to be codified at 19 U.S.C. § 1677(7)(C)(iv)), requires the Commission to cumulatively assess the volume and effect of imports of like products subject to both antidumping and countervailing duty investigations. Section 612(a)(2) of the 1984 Act amended section 771(7)(C) of the Tariff Act of 1930 by adding *inter alia* the following:

> (iv) Cumulation.—For purposes of clauses (i) [volume] and (ii) [price], the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

19 U.S.C.A. § 1677(7)(C)(iv) (West Supp. 1985).

Plaintiffs contend that the subsection (iv) cumulation provision quite broadly "requires the Commission to cumulate when two criteria are satisfied: (1) Imports of like products are subject to inves-

tigation, and (2) imports compete with one another and with the domestic like product." Plaintiffs' Brief at 13. Plaintiffs' position is that there is no additional requirement that the cumulated imports be subject to the same type of investigation and, therefore, subsection (iv) requires the "cross-cumulation" of the volume and effect of imports subject to both antidumping and countervailing duty investigations.[1]

Defendant contends that as the 1984 Act provision for cumulation is entirely silent concerning cross-cumulation, initial statutory directives imposing countervailing and antidumping duties continue to control.[2] In countervailing duty cases, for instance, defendant claims that 19 U.S.C. § 1671(a) applies, which reads:

> (a) General Rule.—If—
> (1) the administering authority determines that—
> (A) a country under the Agreement, or
> (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and
> (2) the Commission determines that—
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
> *by reason of imports of that merchandise,*
>
> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

19 U.S.C. § 1671(a) (1982) (emphasis added). Essentially, defendant's argument is that section 1671(a) restricts the Commission's injury investigation in countervailing duty cases to the injury "by reason of imports of that merchandise" investigated with respect to the provision of a subsidy. By the same reasoning, defendant argues that in antidumping duty investigations 19 U.S.C. § 1673 restricts the Commission's injury investigation to the injury "by reason of that merchandise" investigated with respect to sales in the United States at less than fair value.

The Court finds that section 1677(7)(C)(iv), without exception, requires the cumulation of imports from two or more countries of like products "subject to investigation" that compete with one an-

[1] The term "cross-cumulation" as used in this opinion refers to the aggregation of less than fair value (dumped) and subsidized imports from two or more countries for purposes of volume and price analysis.

[2] The Commission cited the respective provisions for *final* determinations, 19 U.S.C. §§ 1671d (countervailing duty investigations) and 1673d (antidumping duty investigations), as its basis for refusing to cross-cumulate. *See* U.S.I.T.C. Public. 1720, at 12–13. Defendant in its briefs focused on 19 U.S.C. §§ 1671(a) and 1673, though, apparently because this action is a challenge to a *preliminary* determination.

other and with the domestic like product, regardless of whether the investigations relate to dumping, subsidies, or both.

Although an agency's interpretation of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with congressional intent, *see Asahi Chemical Industry Co.* v. *United States*, 4 CIT 120, 123-25, 548 F. Supp. 1261, 1264-65 (1982), the court will not defer to an interpretation that is contrary to the express language of the statute, its purpose, and congressional intent. *See Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, No. 84-1274, slip. op. at 6 (U.S. Jan. 22, 1986); *Rose* v. *Lundy*, 455 U.S. 509, 517 (1982); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979). The Court is constrained to conclude in the instant case that the Commission's refusal to cumulate is indeed contrary to the statute, its purpose, and legislative intent.

The legislative history of the 1984 Act does not explicitly address the issue of cross-cumulation. The House Ways and Means Committee, however, provided the following explication of the new cumulation provision:

> *Reasons for change*
>
> The purpose of mandating cumulation under appropriate circumstances is to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries. Most Commissioners have applied cumulation under certain circumstances but have articulated a variety of differing criteria and conditions. However, cumulation is not required by statute. In addition, a few Commissioners have imposed conditions which do not seem justified to the Committee.
>
> The Committee believes that the practice of cumulation is based on the sound principle of preventing material injury which comes about *by virtue of several simultaneous unfair acts or practices.* The Committee amended the criteria to permit cumulation of imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury. The requirement in the bill as introduced that imports from each country have a "contributing effect" in causing material injury would have precluded cumulation in cases where the impact of imports from each source treated individually is minimal but the combined impact is injurious. The Committee does intend, however, that the marketing of imports that are cumulated be reasonably coincident. Of course, imports of like products from countries not subject to investigation would not be included in the cumulation.

H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5127, 5164 (emphasis added).

In keeping with the foregoing views, Congress broadly required cumulation of the injurious effects of "simultaneous unfair acts or

practices" if certain conditions are met. Congress's rejection of the concept of "contributing effect" underscores its intent that cumulation be broadly applied, even where the impact of unfairly traded imports from one source may be minimal, "but the combined impact is injurious." There is no doubt that the combined impact from both dumped and subsidized imports may be injurious. Further, there is no suggestion in the language of the 1984 statute or in its legislative history that the Commission separately consider the injurious effects of one type of unfair practice from those of another type of unfair practice.[3] The effects of injury from different types of unfair trade practices upon the domestic industry are identical—it makes no difference to a domestic light construction castings producer whether it loses sales because foreign castings are dumped or because they are subsidized. As the Commission's own General Counsel correctly observed, "[t]he rationale for aggregating import data rests upon the combined effects of unfairly traded imports in contributing to injury to the domestic industry involved. The considerations are not different in countervailing duty investigations than they are in antidumping investigations." Memorandum from General Counsel to the Commission, GC-G-05, at 12-13 (Jan. 7, 1983) (quoting GC-F-186).

It is further noteworthy that when Congress considered the amendment of section 1677(7)(C) it was apprised of the question of cumulating imports of the same product in separate countervailing duty and antidumping duty investigations:

> The law now permits the International Trade Commission to combine or "cumulate" imports from different countries when making injury determinations in antidumping and countervailing duty investigations. Cumulation makes sense; death by one or one hundred blows is equally fatal. The ITC, however, has been hesitant to cumulate imports at all and extremely reluctant to do so in preliminary injury investigations. *There also has been some question about cumulation of imports of the same product in separate countervailing duty and antidumping cases.* We believe that it would be helpful to amend the statute to require cumulation in certain circumstances. Such an amendment would help to ensure that domestic industries are not denied relief because of an unwise exercise of discretion by the Commission.

Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means, 98th Cong., 1st Sess. 197, 203 (1983) (statement of Adolph J. Lena) (emphasis added). Significantly, Congress did not make any exclusion or ex-

[3] The legislative history of the Trade Agreements Act of 1979 also emphasizes congressional focus on the impact to domestic industries from unfair trade practices. There too Congress viewed subsidies and dumping as "two of the most pernicious practices which distort international trade to the disadvantage of United States commerce." S. Rep. No. 249, 96th Cong., 1st Sess. 37, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 423.

ception for cross-cumulation in the 1984 statute, but rather elected to mandate cumulation in broad terms.[4]

Defendant points out, however, that Congress intended the Trade Agreements Act of 1979 to implement two important, but separate, multilateral agreements—the Subsidies and the Antidumping Codes, that is, the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. *See* S. Rep. No. 249, at 37. Moreover, Congress added material injury requirements respectively to the countervailing duty and antidumping duty statutes. Defendant thus contends that the enactment of United States obligations under the separate Codes with separate injury tests bars the cross-cumulation of injury from imports subject to separate countervailing duty and antidumping duty investigations. Defendant appears especially impressed that the injury test in subsidy cases applies only to countries that have signed the Subsidies Code, while all importers receive the benefit of an injury determination in antidumping investigations. *Compare* 19 U.S.C. §§ 1303 and 1671(b) (imposition of countervailing duties) *with* 19 U.S.C. § 1673 (imposition of antidumping duties); *see also* S. Rep. No. 249, at 61.

Nevertheless, the definition of material injury, the respective indicia of injurious impact, and the causal nexus between the injury and the unfairly traded imports are identical for subsidy and dumping investigations and are outlined in a common statutory provision—19 U.S.C. § 1677(7). The 1984 Act added to this statute subsection (C)(iv), which broadly states that "the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry."

While mere placement of the cumulation directive in a statutory provision applicable to both antidumping and countervailing duty cases does not in and of itself suggest or require aggregation of dumped and subsidized imports, the language of subsection (C)(iv)

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[4] Prior to the 1984 Act, the Commission had found the cumulation methodology appropriate in certain investigations under the Antidumping Act of 1921 and the Trade Agreements Act of 1979. *See, e.g., Portland Gray Cement from Portugal*, T.C. Public. 37, Investigation No. AA1921-22, (1961); *Pig Iron from East Germany, Czechoslovakia, Romania, and the U.S.S.R.*, T.C. Public. 265, Investigation Nos. AA1921-52-55, (1968); *Aminoacetic Acid (Glycine) from France*, T.C. Public. 313, Investigation Nos. AA1921-61, (1970); *Certain Carbon Steel Products from Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands, and The United Kingdom*, U.S.I.T.C. Public. 1064, Investigation Nos. 731-TA-18-24 (Preliminary) (1980). The Commission had not, however, *cross-cumulated* prior to the 1984 Act. U.S.I.T.C. Public. 1720, at 12.

Cumulation was first judicially approved in *City Lumber Co. v. United States*, 64 Cust. Ct. 826, A.R.D. 269, 311 F. Supp. 340 (1970), *aff'd*, 59 CCPA 89, C.A.D. 1045, 457 F.2d 991 (1972). Still, Congress explicitly recognized in 1974 that cumulation was not required "as a matter of law," but could be applied by the Commission on a case by case basis. S. Rep. No. 1298, 93d Cong., 2d Sess. 180 (1974). It was only after a long period of administrative discretion in applying cumulation that Congress finally made the methodology mandatory in the 1984 Act.

For a rendition of the legislative process leading to the enactment of section 1677(7)(C)(iv) and the refusal of the House conferees to yield on the stringent cumulation requirement, as they had done in agreeing to agency discretion respecting other provisions, see Bello & Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 Int'l Law. 639, 661 & nn. 74-78 (1985).

requires the cumulation of products "subject to investigation." There is absolutely no indication that cumulation is to be limited to products subject only to antidumping duty investigations or to products subject only to countervailing duty investigations. Again, "[t]he primary concern of the law is with the effect on domestic industry." *American Grape Growers Alliance for Fair Trade* v. *United States*, 9 CIT——, 615 F. Supp. 603, 606, *appeal docketed*, No. 85-2717 (Fed. Cir. Aug. 28, 1985) (cumulation required where like products compete with each other only to the same degree as with like products of domestic industry under pre-1984 Act law). In light of Congress's expressed concern with the combined effects of all unfairly traded imports upon domestic industries, the Court must inexorably conclude that section 1677(7)(C)(iv) is intended to require the cumulation of all competing like products subject to investigation, whether the investigations cover dumped or subsidized imports, or both.

The Court is mindful of the policy of encouraging countries to sign the Subsidies Code, *see* S. Rep. No. 249, at 44-45, which underlays the requirement of an injury determination in subsidy investigations. Although countries "under the Agreement" providing subsidies leading to only *de minimis* injury may be penalized because of dumped merchandise over which they have no control, the concern is no different in multiple subsidy investigations where each country has no control over subsidization by other countries, and where cumulation is concededly mandatory. In enacting countervailing and antidumping duty laws, Congress balanced many interests. But with the 1984 cumulation provision, Congress clearly tipped the scale in favor of the domestic industry and against any country engaging in unfair trade practices.

Defendant contends that the application of cross-cumulation would lead to anomalous results, referring to various distinctions between the antidumping and countervailing duty provisions respecting certain special findings and considerations in injury investigations. *Compare* 19 U.S.C. § 1671d(b)(4) *with* 19 U.S.C. § 1673d(b)4 (additional findings required upon an affirmative finding of critical circumstances); *see also* 19 U.S.C. § 1677(7) (E) and (F)(i) (consideration of nature of subsidy in determination of threat of material injury). Cumulation, however, is required only for the purpose of evaluating volume and price effects under 19 U.S.C. § 1677(7)(C) (i) and (ii). Plainly, cross-cumulation does not preclude the Commission from properly making certain findings or considering information as required by these other statutory provisions.

Defendant's argument, based on a literal reading of statutory provisions *other* than the cumulation provision (i.e., 19 U.S.C. §§ 1671(a), 1671d(b), 1673 and 1673d(b)), stems from a perceived requirement of a causal nexus between dumped or subsidized imports, not a combination of both, and the injury to the domestic in-

dustry.[5] A literal reading of these provisions, however, would equally prohibit the cumulation of imports subject to two or more investigations of the same unfair trade practice. If 19 U.S.C. §§ 1671d(b) and 1673d(b), for example, were read to mean that the Commission's final determination must be of injury "by reason of imports of the merchandise" found by the International Trade Administration to be subsidized (or dumped), it would follow that cumulation of the injurious effects of imports covered by separate investigations would always be prohibited because the Commission must limit its causal nexus analysis to the merchandise which is subject to the particular dumping or subsidy investigation. To the extent that the other statutory provisions cited by defendant are *in pari materia* with the cumulation provision, they must be harmonized with the clear congressional purpose in broadly mandating cumulation. *See United States* v. *Invicta Seeland, Inc.*, 25 CCPA 300, 305–06, T.D. 49397 (1938).

Defendant has not pointed to one policy reason why the cumulative injurious effects of imports in multiple subsidy investigations or multiple dumping investigations should be treated differently from the cumulative injurious effects of imports in concurrent subsidy and dumping investigations. Defendant's interpretation of the law in essence urges this Court to tolerate an obvious loophole in the cumulation directive for no apparent justification. As discussed, congressional intent to protect domestic industry from the compounded effects of unfairly traded imports from two or more countries requires no more than that the injury be caused by imports of competing like products from countries under investigation.[6]

The criteria that the Commission is required to consider in subsections (C) (i) and (ii) applies to both preliminary and final determinations. *See* 19 U.S.C. § 1677(7)(B). The Court accordingly holds that the Commission's refusal in its preliminary determination to cumulate the volume and effect of imports of the merchandise subject to both the countervailing and antidumping duty investigations is not in accordance with law. This case must therefore be remanded to the International Trade Commission for further consideration and redetermination consistent with this opinion.

Plaintiffs also challenge the Commission's interpretation and application of the "reasonable indication" standard of 19 U.S.C. § 1673(b)(a) (1982) in making its preliminary determination, citing *American Lamb Co.* v. *United States*, 9 CIT ——, 611 F. Supp. 979,

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[5] The extent of the relevant cause of injury is itself a highly controversial issue and not settled in the law. *See generally*, Victor, *Injury Determinations by the International Trade Commission in Antidumping and CVD Proceedings* in the Trade Agreements Act of 1979—Four Years Later 117, 147–54 (1983).

[6] An additional requirement for cumulation, clear from the legislative history, is that the marketing of unfairly traded imports be "reasonably coincident." H.R. Rept. No. 725, at 37; *see also* Price, *The Trade and Tariff Act of 1984: An Analytical Overview*, 19 Int'l Law. 321, 335 (1985) (predicating cumulation on three conditions); *cf. Certain Carbon Steel Products from Austria, Poland, Romania, Sweden and Venezuela*, U.S.I.T.C. Public. 1642, at 48–50, Investigation Nos. 701-TA-225-234 and 731-TA-213-217, 219, 221-26, and 228-35 (Preliminary) (1985) (views of Vice Chairman Liebeler) (cumulation limited to imports from countries that are *currently* the subject of an investigation). This issue is not before the Court in the present case since the countervailing duty investigation exactly paralleled the antidumping investigations.

appeal docketed, No. 86-560 (Fed. Cir. Oct. 21, 1985); *Jeannete Sheet Glass Corp.* v. *United States,* 9 CIT ——, 607 F. Supp. 123, *appeal docketed,* No. 86-519 (Fed. Cir. October 4, 1985); *Republic Steel Corp.* v. *United States,* 8 CIT 29, 591 F. Supp. 640 (1984), *reh'g* denied, 9 CIT ——, Slip. Op. 85-27 (March 11, 1985). As it may ultimately be unnecessary to reach the issue of "reasonable indication" in this case, the Court reserves decision on this question at this time.

(Slip Op. 86-15)

ARMSTRONG RUBBER CO., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 84-10-01444

Before WATSON, *Judge.*

MEMORANDUM AND ORDER

[Motion for an order of contempt denied.]

(Decided February 14, 1986)

Frederick L. Ikenson for the plaintiffs.
Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, (*J. Kevin Horgan,* Attorney) for defendant.

WATSON, *Judge:* Plaintiffs have moved the court to hold certain officials of the Commerce Department in contempt of court for refusing to resume an investigation of whether or not radial ply tires from the Republic of Korea were being sold here at less than fair value.

This refusal followed a judgment in which the court reversed a determination by the International Trade Commission (ITC), which determination had the effect of terminating the administrative investigation of those tires.

The ITC had determined that there was no reasonable indication of injury from imports of tires from the Republic of Korea. This court found that the ITC had applied an erroneous legal standard and remanded the matter for the issuance of a determination in accordance with the court decision. *Armstrong Rubber Co., et al.* v. *United States,* 9 CIT —— Slip Op. 85-85 (August 8, 1985).

In a later opinion in the same case the court denied defendants' motion for a stay pending appeal. (Slip Op. 85-109, October 18, 1985)

On these facts, the court will not exercise its contempt power against officials of the Department of Commerce. Although it was within the contemplation of the court that the judgment it was issuing would lead to the resumption of the investigation by the Department of Commerce, the court did not say so specifically. While

it is true that the opinion denying the motion for a stay speaks of the strong public interest in the "uninterrupted progress of these investigations" it did not direct the continuation explicity.

It is also true that the opinion denying the stay refers to the opinion in *American Grape Growers Alliance, et al.* v. *United States,* 9 CIT ——, (Slip Op. 85-104 October 7, 1985), in which the court's expectation that such judgments create the necessity of a resumption of the investigation by the Department of Commerce is even more pronounced.

Nevertheless, even though it may be said that the court expected its judgments with respect to erroneous ITC determinations (determinations which had the effect of terminating investigations) to lead inexorably to the continuation of the investigations by the Commerce Department, it did not include a direction to that effect in its judgment.

An excuse for inaction which would be a minor technicality in other areas in which courts are called upon to judge the consequences of action or inaction, must be given more importance in the area of contempt. It is a settled safeguard, as it should be, that the awesome power of contempt is not to be used unless the party said to be in contempt has been given a clear direction by the court. *International Longshorement's Association* v. *Philadelphia Marine Trade Association,* 389 U.S. 64, 76 (1967). In fairness, it must be said that the judgment in this action did not give the Commerce Department a plain direction to resume the investigation.

Since making this motion for contempt, plaintiff has commenced a separate action to compel the Department of Commerce to resume the investigation. The substance of the dispute regarding the inaction of the Department of Commerce will be reached in the new action.

For the reasons given above, plaintiffs' motion to hold officials of the Department of Commerce in contempt of court is denied.

(Slip Op. 86-16)

PHILIPP BROTHERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-4-00528

OPINION

[Remanded.]

(Decided February 14, 1986)

Donohue and Donohue (*James A. Geraghty* and *Margaret R. Polito*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Elizabeth C. Seastrum,* (*Andrea E. Migdal* of Counsel), Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* This matter is before the court on plaintiff's challenge of the final determination in a section 751 annual review of a countervailing duty (CVD) order. Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (1982 & West Supp. 1985); 49 Fed. Reg. 9,923 (1984). On April 4, 1980, the International Trade Administration (ITA) of the United States Department of Commerce published a CVD order, pursuant to 19 U.S.C. § 1303 (1982), on pig iron from Brazil.[1] 45 Fed. Reg. 23,045 (1980). The excessive remission of Brazil's value-added Industrial Products Tax (IPI) was among the subsidies found to be provided by the government of Brazil for exports of Brazilian pig iron. Prior to issuance of the CVD order by ITA, however, the Brazilian government announced that this excess credit would be eliminated as of December 12, 1979, and the subsidy determination was reduced accordingly. Consistent with the conclusion of the Treasury Department, ITA's estimated duties for the eight largest exporters were calculated on a company-specific, rather than average, basis reflecting the varying benefits received by each of the companies from the subsidies. In both its first and second annual reviews, however, ITA switched from its company-specific CVD assessment to an average assessment, which thereby required each pig iron exporter to pay countervailing duties at the same rate. In addition, in its second annual review, ITA announced that it had learned that although the Brazilian government had begun to impose a tax to offset the IPI export credit premium, collection of that tax had been delayed. ITA concluded that the delay in collection conferred a benefit akin to an interest free loan to Brazilian pig iron exporters. ITA calculated the *ad valorem* benefit of the delay in collection of the offset tax and increased the aggregate countervailing duty rate accordingly in its second annual review, covering entries made during 1980.

Only plaintiff's challenge of ITA's second annual review is before the court. Plaintiff alleges that the decision to assess countervailing duties on an average basis rather than a company-specific basis was unlawful. In addition, plaintiff asserts that ITA's second annual review was untimely and therefore contrary to law. Further, plaintiff claims that adjustment of the CVD rate due to the lag in collection of the IPI export credit premium offset tax constituted the imposition of a CVD without first establishing that such delay is in fact a subsidy. Finally, plaintiff contends that even if this delay in tax collection constitutes a subsidy, ITA's calculation of the IPI export credit subsidy based on credits earned rather than received, required it to similarly consider the date of offset tax assessment rather than collection.

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[1] The CVD investigation was initially conducted by the United States Department of Treasury as the administering authority under 19 U.S.C. § 1303, prior to enactment of the Trade Agreements Act of 1979. After issuance of the final affirmative determination by Treasury, the Trade Agreements Act of 1979 became effective and authority to issue CVD orders was transferred from Treasury to Commerce. Subsequent proceedings were governed by the transition rules of the Trade Agreements Act of 1979. Public L. No. 96-39, § 102, 93 Stat. 144.

I. *Participation in Comment Period as Jurisdictional Prerequisite*

Defendant raises the same jurisdictional defense, failure to exhaust administrative remedies, to plaintiff's first two claims. Specifically, defendant maintains that plaintiff was required to participate in the comment period following the issuance of the section 751 preliminary review before seeking judicial relief. Under section 751, as it read during the period in question, ITA was required to conduct annual reviews of each CVD order.[2] Accordingly, the agency published its notice of "Preliminary Results of Administrative Review" concerning Brazilian pig iron. 48 Fed. Reg. 54,091 (1983). This notice invited interested parties to comment on the preliminary results. *Id.* Written comments could be submitted within thirty days of the date of publication of the notice (November 30, 1983). Parties could also "request disclosure and/or a hearing" within ten days of publication. *Id.* at 54,093. The first question confronting the court is whether plaintiff was required to submit comments or request a hearing before raising issues in this court that could have been raised before the agency.

"The general rule is that 'administrative exhaustion of remedies is required before a litigant will be allowed to raise a claim via a civil action.' " *Allen* v. *Regan*, 9 CIT ——, Slip Op. 85-126 at 6 (Dec. 10, 1985) (quoting *Rhone Poulenc, S.A.* v. *United States*, 7 CIT 133, 583 F. Supp. 607, 609 (1984), citing *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Procedures governing section 751 reviews are set out in 19 C.F.R. § 355.41 (1983), promulgated by the Secretary of the Treasury. Section 355.41(d) specifically lists the various procedures that ITA set forth in its preliminary order. Thus, to have exhausted its administrative remedies, plaintiff should have either requested a hearing or offered written comments on the proposed changes. Under normal circumstances, only then would it be able to raise those issues at the judicial level. *L.A. Tucker Truck Lines*, 344 U.S. at 37 ("as a general rule * * * courts should not topple over administrative decisions unless the administrative body not only had erred, but has erred against objection made at the time appropriate under its practice"); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155 (1946) ("[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore pre-

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[2] 19 U.S.C. § 1675(a) reads as follows:

Administrative review of determinations

(a) Periodic review of amount of duty.—

(1) In general.—At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order * * * the administering authority, [if a request for such a review has been received and] after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

(Bracketed material was added by amendment in 1984.)

sented"); *Meglio* v. *Merit Systems Protection Board*, 758 F.2d 1576, 1577-78 (Fed. Cir. 1984) (failure to raise claim before administrative body constitutes effective waiver of right to contest).

A plaintiff's failure to exhaust its administrative remedies is not always fatal to its case, however. This court is not required by statute to consider full exhaustion of administrative remedies a jurisdictional prerequisite to an action contesting the final determination of an annual review of a countervailing duty order. Instead, in this situation, the court "shall, *where appropriate*, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (1982) (emphasis added). *See Rhone Poulenc*, 7 CIT at 136, 583 F. Supp. at 611 (exhaustion required "where appropriate" if plaintiff satisfies prerequisite of participation under 19 U.S.C. § 1516a(a)(2)).[3]

With regard to the average versus company-specific CVD rates issue, plaintiff contends that it should be excused from the requirement of raising the issue at the administrative level because the law, as interpreted by this court just after publication of the preliminary section 751 review, prohibited ITA from retroactively assessing countervailing duties. The day after the section 751 preliminary review was published, this court issued its decision in *Ambassador Division of Florsheim Shoe Co.* v. *United States*, 6 CIT 278, 577 F. Supp. 1016 (1983), *rev'd*, 748 F.2d 1560 (Fed. Cir. 1984). In *Florsheim*, this court interpreted section 751 and held that ITA could not, pursuant to a periodic review, suspend liquidation of entries and impose a retroactive assessment of countervailing duties. Plaintiff's position is that it was entitled to rely on the expectation that Commerce would act in accordance with this court's decision in *Florsheim*. Pursuant to *Florsheim* (prior to reversal), Commerce could not have switched from the lower company-specific rates to the higher average assessment because to do so would be the retroactive assessment of countervailing duties which was barred by *Florsheim*. Defendant contended at oral argument that although *Florsheim* was arguably favorable to plaintiff, the case did not specifically address the company-specific versus average issue and was, therefore, distinguishable from plaintiff's case. Plaintiff was, according to defendant, obliged to bring to ITA's attention the applicability of that decision to plaintiff's case and, presumably, to raise any additional objections to the assessment of CVDs on an average basis.

The court cannot agree with defendant's argument. It is true that *Florsheim* did not specifically address the company-specific versus average issue. The holding of that case, however, invalidating the suspension of liquidation and retroactive assessment of countervailing duties pursuant to a section 751 review, clearly would have controlled the case at bar had it not been reversed subsequently. Although the *Florsheim* decision was not final, in the

[3] There is no dispute that plaintiff "participated" in the proceedings below.

sense that time for appeal had not run, it was sufficiently final to constitute applicable precedent. *See Rhone Poulenc* 7 CIT at 137, 583 F. Supp. at 612 (an appealed decision remains valuable precedent until reversed). In the final results of the section 751 review in question, ITA did not deny the applicability of the lower court decision in *Florsheim*. Rather, ITA responded to a comment of the Brazilian government noting the applicability of *Florsheim* by stating, "[t]he Department [of Commerce] has appealed the *Florsheim* decision. The Department believes that its practice of retroactive collection [of CVDs] is correct and will continue to operate on that belief pending the outcome of the appeal." 49 Fed. Reg. at 9,924. Thus, this is a situation in which ITA refused to apply the clearly applicable precedent and not one in which a party failed to argue for adherence to possibly distinguishable case law.[4] Even in such a situation, plaintiff might have the burden of presenting alternative arguments to ITA prior to raising those arguments to this court, but further aggravating factors exist. Plaintiff's argument to this court challenging the legality of ITA's switch to a company-specific assessment of CVDs is based on facts available only in the confidential administrative record. The deadline for seeking access to the confidential administrative record had passed by the time plaintiff received notice of the deadline.[5] Nonetheless, absent the situation created by ITA's disregard of the lower court opinion in *Florsheim*, which plaintiff had no reason to anticipate, plaintiff would not be relieved of the obligation to seek additional time to obtain access to the confidential administrative record, which it needed to make presentation of alternative arguments possible. Separately, neither of these factors necessarily tips the scale against requiring exhaustion of administrative remedies, but the result is clear if they are weighed together. The court considers it inappropriate to require plaintiff, under the doctrine of exhaustion of administrative remedies, to argue to ITA for adherence to clearly applicable precedent, to anticipate disregard of the precedent and to then raise alternative arguments to the agency, the basis for which plaintiff could not know. Thus, plaintiff is not barred by a failure to exhaust its administrative remedies and its claim that ITA's switch to an assessment of CVDs on an average, rather than company-specific, basis is properly before this court. The court must, therefore, determine whether this decision of ITA in the sec-

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[4] It should be noted that India, the country under investigation in *Florsheim*, was not a signatory to the GATT Subsidies Code while Brazil is an "agreement country." The procedures governing CVD determinations are more favorable to agreement countries, *see* 19 U.S.C. § 1671(a) (1982 & West Supp. 1985) (requiring material injury determination for agreement countries as prerequisite to imposition of CVDs), however, and thus it would not make sense to say that the lower court ruling in *Florsheim* was distinguishable on this basis.

[5] The "preliminary results" of the section 751 review were published in the federal register on November 30, 1983, 48 Fed. Reg. 54,091 (1985), and the deadline for requesting confidential information was stated therein to be just 5 days later, December 5, 1983. Generally, notice by publication in the federal register is appropriate for all purposes, *see, e.g.*, 19 C.F.R. § 355.28(a)(4) (1983), but here the section 751 annual review was already months late at the time these preliminary results were published. *See* 19 U.S.C. § 1675 (1982 & West Supp. 1985). Under these circumstances, ITA appropriately undertook to notify the parties directly. This notification was sent to plaintiff by letter dated December 6, 1983, by which time the December 5, 1983, deadline for requesting confidential information had already passed.

tion 751 review that is before this court is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982).

II. *Company-Specific Versus Average CVD Assessment*

As noted, although ITA calculated estimated CVDs on a company-specific basis in its CVD order, it then switched to an average assessment in the section 751 reviews. Plaintiff contends that ITA's failure to explain its departure from the company-specific deposit rates necessarily determines that ITA's decision was unlawful. Defendant responds that although ITA is required, in conducting preliminary and final countervailing duty determinations, to state any material differences in the benefits received by separate enterprises, 19 C.F.R. §§ 355.28(a)(3) and 355.33(f) (1983), no such requirement exists for section 751 reviews.[6] In addition, defendant claims that, even if company-specific assessments might be required in particular instances, the decision to use an average assessment in the case at bar was imminently reasonable because of the lack of material differences in the benefits received by various companies. Finally, defendant argues that to require company-specific assessments in section 751 reviews would impose an unfair burden on ITA.

To begin, the fact that 19 C.F.R. §§ 355.28(a)(3) and 355.33(f) may be inapplicable by their terms to the form of final published results of section 751 reviews does not enable ITA to disregard these regulations in conducting such reviews. Sections 355.28(a)(3) and 355.33(f) unquestionably require company-specific benefits to be stated in preliminary and final determinations made prior to a section 751 review if companies receive materially different benefits. It cannot have been intended that ITA, once having made such a finding, simply ignore any material differences in benefits received in conducting a section 751 review. In conducting such a review, ITA is specifically required to publish "a revised Countervailing Duty Order, including any revised bases for the assessment of duties on the merchandise." 19 C.F.R. § 355.41(d) (1983). The switch from company-specific deposit rates to an average assessment of CVDs falls within this requirement. Although the fact that an average assessment would be used was stated in both the preliminary and final results of the section 751 review, there is no indication on the record of ITA's justification for this change to an average as-

[6] 19 C.F.R. § 355.28 contains guidelines governing the issuance of preliminary determinations. Subsection (a)(3) provides that "[i]f separate enterprises have received materially different benefits, suchy differences shall also be estimated and stated." 19 C.F.R. § 355.28(a)(3) (1983).

Similarly, 19 C.F.R. § 355.33(f) contains guidelines governing the issuance of final determinations. Subsection (f) specifies that "[i]f separate enterprises have received materially different benefits, such differences shall be estimated and stated." 19 C.F.R. § 355.33(f) (1983).

Although the term "stated" is not defined, the logical inference would be that company-specific deposits rates are to be used where such material differences are found. *See* Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, *Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 43,063, 43,068 and 69 (1983) (citing § 355.33(f) and imposing company-specific deposit rates where material differences were found to exist.

sessment. Whether or not ITA's initial use of company-specific CVD deposit rates was based on a finding of "material" differences in benefits received, ITA evidently concluded that the differences were sufficiently large to warrant company-specific deposit rates.[7] To then ignore such differences in the section 751 review without explanation on the record (*e.g.*, of an unavailability of the requisite data or of a discovery that such differences, in fact, do not exist) results, as here, in a determination made contrary to law.[8] " '[T]he failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible.' "[9] *SCM Corp.* v. *United States*, 84 Cust. Ct. 227, 233, C.R.D. 80-2 (1980) (quoting *Public Media Center* v. *FCC*, 587 F.2d 1322, 1331-32 (D.C. Cir. 1978), quoting *American Smelting & Refining Co.* v. *FPC*, 494 F.2d 925, 945 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974)).

III. *Deemed Liquidation*

Plaintiff's second claim is that the merchandise at issue should be liquidated by operation of law at the rate specified by plaintiff when it was entered because Customs failed to complete the annual review within the statutory deadline of twelve months. Plaintiff's argument is as follows: An entry of merchandise not liquidated within one year from the entry of such merchandise is deemed liquidated at the rate of duty, value, quantity, and amount of duties specified by the importer at the time of entry unless the Secretary extends the time for liquidation. 19 U.S.C. § 1504(a) (1982 & West Supp. 1985). One of the situations in which extension is allowed is when liquidation is suspended as required by statute. 19 U.S.C. § 1504(b)(2) (1982 & West Supp. 1985). Plaintiff argues that although liquidation in this case was originally suspended for the

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[7] It should be noted that regulations proposed by ITA would clarify the magnitude of differences in subsidies among companies that would mandate company-specific CVD deposit rates following final affirmative determinations and company-specific CVD assessments in § 751 reviews. Proposed regulations 19 C.F.R. §§ 355.22(d) (2) and (3) state that in conducting a section 751 review,

> (2) If the Secretary decides that an individual (including government-owned) producer or exporter received a significantly different net subsidy during the period, the Secretary will state in the final results an individual rate for that person, and that rate will be the basis for the assessment of countervailing duties and, except as provided in paragraph (c)(7)(iii) of this section, the cash deposit of estimated countervailing duties for that person.
>
> (3) A significant differential is a difference of the greater of at least 10 percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis.

50 Fed. Reg. 24,207, 24,226 (1985).

Proposed regulation 19 C.F.R. § 355.20(d)(3) contains the same definition of a "significant differential" in the context of final CVD determinations. 50 Fed. Reg. at 24,225. This definition of a "significant differential" would apparently have mandated company-specific deposit rates and CVD assessments here for certain companies in the final CVD determination and the § 751 review respectively. Although obviously not dispositive here, this fact is instructive as to the significance of the differences in benefits received in the case at bar, particularly in light of ITA's stated purpose, in proposing this definition, of decreasing instances in which company-specific CVD rates would be required. *Id.* at 24,211-12.

[8] From the administrative record it is evident that ITA, in conducting the 1981 § 751 review, compiled company-specific data for 1981 for the eight largest exporters to the United States of Brazilian pig iron. Thus, it cannot be argued that ITA lacked the relevant company-specific data for these companies.

[9] The parties did not brief an issue which relates to the change in duties assessed, that is ITA's inclusion in the average CVD assessment of the "subsidy" received by Cimetal. The alleged subsidy received by Cimetal was apparently based largely on its bankruptcy during 1981 and its consequent failure to repay government loans. The size of this alleged subsidy apparently skewed the average assessment. The court makes no determination as to the reasonableness of ITA's apparent conclusion that the failure to repay government loans due to bankruptcy is, in fact, a countervailable subsidy.

periodic review, *Ambassador Division of Florsheim Shoe* v. *United States,* 748 F.2d 1560, 1563 (Fed. Cir. 1984), the suspension automatically terminated at the end of the twelve-month period allowed for the review. Once a suspension terminates, an entry is liquidated within ninety days. 19 U.S.C. § 1504(d) (1982 & West Supp. 1985). Plaintiff contends that pursuant to this scheme, the merchandise was liquidated on July 4, 1983.

In several other contexts courts have recognized that statutory time periods are directory, as opposed to mandatory, when no restraint is affirmatively imposed on the doing of the act after the time specified and no adverse consequences are imposed for the delay. *Usery* v. *Whitin Machine Works, Inc.,* 554 F.2d 498, 501 (1st Cir. 1977) (Secretary of Labor's decision on petition for trade adjustment assistance); *Fort Worth National Corp.* v. *Federal Savings & Loan Insurance Corp.,* 469 F.2d 47, 58 (5th Cir. 1972) (Federal Savings and Loan Insurance Corp. decision on application for acquisition of institution insured by the Corp.); *Katunich* v. *Donovan,* 8 CIT 156, 594 F. Supp. 744, 748–50 (1984) (same program as *Usery*); *Alberta Gas Chemicals, Inc.* v. *United States,* 1 CIT 312, 315–16, 515 F. Supp. 780, 785 (1981) (Treasury determination regarding dumping complaint);[10] *Diamond Match Co.* v. *United States,* 44 Cust. Ct. 67, 74–75, 181 F. Supp. 952, 959 (1960) (notification by Customs collector of filing of protest), *aff'd,* 49 CCPA 52, C.A.D. 796 (1962). As discussed above, the statute in question in this case does not purport to restrain ITA from acting after the twelve-month period has passed. The more problematic issue is whether the statute imposes the adverse consequence for the delay, which plaintiff seeks to have imposed on ITA. The Court of Appeals for the Federal Circuit has noted "that both § 1504 and the provisions respecting countervailing duties, such as § 1675(a), were enacted as in *pari materia,* both being amendments to * * * the Tariff Act of 1930, and therefore a legislative intent to have them work harmoniously together, and for neither to frustrate the other * * * is very much to be inferred." *Florsheim,* 748 F.2d at 1565 (discussing 19 U.S.C. §§ 1504 and 1675(a)). Although these two provisions are to be read in tandem, and the suspension is to be implied, there is nothing in the statute or legislative history that compels the conclusion that the implied suspension automatically terminates at the close of the twelve-month period specified in section 751. Thus, in this situation, the court is unable to conclude that the statute imposes a penalty of deemed liquidation for the delay. Although ITA's failure to comply with the statutory time limit is not condoned by this court, this failure to act in a timely manner did not deprive ITA of jurisdiction to complete the section 751 review.[11]

[10] "Although the legislative history cited by plaintiff shows clearly that Congress desired the expeditious handling of [these cases,] 'there is nothing in the statute which in any way suggests that the time limitation was designed to be jurisdictional.'" *Alberta Gas,* 1 CIT at 316, 515 F. Supp. at 785 (quoting *Usery,* 554 F.2d at 501).

[11] In view of the fact that the court finds that defendant acted in accordance with law as to this claim, the court believes that discussion of the numerous issues relating to exhaustion of administrative remedies is unnecessary as to the deemed liquidation issue.

IV. *Lag in Collection of Offset Tax*

Plaintiff alleges that ITA's treatment of the lag time in collection of the IPI export credit offset tax is not supported by substantial evidence and is not in accordance with law. Plaintiff contends that the benefit conferred due to the lag time between Brazil's assessment and collection of the tax is not a countervailable subsidy. In the alternative, plaintiff claims that even if this is a countervailable subsidy, ITA was not justified in imposing a CVD for this gap in collection. The CVD assessment on the IPI export credit program was based on the time at which credits were earned rather than received. To be consistent with the assessment of CVDs based on credits earned rather than received, plaintiff argues that the impact of the offset tax should be determined from the date the taxes were assessed rather than collected. Defendant offers two alternative arguments to counter plaintiff's contentions here.

Defendant first argues that plaintiff is barred from a judicial challenge to the assessment of CVDs based on export credits earned rather than credits received because plaintiff failed to raise this issue at the administrative level. ITA did not take account of this lag in offset tax collection, however, until its final decision concerning the section 751 review under consideration. Therefore, insofar as plaintiff argues for consistency in ITA's assessment of CVDs, there was no opportunity to raise the issue at the administrative level. Thus, even if the *Florsheim* decision, and other events discussed previously, had not intervened, plaintiff would not be barred from raising this issue before the court.

In the alternative, defendant asserts that its treatment of the lag in tax collection was within ITA's statutorily prescribed discretion under 19 U.S.C. § 1677(6)(C) (1982) to calculate an allowance for taxes imposed by the foreign government to offset a subsidy.[12] Thus, defendant characterizes the treatment of the lag in tax collection *not* as the imposition of a distinct CVD but rather an adjustment in the allowance for the offset tax. In enacting this provision, Congress stated that "[i]n determining the amount of offsets which are permitted, it is expected that the administrative authority will only offset amounts which are *definitively established by reliable, verified evidence.*" S. Rep. No. 249, 96th Cong., 1st Sess. at 86, *reprinted in* 1979 U.S. Code Cong. Ad. News 381, 472 (emphasis added). Defendant argues that the use of the word "may" in section 1677(6)(C) places within ITA's sole discretion the decision of whether to allow an offset in calculating the net subsidy.[13] The govern-

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[12] 19 U.S.C. § 1677 (1982) reads in pertinent part as follows:

(6) Net subsidy.—For the purpose of determining the net subsidy, the administering authority *may* subtract for the gross subsidy the amount of—

. . . . . .

(C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

(emphasis added).

[13] To be consistent with the GATT Subsidies Code, CVDs can be imposed only to the extent "necessary to eliminate the amount of the subsidy." General Agreement on Tariff and Trade: Interpretation and Application

Continued

ment seems to argue that the manner of the calculation of the offset is, therefore, nonreviewable. The court doubts that that is truly the intent of Congress here. ITA undoubtedly has discretion in deciding whether to allow an offset, but discretion as to its manner of calculation is not unlimited. As stated by the Supreme Court, judicial review is precluded only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945) (legislative history of APA)). This court has recognized that "judicial review of final agency action is not precluded unless there is persuasive reason to believe that this was the intention of Congress." *Maple Leaf Fish Co.* v. *United States*, 5 CIT 275, 278, 566 F. Supp. 899, 902 (1983) (citing *Overton Park, supra; Data Processing Service* v. *Camp*, 397 U.S. 150, 156–57 (1970); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967) (Judicial review under APA allowed absent "persuasive reason to believe" Congress intended otherwise)).[14] In the area of international trade, agency and executive determinations have generally been found to be nonreviewable, or reviewable only for procedural irregularities, only in areas where there truly is no law to apply such as the "multifaceted judgmental decision to settle a claim," *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254, 1262 (Fed. Cir. 1982) (Secretary of Commerce's settlement agreement in antidumping matter), and in those areas fraught with foreign affairs considerations. *See, Florsheim Shoe Co.* v. *United States*, 744 F.2d 787, 793 (Fed. Cir. 1984) (decision regarding duty-free treatment under Generalized System of Preferences is "intimately involved with foreign affairs"); *Sacilor, Acieries Et Laminoirs De Lorraine* v. *United States*, 9 CIT ——, 613 F. Supp. 364, 369–70 (1985) (allowance of additional imports under "short supply" exception is within realm of foreign affairs), *appeal docketed*, No. 85–2706 (Fed. Cir. Aug. 26, 1985). The decision in question, the manner in which an offset is calculated by ITA, falls within neither of these categories and, in fact, Congress not only specifically provided for judicial review in this area, but also gave guidance as to the type of evidence that would support an offset. The court concludes that there is "law to apply" to the manner in which ITA calculates an offset under this section and, as such, if an offset has been allowed it must be calculated in a way that does not amount to an abuse of whatever discretion is al-

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of Articles VI, XVI and XXIII, Apr. 12, 1979, part I, article 4, 31 U.S.T. 513, 524, T.I.A.S. No. 9619. Although inconsistent statutory provisions will prevail over GATT, Congress has stated that the Trade Agreements Act of 1979 was intended to be GATT consistent. *See* S. Rep. No. 249 at 1, 1979 U.S. Code Cong. & Ad. News at 387. Arguably, if there is an offset, duties are not necessary to eliminate the subsidy. Based on the arguments presented in this case, the court is not prepared to conclude that ITA is free to totally ignore offsets clearly evidenced by reliable information. This issue need not be resolved here because it is apparent in this case that, thus far, ITA has taken the offset into account in some manner.

[14] These limited exceptions to judicial review correspond (in reverse order) to the limitations on judicial review found in § 701(a) of the APA. 5 U.S.C. § 701(a) (1982). According to this provision, judicial review is allowed "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.*; *see Heckler* v. *Chaney*, 105 S. Ct. 1649, 1654–55 (1985).

lowed. *See Montgomery Ward*, 69 CCPA at 107, 673 F.2d at *1261* ("If an action is discretionary but there is law from which a court may determine that the exercise of discretion is arbitrary or capricious, or not in accordance with law, the decision itself may be reviewed on that limited basis.")

ITA initially allowed an offset in this case because it believed that an export tax, which nullified the IPI export credit subsidy, had been assessed on June 26, 1981, by the Brazilian government. Prior to issuance of its "final review" in the second section 751 review, however, ITA discovered that the Brazilian government did not begin to collect the offsetting export tax until December 31, 1982. ITA concluded that "the lag in collection was *equivalent to an interest free loan* in the amount of the tax owed rolled over monthly until the tax was actually paid." 49 Fed. Reg. at 9,925 (emphasis added). The "loan" was deemed to have been made on the date on which the tax was due, which under current practice, was determined to be forty-five days after the end of the month in which the shipment earning premium occurred. ITA calculated the *ad valorem* benefit of this delay to be .95 percent, using the monthly Banco de Brasil rate for discounts of accounts receivable of 4.97 percent. *Id.* Plaintiff asserts that what ITA did here was to impose a CVD based on the lag in tax collection without first establishing that such lag constitutes a countervailable subsidy. At oral argument, defendant claimed, to the contrary, that its reference to the lag in collection as an "interest free loan" was merely by way of analogy and that ITA was, in fact, adjusting the offset allowed under 19 U.S.C. § 1677(6)(C) to reflect the fact that the offset tax imposed was not collected immediately rather than recognizing another form of subsidy. The administrative record provides no guidance as to whether ITA did in fact treat the lag in tax collection as a separate countervailable subsidy or whether ITA simply adjusted the offset allowed under section 1677(6)(C). Inasmuch as this matter is remanded for a related purpose, and inasmuch as plaintiff had no opportunity to comment on this late-arising issue, the court deems it appropriate for ITA to review this aspect of its order as well. It appears to the court that if ITA treats the lag in tax collection as an interest free loan justifying imposition of a CVD, it must first be established that such lag is in fact a countervailable subsidy within the meaning of the statute. *Compare, e.g., Carlisle Tire and Rubber Co.* v. *United States*, 5 CIT 229, 564 F. Supp 834 (1983) and *Cabot Corp.* v. *United States*, 9 CIT——, 620 F. Supp. 722 (1985) (limits of countervailable subsidies based on general availability). In the alternative, if ITA treats the alleged .95 percent *ad valorem* benefit of the delay between imposition and collection of the offset tax as an adjustment to the CVD offset allowed under section 1677(6)(C), ITA should address the arguments raised by plaintiff concerning its methodology.

V. *Conclusion*

For the above reasons the court concludes that the second annual review was not conducted in accordance with law. This matter is remanded to ITA for further action consistent with this opinion.

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Customhouse Broker License—Suspension

Suspension of Customhouse Broker's License No. 5932

Effective upon publication date of this notice, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111 of the Customs Regulations, as amended (19 CFR Part 111), the individual customhouse broker's license no. 5932 issued to Paul V. McCormack, for the Customs District of New York, New York is hereby suspended for a period of not less than four years. Pursuant to a negotiated settlement between the U.S. Customs Service and Paul V. McCormack, after the four year period has expired, Mr. McCormack may apply for reissuance of customhouse broker's license no. 5932.

Date: February 27, 1986.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

[Published in the Federal Register, March 6, 1986 (51 FR 7872)]

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19 CFR Parts 141 and 152

(T.D. 86-56)

Entry of Merchandise Imported From Countries Imposing Export Restrictions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of policy.

SUMMARY: In recent years, importers of merchandise from countries which impose minimum price requirements to obtain quota or permission to export have been importing such merchandise using documents procured from the government of the country of origin by means of fraud or false statements. The documents in question are usually "visaed invoices" (an invoice stamped with or otherwise recording export approval by an appropriate authority of the gov-

ernment of the country of origin), where the export approval was based on false (inflated or deflated) merchandise values supplied by the exporter and set forth on the invoice. The acceptance of these documents by Customs is inconsistent with the requirement, under the law and regulations, that the invoice set forth the purchase price of the merchandise, and is precluded by the regulations, which call for the rejection of any documents which appear, or are known, to be erroneous. Customs will adhere to the law and regulations.

EFFECTIVE DATE: The policy will become effective with respect to all merchandise entered or withdrawn from warehouse for consumption on or after May 5, 1986.

FOR FURTHER INFORMATION CONTACT: Bruce Shulman, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In recent years, certain importers of merchandise from countries which impose export restrictions on such merchandise (an export quota, for example) have gained export approval from the government of the country of origin by means which result in the presentation to Customs, upon the entry of the merchandise into the U.S., of documents—usually "visaed invoices"—which contain false statements. A "visaed invoice" is an invoice which is stamped with or otherwise signifies the export approval of the appropriate government authority in the country of origin but, in the situations in question, such approval is premised on false (inflated or deflated) merchandise values set forth in the invoice by the exporter.

For example, the exporter and the U.S. importer may agree on a unit price of $10 for merchandise which the government of the country of origin will not approve for export to the U.S. at a unit price of less than $20. To obtain export approval, therefore, the exporter prepares an invoice setting forth a unit price of $20 for the merchandise; the appropriate authority of the government of the country of origin, based on the invoice information, stamps the invoice or otherwise signifies its approval for the export of the merchandise to the U.S. This document is required to be presented to Customs upon the entry of the merchandise into the U.S. and becomes a part of the entry package.

In many instances, the importer—for duty purposes—will allege the existence of a lower selling price than that recorded on the invoice, offering other evidence of the actual selling price, including (1) a second invoice prepared by the exporter showing the actual selling price, and evidence of payment by the importer of the latter price; (2) evidence of receipt of a refund from the exporter in an amount of the difference between the invoice price and the actual

agreed-upon selling price; or (3) evidence that the "overpayment" to the exporter per the inflated invoice price has been used to create an artificially low price for other goods shipped to the importer (other merchandise not subject to the same export restrictions). Although many importers have revealed the actual purchase details to Customs (in order to avoid any overpayment of duty, to avoid a possible penalty assessment for presenting Customs with a document known to contain false information, or for other reasons), others may not have done so—electing instead to pay the additional duty and to accept the risk of penalties in an effort to facilitate the processing of the entry by Customs.

Section 484(a), Tariff Act of 1930, as amended (19 U.S.C. 1484(a)), requires that importers file with Customs documentation which, among other things, allows Customs "to assess properly the duties on the merchandise, [and] collect accurate statistics with respect to the merchandise * * *." Clearly, an invoice which sets forth a false purchase price does not satisfy this requirement. Equally clearly, such an invoice fails the requirement imposed by 19 U.S.C. 1481(a)(5), that each invoice of imported merchandise set forth "[t]he purchase price of each item * * *." These requirements are confirmed in the corresponding implementing regulations (*e.g.*, Sections 141.81, 141.83 and 141.86, Customs Regulations, 19 CFR 141.81, 141.83, and 141.86). Sections 141.61(e)(4) and 141.64, Customs Regulations (19 CFR 141.61(e)(4) and 141.64), provide that Customs shall not accept entry and entry summary documentation which clearly appears, or is known by Customs, to be erroneous.

ACTION

On or after the effective date of this document, any differences or inconsistencies in the information contained in documents presented to Customs in connection with the importation of merchandise shall be considered as an indication that one or more of such documents contains false or erroneous information. In such circumstances, the entry documentation will not be accepted by Customs but will instead be returned to the importer for correction.

In situations where the visaed invoice or document presented to Customs (and necessary for the entry of the merchandise) contains erroneous value or price information, such invoice or document can only be corrected by the presentation to Customs of a new, corrected invoice or document stamped with the visa of the government of the country of origin. Customs will not accept pro forma invoices in any case involving apparent differences in price or value information in the documents required to be submitted to Customs and which involve the production of a document which is required to contain a foreign country's visa.

Customs will fully investigate any suspected attempts to circumvent the foregoing policy, including unusual resales and the submission of other entry documentation corroborating the value or

price information set forth in a visa document and otherwise suspected to be false. In appropriate circumstances, Customs will initiate actions under the civil and criminal penalty statutes it administers, including but not limited to 19 U.S.C. 1592, 18 U.S.C. 542, and 18 U.S.C. 1001.

PREVIOUS CUSTOMS RULINGS

To the extent that any ruling previously issued by Customs including those discussing whether a transaction value exists in situations similar to those described above, may have indicated that entry documentation containing inconsistencies or differences in price or value information would be accepted by Customs (either because the ruling failed to address the acceptability of such documentation or otherwise), those rulings are hereby amended and modified to conform with the policy hereinabove set forth.

WILLIAM VON RAAB,
Commissioner of Customs.

Dated: February 20, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 6, 1986 (51 FR 7783)]

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19 CFR Part 12

(T.D. 86-57)

Customs Regulations Amendment Relating to Textiles and Textile Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the importation of textiles and textile products into the U.S. Due to recent changes in the Tariff Schedules of the United States resulting from Presidential Proclamation 5365, dated August 30, 1985, effectuating the U.S.-Israel Free Trade Area agreement, certain general headnotes upon which portions of the Customs Regulations are predicated no longer exist. Accordingly, this document revises the Customs Regulations to reflect those changes.

EFFECTIVE DATE: March 11, 1986.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Phil Robins, Classification and Value Division (202-566-8181); Operational Aspects: Bill Marchi, Duty Assessment Division (202-566-2957); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

By T.D. 85-38, published in the Federal Register on March 5, 1985 (50 FR 8710), § 12.130, Customs Regulations (19 CFR 12.130), was amended to provide specific regulatory authority mandating that "country of origin" rules be applied in determining whether textiles or textile products are subject to any of the multilateral or bilateral textile agreements negotiated by the U.S. pursuant to § 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854).

Section 12.130(a), Customs Regulations, now states that textiles or textile products subject to § 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854), include merchandise subject to General Headnotes 3(g)(iii)(C)(1), 3(g)(iii)(C)(2), and 3(g)(iii)(E) of the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202). In addition, § 12.130(f), Customs Regulations, states that all importations of textiles and textile products covered by General Headnotes 3(g)(iii)(C)(2) or 3(g)(iii)(E), TSUS, shall be accompanied by the appropriate declaration(s) of the manufacturer, producer, exporter or importer of the textiles or textile products.

Pursuant to the U.S.-Israel Free Trade Area (FTA) agreement, which became effective September 1, 1985, certain changes were made to the TSUS; including the deletion of General Headnotes 3(g)(iii)(C)(1), 3(g)(iii)(C)(2), and 3(g)(iii)(E).

The FTA agreement is a program providing for free or reduced rates of duty for merchandise from Israel to stimulate trade between Israel and the U.S. This program was authorized by §§ 401-405 of the Trade and Tariff Act of 1984 (Pub. L. 98-573) and implemented by the U.S.-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note) and Presidential Proclamation 5365 of August 30, 1985, published in the Federal Register on September 5, 1985 (50 FR 36220). On January 1, 1985, all currently eligible reduced rate importations from Israel will be accorded duty-free treatment.

The deletion of the above mentioned general headnotes from the TSUS necessitates their deletion from § 12.130. These are nonsubstantive changes which will merely conform the Customs Regulations to the TSUS.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for this final rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601, *et seq.*), do not apply.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Inasmuch as this amendment merely conforms the Customs Regulations to the TSUS, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

DRAFTING INFORMATION

The principal author of the document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspection, Imports, Textile products and apparel.

AMENDMENT TO THE REGULATIONS

Part 12, Customs Regulations (19 CFR Part 12), is amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for Part 12 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624. All other statutory authority cited at the end of various sections in Part 12 remains the same.

2. Paragraph (a) and the introductory text of paragraph (f) of § 12.130 are revised to read as follows:

§ 12.130 Textiles and textile products country of origin.

(a) *General.* Textiles or textile products subject to § 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854), include merchandise which is classifiable under the provisions contained in Schedule 3, Subpart 6D of Schedule 6, Part 1 of Schedule 7, and Subparts 4A, 5D, 5E, 7B, 12C, and 13B of Schedule 7 of the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202); provided that such merchandise:

(1) is in chief value of cotton, wool, or man-made fibers, or any textile fibers subject to the terms of any textile trade agreement, or any combination thereof; or

(2) contains 50 percent or more by weight of cotton or man-made fibers, or any textile fibers subject to the terms of any textile trade agreement; or

(3) contains 17 percent or more by weight of wool; or

(4) if in chief value of textile fibers or textile materials, contains a blend of cotton, wool, or man-made fibers, or any textile fibers subject to the terms of any textile trade agreement, or any combination thereof, which fibers, in the aggregate amount to 50 percent or more by weight of all component fibers.

* * * * * * *

(f) *Declaration of manufacturer, producer, exporter, or importer of textiles and textile products.* All importations of textiles and textile products subject to § 204, Agricultural Act of 1956, as amended, shall be accompanied by the appropriate declaration(s) set forth in paragraph (f)(1) or (f)(2) of this section. Textiles or textile products subject to § 204 include that merchandise described in § 12.130(a). All importations of textiles and textile products not subject to § 204 shall be accompanied by the declaration set forth in paragraph (f)(3) of this section. The declaration(s) shall be filed with the entry. The declaration(s) may be prepared by the manufacturer, producer, exporter or importer of the textiles and textile products. If multiple manufacturers, producers, or exporters are involved, a separate declaration prepared by each may be filed. A separate declaration may be filed for each invoice which is presented with the entry. The determination of country of origin, other than as set forth in paragraph (g) of this section, will be based upon information contained in the declaration(s). The declaration(s) shall not be treated as a missing document for which a bond may be filed. Entry will be denied unless accompanied by a properly executed declaration(s).

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 24, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 11, 1986 (51 FR 8314)]

(T.D. 86-58)

Customs Broker's License—Revocation by Operation of Law of Customs Broker's License No. 5234

Pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), notice is hereby given that Customs broker's license No. 5234 of Behring International, Inc., is revoked by operation of law.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, March 11, 1986 (51 FR 8391)]

U.S. Customs Service

General Notice

Request for Comments Regarding Effective Date for Country-of-Origin Marking Requirement on Orange Juice Containers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Solicitation of public comments and notice of public hearing.

SUMMARY: Customs is soliciting the views of the public regarding an implementation date for a requirement that labels on frozen concentrated and reconstituted orange juice products which contain imported concentrate be marked to show the foreign country-of-origin of the products. The requirement for marking the products was recently upheld by the Court of International Trade, but Customs was directed by the Court to seek comments from all interested parties before reaching a decision on an effective date for the requirement.

DATE: Comments (preferably in triplicate) must be received on or before April 10, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

Background

Customs is requesting the views of the public in regard to the earliest practicable implementation date for a requirement that containers of orange juice in frozen concentrated or reconstituted forms, which contain imported concentrate, must be labeled to comply with the country-of-origin marking requirements of § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304).

In response to a formal request, Customs published a ruling dated September 4, 1985, in the CUSTOMS BULLETIN of September 25, 1985 (C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21), stating that retail packages of orange juice containing imported concentrate must be marked. The rationale for that decision is discussed in detail in the cited decision. That ruling was to be implemented for affected products entered for consumption or withdrawn from warehouse on or after January 1, 1986.

That implementation date was extended to March 1, 1986, by a notice published in the December 11, 1985, CUSTOMS BULLETIN (19 Cust. Bull. No. 50). The extension decision took into account the ruling's perceived economic impact on the manufacturing public, as well as the right of ultimate purchasers of affected juice products to be fully informed about the origin of those products. The March 1, 1986, date was nearly 6 months after the initial ruling had been issued, and was considered reasonable.

In a recent case brought by the National Juice Products Association, *et al.* challenging C.S.D. 85–47, *National Juice Products Association* v. *United States*, —— CIT ——, Slip Op. 86–13 (January 30, 1986), the Court of International Trade held that C.S.D. 85–47 was substantively valid. The Court, however, remanded the case to Customs for reconsideration of the effective date. The Court directed Customs to adhere to the notice and comment provisions of § 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)), and to carefully consider all possible issues relating to a reasonable time to implement the new ruling.

Accordingly, Customs is soliciting comments related to the implementation date. Of particular interest is any information concerning the time it generally takes suppliers to provide new or changed labels and cans to the packagers of orange juice products, as well as the quantity of labels and printed retail containers usually kept in inventory. We also seek information as to whether the industry has already taken steps to procure new labels which satisfy the requirements of C.S.D. 85–47.

PUBLIC HEARING

A public hearing will be held on this matter on March 28, 1986, commencing at 9:30 a.m. in Room 3428, Customs Service Headquarters.

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S.

Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 21, 1986.
DAVID D. QUEEN,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 11, 1986 (51 FR 8338)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-560)

AMERICAN LAMB CO., ET AL., APPELLEES *v.* UNITED STATES, APPELLANT, AND NEW ZEALAND MEAT PRODUCTS BOARD, ET AL., INTERVENORS

Catherine R. Field, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellant. With her on the brief were *William E. Perry*, *Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

Edward J. Farrell, Bronz & Farrell, of Washington, D.C., argued for intervenors, New Zealand Meat Products Board, et al.

Robert T. Wray, Robert Wray Associates, of Washington, D.C., argued for appellee.

N. David Palmeter, *David P. Houlihan* and *Alan H. Price*, Mudge Rose Guthrie Alexander & Ferdon, of Washington, D.C., were on the brief for Amicus Curiae Crystal International Corp., et al. *Victor T. Fuzak* and *Craig M. Indyke*, Hodgson, Russ, Andrews, Woods & Goodyear, of Buffalo, New York, of counsel.

Thomas B. Wilner, *Sukhan Kim and Kimberly Till*, Arnold & Porter, of Washington, D.C., were on the brief for Amicus Curiae Hankook Tire Mfg. Co., et al.

Italo H. Ablondi, *F. David Foster*, *Sturgis M. Sobin* and *Pamela A. McCarthy*, Ablondi & Foster, P.C., of Washington, D.C., were on the brief for Amicus Curiae Taiwan Electrical Appliance Manufacturers Association.

Ronald N. Isroff and *Morton L. Stone*, Ulmer, Berne, Laronge, Glickman & Curtis, of Cleveland, Ohio, were on the brief for Amicus Curiae Glaverbel S.A.

Appealed from: U.S. Court of International Trade.

Judge DICARLO.

(Appeal No. 86-560)

AMERICAN LAMB CO., ET AL., APPELLEES *v.* UNITED STATES, APPELLANT, AND NEW ZEALAND MEAT PRODUCTS BOARD, ET AL., INTERVENORS

(Decided February 28, 1986)

Before MARKEY, *Chief Judge*, BALDWIN, and NIES, *Circuit Judges*.

MARKEY, *Chief Judge*.

Interlocutory appeal from an order of the United States Court of International Trade, 611 F. Supp. 979 (Ct. Int'l Trade 1985), ordering the U.S. International Trade Commission (ITC) to reconsider a

preliminary determination issued in an antidumping duty investigation under section 733(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673b(a) (1982). The court certified its order for immediate appeal. We remand with instructions to vacate the order.

BACKGROUND

On April 18, 1984, three domestic lamb producers, American Lamb Co., Denver Lamb Co., and Iowa Lamb Corp. (Denver Lamb), filed petitions with the ITC and the International Trade Administration of the U.S. Department of Commerce (ITA), alleging that imports of lamb meat from New Zealand are being subsidized and then sold in the United States at less than fair value (LTFV). Accordingly, ITC instituted preliminary countervailing and antidumping investigations under sections 703(a) and 733(a), respectively, of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671b(a) and 1673b(a), to determine whether there is a reasonable indication that an industry in the United States is being materially injured, or is being threatened with material injury, or whether there is a reasonable indication that the establishment of an industry in the United States is being materially retarded, by reason of imports of such merchandise.

Notice of the initiation of ITC's investigation, and of a public conference to be held in connection with the investigation, was posted in the Office of ITC's Secretary and was published in the Federal Register on April 25, 1984. 49 Fed. Reg. 17,828 (1984). The conference was held on May 10, and all persons so requesting were permitted to appear in person or by counsel.

Denver Lamb presented the evidence disclosed in its petitions (declining production of live lambs, decreased prices, and increasing lamb and sheep slaughter). During its preliminary investigation, ITC also received information from the United States Department of Agriculture, packers and producers of lamb meat, academic and trade association researchers, and from intervenors New Zealand Meat Producers Board, Meat Export Development Company, and New Zealand Lamb Company.

Having weighed all the evidence, ITC determined on May 25, 1984 (by a 4-2 vote) that there is no reasonable indication that the domestic lamb industry is being materially injured, or being threatened with material injury, or that the establishment of an industry in the United States is being materially retarded, by reason of the importation of lamb meat from New Zealand. *Lamb Meat from New Zealand*, Investigations Nos. 701-TA-214 (Preliminary), and 731-TA-188 (Preliminary), U.S.I.T.C. Pub. No. 1534 (1984). Those determinations were published in the Federal Register. 49 Fed. Reg. 24,458 (June 13, 1984).

Denver Lamb sought review in the Court of International Trade of those negative preliminary determinations pursuant to 19 U.S.C. § 1516a(a)(1)(A)(iii), arguing that the action should be remanded be-

cause the ITC weighed conflicting evidence in making its determinations and because the weighing of conflicting evidence was contrary to the decisions of the court in *Republic Steel Corp.* v. *United States*, 591 F. Supp. 640 (1984), *reh'g denied*, 16 Cust. B. & Dec., No. 14, at 55 (Ct. Int'l Trade 1985), and *Jeannette Sheet Glass Corp.* v. *United States*, 607 F. Supp. 123 (Ct. Int'l Trade 1985).

ITC conceded that if those decisions are followed, the action should be remanded, but argued that the cases should not be followed because 19 U.S.C. § 1673b(a) authorizes ITC to weigh conflicting evidence in a preliminary investigation.

The court dismissed as moot the challenge to ITC's negative preliminary determination resulting from the countervailing duty investigation, No. 701-TA-214 (Preliminary), because, effective April 1, 1985, the Office of the U.S. Trade Representative terminated New Zealand "as a country" under Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (GATT Subsidies Code). 50 Fed. Reg. 13,111 (April 2, 1985). Thus, New Zealand was no longer entitled to an injury test in countervailing duty investigations.[1] 611 F. Supp. at 980 n.1; *see* 19 U.S.C. § 1671, as amended by Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 602(a), 98 Stat. 3024.[2]

Concerning the challenge to the antidumping duty determination, the court wrote:

> Defendant's arguments have been rejected three times within the year by two judges of this Court with broad experience in this complex area of the law. Under these circumstances, *stare decisis* counsels the Court to follow the prior decisions. Defendant should address its arguments to our appellate court.

611 F. Supp. at 981. The court remanded the action, in light of *Republic Steel* and *Jeannette Sheet Glass*, instructing ITC to reconsider the antidumping determination.

On July 19, 1985, the court certified its order allowing ITC to appeal to this court pursuant to 28 U.S.C. § 1292(d)(1). The trial court granted ITC's motion to stay proceedings until this court denied, or rendered a decision in, the appeal.

On October 15, 1985, this court granted ITC's petition to accept the interlocutory appeal. Briefs were filed by the parties, intervenors, and *amici*,[3] and oral argument was presented.

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[1] Denver Lamb filed a new countervailing duty petition with the ITA on March 26, 1985. *Lamb Meat from New Zealand: Initiation of Countervailing Duty Investigation*, 50 Fed. Reg. 15,949 (April 23, 1985). That matter is not before us.

[2] Because the preliminary determination at issue here is that under the antidumping laws and not that under the countervailing duty laws, this opinion deals with 19 U.S.C. § 1673b(a) and not with § 1671b(a). Because, however, the question before us deals with preliminary determinations of material injury or threat thereof, and because both sets of laws require those determinations and employ the phrase "reasonable indication", what is said here may be seen as applicable to preliminary determinations of injury under both sets of laws.

[3] Crystal International Corporation and Flachglas, A.G.; Taiwan Electrical Appliance Manufacturers Association; Glaverbel S.A.; Jeannette Sheet Glass Corp.; and Hankook Tire Manufacturing Co., Ltd., Hankook Tire American Corp., Kumho and Co., Inc., Kumho U.S.A., Inc., Hyosung Corp., and Hyosung America, Inc.

ISSUE

Whether ITC's weighing of all evidence in applying the "reasonable indication" standard of 19 U.S.C. § 1673b(a) in a preliminary investigation is permissible.

OPINION

I. Introduction[4]

The important question before this court involves a statute so fundamental to the application of the United States antidumping laws that an introductory listing of implementing procedures appears appropriate. *See generally* Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws*, 58 St. John's L. Rev. 828 (1984).

Normally, as in this case, proceedings are initiated when petitions are filed by interested parties on the same day with the ITC and ITA, § 1673a(b)(2), though ITA may self-initiate an investigation, 19 U.S.C. § 1673a(a); *see* 19 C.F.R. § 353.35 (1985).

A normal antidumping duty proceeding involves five stages:

(1) The ITA decides within twenty days of receiving a petition whether to initiate an investigation. 19 U.S.C. § 1673a(c); *see* 19 C.F.R. § 353.37(a) (1985). An investigation will be initiated if the petition alleges the necessary elements for imposition of a duty and is accompanied by information "reasonably available to the petitioner supporting the allegations." 19 U.S.C. § 1673a(c). ITA's self-initiated investigations are based on "information available to it." 19 U.S.C. § 1673a(a); *see United States* v. *Roses, Inc.*, 706 F.2d 1563, 1566 (Fed. Cir. 1983). If ITA finds a petition insufficient an investigation is not initiated, 19 U.S.C. § 1673a(c)(3), and any investigation initiated by ITC is terminated. 19 U.S.C. § 1673b(a).

(2) If ITA has not found the petition insufficient, ITC must preliminarily determine within 45 days of the filing of the petition "whether there is a reasonable indication" that a domestic industry is being materially injured or threatened with material injury. 19 U.S.C. § 1673b(a). ITC bases its preliminary determination on questionnaires sent to importers and domestic interests, public conferences, post conference briefs, and exhibits. If that determination be in the negative, ITC terminates the investigation. *Id.; see* 19 C.F.R. § 207.18.

(3) If ITC finds a reasonable indication of injury, ITA must preliminarily determine, within 160 days of the petition filing date (subject to extension of up to 210 days, 19 U.S.C. § 1673b(c)(1)), whether there is a "reasonable basis to believe or suspect" that the

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[4] Several appeals docketed in this court have been stayed pending the outcome of this appeal. *Jeannette Sheet Glass, supra*, Nos. 85-2455/2554/2555/2589, 86-519/609/700 (Fed. Cir. June 7—Nov. 29, 1985); *American Grape Growers Alliance For Fair Trade* v. *United States*, 615 F. Supp. 603 (Ct. Int'l Trade), No. 85-2717 (Fed. Cir. Aug. 18, 1985); *Armstrong Rubber Co.* v. *United States*, 614 F. Supp. 1252 (Ct. Int'l Trade), No. 85-2707 (Fed. Cir. Aug. 26, 1985). In addition, several cases pending in the Court of International Trade will be directly affected by resolution of the question on appeal.

merchandise is being sold, or is likely to be sold, at LTFV. 19 U.S.C. § 1673b(b)(1); *see* 19 C.F.R. § 353.39. An affirmative preliminary LTFV determination results in suspension of liquidation of duties and in posting of bonds for the merchandise. 19 U.S.C. § 1673b(d)(1)–(2). A negative preliminary determination prevents imposition of those provisional remedies but does not terminate the investigation.

(4) Within 75 days of its preliminary determination (subject to extension of up to 135 days, 19 U.S.C. § 1673d(a)(2)), ITA makes a final determination respecting the sale of merchandise at LTFV. 19 U.S.C. § 1673d(a)(1). If that final determination is in the negative, the investigation is terminated. 19 U.S.C. § 1673d(c)(2).

(5) If ITA's final LTFV determination is in the affirmative, ITC makes its final determination of material injury. 19 U.S.C. § 1673d(b)(1).[5] That determination is based on technical and economic testimony given at a trial-like hearing. If ITC finally determines that no injury exists, the investigation is terminated. If ITC determines that injury exists, ITA issues an antidumping duty order. 19 U.S.C. § 1673d(c)(2).

Judicial review in the Court of International Trade is available of any negative preliminary determination (stages 1–3), 19 U.S.C. § 1516a(a)(1), and of any final determination (stages 4 and 5). 19 U.S.C. § 1516a(a)(2).

II. Court of International Trade Decisions

In making preliminary determinations of injury, and in applying the "reasonable indication" standard, ITC has been weighing conflicting evidence. It has, since its very first investigation under the 1974 Act, been determining that there is no "reasonable indication" of material injury or threat when: (1) There is clear and convincing evidence of the absence of such reasonable indication; and (2) the record shows it extremely unlikely that evidence of a "reasonable indication" would be developed in a final investigation. *Butadiene Acrylonitrile Rubber from Japan*, Inq. No. AA1921-Inq.-1, U.S.I.T.C. Pub. No. 727, at 5 (1975). It applied the same criteria in subsequent proceedings. *See, e.g., Low-Fuming Brazing Copper Wire and Rod from France, New Zealand and South Africa*, Inv. Nos. 701-TA-237 and 731-TA-247 (Preliminary), U.S.I.T.C. Pub. No. 1673 (1985); *Uncoated Free Sheet Offset Paper from Canada*, Inq. No. AA1921-Inq.-10, U.S.I.T.C. Pub. No. 869 (1978). It was that administrative procedure that was rejected by the court in *Republic Steel* and *Jeannette Sheet Glass*.

In *Republic Steel*, the court remanded to the ITC two determinations in countervailing duty investigations because ITC weighed

[5] If ITA's preliminary determination is in the affirmative, ITC's final determination must be made within 120 days of that ITA determination or within 45 days of ITA's final determination, whichever is later. 19 U.S.C. § 1673d(b)(2). If ITA's preliminary determination is negative, ITC's final determination must be made within 75 days of any affirmative final determination of ITA. 19 U.S.C. § 1673d(b)(3).

conflicting evidence in making a negative preliminary determination. The court wrote:

> The low threshold of the ITC's determination of whether there is a reasonable indication of injury is the unavoidable and logical consequence of the completely different nature of the two stages of the ITC's involvement in these proceedings. *The object of these determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination.*
>
> The fundamental point which the Court emphasizes is that the standard claimed by the ITC for its preliminary determination of reasonable indication of injury, is actually the proper standard for a final determination. If applied at this early stage it would create a serious imbalance in the operation of the law.

591 F. Supp. at 650 (emphasis in original).

The court in *Republic Steel* denied ITC's motion for reconsideration and reaffirmed its rule that "the weighing of conflicting evidence by the ITC cannot be done at the threshold without entirely distorting the operation of the law and impeding the legislative intention that investigations be commenced on the basis of possibilities." 16 Cust. B. & Dec., No. 14, at 56. The court continued:

> Even if the ITC is held to a standard which required them to have "clear and convincing" evidence that there is no possibility of injury, the operation of the law is being distorted.
>
> The right to a full investigation was not intended to depend on anything more than a reasonable showing by a petitioner from matters fairly within its capacity to know. It was not intended to depend on a pre-investigation of conflicting evidence.

Id. The court then gave its own set of guidelines as to when ITC could terminate the investigation at the preliminary stage:

> If the petition does not contain the evidence of injury which could reasonably be expected to be within petitioner's knowledge, or is false, or is in conflict on essential points with matters of public record, or does not state injury as a matter of law even if its contents are taken as true, then the ITC may properly conclude that there is no reasonable indication of injury and no need for further investigation.

Id.

Because a negative preliminary determination is overturned by the Court of International Trade only if found to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 19 U.S.C. § 1516a(b)(1)(A), the court felt that if ITC weighed the evidence, its decision could never be reversed. 19 Cust. B. & Dec., No. 14, at 56. The court found it difficult to conceive that

Congress wanted ITC to have "an absolute veto power on the commencement of countervailing and antidumping investigations." *Id.*

In *Republic Steel,* ITC had considered whether injury was reasonably indicated by importations from individual countries. The court held that ITC must in a preliminary investigation consider the cumulative or combined effect of all competitive, subsidized, or allegedly subsidized importations of a particular product from all involved countries. The court held that its requirement for cumulation did not conflict with the requirement that importations from a particular country be the cause of injury, because that question could be determined in the final determination. 591 F. Supp. at 645. The court said those "potentially contradictory demands are reconciled by operating at different stages of the investigation." *Id.* at 646. The court thus distinguished ITC's preliminary and final determinations on the basis of the court's own requirement that importations be cumulated in the former and particularized in the latter, leading it to create the "possibility" standard.

The court gave these reasons for its focus on a "possibility" of injury:

> (1) The statute calls for a "reasonable indication" thus suggesting "only the barest clues or signs [are] needed to justify further inquiry." 591 F. Supp. at 646.
>
> (2) In discussing the reasonable indication standard, "the House Committee on Ways and Means stated that a reasonable indication will exist in 'each case in which the facts reasonably indicate that an industry in the United States could *possibly* be suffering material injury * * *.'" *Id.* (quoting House Rep. No. 317, 96th Cong., 1st Sess. 52 (1979)).
>
> (3) The Senate Committee on Finance noted that the ITC preliminary determination, together with the sufficiency determination of ITA, implemented the United States' obligations under GATT Subsidies Code. That legislative history "indicates that the ITC decision is primarily *part of the decision as to whether an investigation should be initiated,*" and thus "should display the same spirit of receptiveness to the initiation of investigations as the ITA sufficiency determination." 591 F. Supp. at 647 (emphasis in original).
>
> (4) The "limited purpose" of the preliminary injury determination is to "weed out those cases which were clearly without merit and which could not possibly deserve further investigation." *Id.*
>
> (5) ITC's preliminary determination is in the "midst of the receptive standard of the *preceding* determination and the relaxed standard of the *following* determination." *Id.* at 648 (emphasis in original). Therefore, "it is reasonable to view the first ITC determination as designed only to eliminate those matters in which there is nothing whatsoever deserving investigation." *Id.*

In *Jeannette Sheet Glass*, the court applied the *Republic Steel* rationale in antidumping investigations and remanded the action to ITC. The court wrote:

> Here, the Commission's preliminary injury determinations did not address the question of whether there is sufficient information in the record to raise the *possibility* of injury, but rather sought to definitively resolve the issues by weighing the conflicting evidence. Put another way, the Commission's "preliminary" determination, in effect, constituted a final determination predicated solely upon data submitted in the forty-five day period permitted at the preliminary stage.

607 F. Supp. at 129 (emphasis added). On at least two other occasions, the court adopted the analysis outlined in *Republic Steel* and remanded cases to ITC. *Armstrong Rubber Co.* v. *United States*, 614 F. Supp. 1252 (Ct. Int'l Trade 1985); *American Grape Growers Alliance* v. *United States*, 615 F. Supp. 603 (Ct. Int'l Trade 1985).

The court's concern is directed to ITC's consideration of any evidence that would negate the allegations or information in a petition. The court's interpretation would thus require an affirmative preliminary determination, and (assuming an ITA preliminary LTFV determination) a subsequent full investigation, whenever information accompanying a petition raises the mere "possibility" of material injury, regardless of any contrary evidence. The difficulty is two-fold: (1) The statutory standard, as the court recognized, is "reasonable indication", not "possibility"; and (2) the court's order that ITC must not weigh the evidence in conducting a preliminary injury investigation is not in accord with the intent of Congress.

III. Standard of Review

A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450–51 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 85 (1964). Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable". *Federal Election Committee* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *see Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984). The agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding. *Chevron, U.S.A. Inc.*, v. *National Resources Defense Council*, 467 U.S. 837, 843 n.11, 104 S. Ct. 2778, 2782 n.11 (1984); *see Consumer Products Division, SCM Corp.* v. *Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

Applying those guidelines, we reject the court's imposition of the mere possibility standard. One writing on a clean slate might find the court's reasoning fully acceptable, but a "court does not simply

impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron, U.S.A., supra,* 467 U.S. at 843, 104 S. Ct. at 2782.

Since the enactment of the 1974 Act, ITC has consistently viewed the statutory "reasonable indication" standard as one requiring that it issue a negative determination, as above indicated, only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation. That view, involving a process of weighing the evidence but under guidelines requiring clear and convincing evidence of "*no* reasonable indication", and no likelihood of later contrary evidence, provides fully adequate protection against unwarranted terminations. Indeed, those guidelines weight the scales in favor of affirmative and against negative determinations. Under the appropriate standard of judicial review, ITC's longstanding practice must be viewed as permissible within the statutory framework.

IV. "Reasonable Indication" v. "Mere Possibility"

We are unable to join the court in its view that the statutory phrase "reasonable indication" means the same as a mere "possibility", or that it suggests "only the barest clues or signs needed to justify further inquiry." The statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry. Moreover, ITC's use of "extremely unlikely" in considering need for further inquiry would appear to meet the court's concern for premature dismissal of that need.

The single sentence quoted by the court from the House Report cannot serve to substitute "possibility" for "reasonable indication" in the statute. Though the word "possibly" appears in that sentence, it follows the words "facts reasonably indicate", implying the need to determine facts and the exercise of reason.

Nor do we find in the statute a requirement for grouping ITC's preliminary determination with ITA's sufficiency determination. The statute establishes the five stages above described, each independent of the others and each with its distinct focus and purpose. Moreover, such grouping would not convert "reasonable indication" to "possibility" or require ITC to look only at the petition and its accompanying information. This court has determined that, when ITA determines the sufficiency of the petition, "Congress intended the *application of agency expertise,* not only to examine the petition and supporting data for internal inconsistencies, but also to evaluate it in light of a wide body of other information, to the end that, so far as possible, the commencement of unwarranted investigations should be avoided." *United States* v. *Roses Inc., supra,* 706 F.2d at 1569 (emphasis supplied).

ITC would not be able to fulfill what the court described as the "limited purpose" of weeding out "those cases which were clearly

without merit" if it must proceed to a final determination whenever it finds a mere "possibility" of injury in the petition and accompanying information. Virtually every petitioner can be expected to submit allegations and information sufficient to show *some* "possibility" of injury.

V. Congressional Intent

ITC's weighing of evidence in complying with § 1673b(a) is in full accord with the intent of Congress.

We begin with the best source of congressional intent, the statute:

> Except in the case of a petition dismissed by the administering authority under section 1673a(c)(3) of this title, the Commission, within 45 days after the date on which a petition is filed under section 1673a(b) of this title or on which it receives notice from the administering authority of an investigation commenced under section 1673a(a) of this title, shall make a determination, *based upon the best information available to it at the time of the determination, of whether there is a reasonable indication* that—
>
> (1) an industry in the United States—
>
> (A) is materially injured, or
>
> (B) is threatened with material injury, or
>
> (2) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

19 U.S.C. § 1673b(a) (emphasis supplied).

The legislative history supports the statutory statement that ITC should use "the best information available" in applying the "reasonable indication" standard. Congress introduced that standard when it added § 201(c)(2) to the Antidumping Act of 1921, Ch. 14, § 201, 42 Stat. 9, 11 (1921), in the Trade Act of 1974, Pub. L. No. 93-618, § 321(a)(2), 88 Stat. 1978, 2043-44 (1974) (1974 Act). When Congress repealed the Antidumping Act of 1921 in the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193 (1979) (1979 Act), it adopted the "reasonable indication" standard for countervailing and antidumping preliminary determinations. 19 U.S.C. §§ 1671b(a), 1673b(a). Congress intended that the Commission apply the standard "in essentially the same manner" as it applied the standard under the 1974 Act. S. Rep. No. 249, 96th Cong., 1st Sess. 66, *reprinted in* 1979 U.S. Code Cong. & Ad. News 449, 452.

The purpose of a preliminary injury determination is to "eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade." S. Rep. No. 1298, 93rd Cong., 2d Sess. 171, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 7186, 7308. When the procedure was adopted in the 1979 Act, the

law became "more clearly consistent with the international agreement which permits the imposition of provisional measures, that is, suspension of liquidation and the posting of a cash deposit, bond or other security on each entry subject to the suspension, only after an affirmative preliminary determination has been made that there are sales at less than fair value and that sufficient evidence of material injury has been presented." H.R. Rep. No. 317, 96th Cong., 1st Sess. 60–61 (1979).

In *Budd Co. Railway Division* v. *United States*, 507 F. Supp. 997, 1000 (Ct. Int'l Trade 1980), the court correctly noted that in requiring that ITC's preliminary determination be based on the "best information available to it," *see* 19 U.S.C. §1677e(b); 19 C.F.R. §207.17, "Congress has prescribed a thorough investigation by the Commission prior to the making of its preliminary determination." The same view is expressed in the House Report:

> The time limit provided in the bill for an ITC preliminary determination, although longer than that under present law, is still quite brief. It is therefore intended that the ITC will investigate the allegations in the petition *in as thorough a manner as possible using the information available within that time period, and will provide interested parties a reasonable opportunity to present their views.* Such opportunity does not ncessarily include a hearing such as that required prior to a final determination.

H.R. Rep. No. 317, *supra*, at 61 (emphasis supplied); *see also* S. Rep. No. 249, *supra*, at 66, *reprinted in* 1979 U.S. Code & Cong. & Ad. News, at 452.

In *Budd Co.*, the court noted that the Congressional mandate to conduct a thorough investigation based upon the best information available

> does not limit "the best information available" to that furnished by the petitioner or by any party-in-interest to the proceedings. The term "available" as used in the statute must be construed in accordance with its common meaning. In so doing, it is clear that all information that is "accessible or may be obtained," from whatever its source may be, must be reasonably sought by the Commission. It is only in this manner that the Commission can comply with the intended congressional mandate to conduct a "thorough investigation."

507 F. Supp. at 1003–04 (footnote omitted). The court in *Budd Co.* also indicated that the "affirmative obligation and duty of the Commission to conduct a 'thorough investigation' is not relieved" by a petition accompanied by information reasonably available to the petitioner supporting the allegations in the petition. *Id.* at 1001. Clearly, ITC cannot conduct a "thorough investigation" if it is permitted to review only such evidence as might support a petition.

Although a hearing is not required in a preliminary determination proceeding, ITC often includes, as it did here, a public confer-

ence "at which interested parties may present their views without the opportunity for cross-examination." *Budd Co. Railway Division, supra,* 507 F. Supp. at 1001; *see* Horlick, *supra,* 58 St. John's L. Rev. at 829–30. If ITC were precluded from all weighing of evidence, i.e., if it were required to disregard all evidence tending to disprove the allegations in a petition, there would be neither reason nor incentive for parties other than petitioners to present their views.

A series of factors—Congress' requirement that ITC conduct a thorough investigation, using the best information available to it, Congress' expectation of opportunity for interested parties to present their views, and Congress' provision of the "reasonable indication" standard for use in investigations initiated in response to a petition and in ITC's self-initiated investigations—all militate against a view that Congress intended ITC to disregard evidence that clearly and convincingly refutes the allegations in a petition. Stated another way, the notion that allegations in a petition found unsupportable because of overwhelming contradictory evidence should nonetheless result in a full investigation and potential imposition of provisional remedies is directly contrary to Congress' intent, as above indicated, of eliminating "unnecessary and costly investigations" and the "impediment to trade" that would reside in an unwarranted imposition of provisional remedies. Considering and weighing, under ITC's guidelines, all evidence gathered within the 45 days available for conducting a preliminary investigation, on the other hand, effectuates that legislative intent.

VI. Judicial Reviewability

Lastly, it should be remembered that ITC's negative preliminary determinations are reviewable in the Court of International Trade. 19 U.S.C. § 1516a(a)(1)(A)(iii). Whether the court might find it more difficult to overturn a negative preliminary determination when ITC had weighed conflicting evidence cannot be a factor in evaluating the premissibility of ITC's method of determining the presence or absence of a "reasonable indication" of injury or threat of injury. If ITC's negative determination, however reached, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", 19 U.S.C. § 1516a(b)(1)(A), the court should overturn it. If ITC's negative determination cannot be held defective on any of those grounds, the court should not overturn it.

Indeed, that Congress intended application of a narrow judicial review standard is made clear in its assertion that "traditional administrative law principles" be applied when reviewing preliminary determinations in which it "has entrusted the decision-making authority in a specialized, complex economic situation to [ITA and ITC]. Thus, review * * * would be to ascertain whether there was a rational basis in fact for the determination * * * ."

S. Rep. No. 249, *supra*, at 252, *reprinted in* 1979 U.S. Code Cong. & Ad. News at 638.

Conclusion

ITC's method of proceeding in applying the statutory reasonable indication standard does not contravene but accords with clearly discernible legislative intent and is sufficiently reasonable. To the extent that *Republic Steel* and its progeny suggest otherwise, those decisions cannot stand. Accordingly the case is remanded to the Court of International Trade with instructions to vacate the certified order.

REMANDED WITH INSTRUCTIONS TO VACATE

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

150-147 O-86--3

Decisions of the United States Court of International Trade

(Slip Op. 86-17)

THE TIMKEN CO., PLAINTIFF *v.* UNITED STATES, MALCOLM BALDRIGE, SECRETARY OF COMMERCE, LIONEL H. OLMER, UNDER-SECRETARY FOR INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, LARRY BRADY, ASSISTANT SECRETARY FOR INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, GARY N. HORLICK, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, LEONARD M. SHAMBON, DIRECTOR, OFFICE OF COMPLIANCE, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, JOHN KUGELMAN, DIRECTOR, ANTIDUMPING ORDER COMPLIANCE DIVISION, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, J. LINNEA BUCHER, COMPLIANCE OFFICER, ANTIDUMPING ORDER COMPLIANCE DIVISION, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND NTN BEARING CORP. OF AMERICA, INTERVENOR

Court No. 82-6-00890

Before MALETZ, *Senior Judge.*

(Dated February 20, 1986)

ON MOTIONS FOR JUDGMENT ON THE AGENCY RECORD AND FOR REMAND

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, and *James R. Cannon, Jr.,* on the briefs) for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Civil Division, Commercial Litigation Branch *(Velta A. Melnbrencis* on the briefs), for defendants.

Barnes, Richardson & Colburn (James H. Lundquist, Robert E. Burke, Donald J. Unger, and *Thomas M. Keating* on the briefs), for intervenor.

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Opinion and Order

Maletz, *Senior Judge:* In 1982, the International Trade Administration (ITA) of the Department of Commerce issued a final determination revoking a dumping finding on tapered roller bearings and component parts (TRBs) made in Japan by NTN Toyo Bearing Company (NTN) and distributed by NTN's subsidiary, NTN Bearing Corporation of America (NBCA). Plaintiff, The Timken Company (Timken), an American manufacturer of TRBs, commenced the present action challenging the ITA determination. Upon the government's motion, unopposed by Timken, the court, over intervenor NBCA's opposition, remanded several issues for further consideration by the ITA. The ITA's recalculation upon remand revealed only *de minimis* dumping margins. Presently before the court are two motions by Timken pursuant to rule 56.1 of this court seeking reversal of the agency revocation decision and remand for further proceedings. The government for its part agrees that partial remand is appropriate; NBCA, on the other hand, seeks affirmance of the ITA revocation determination. For the reasons set forth below, the court again remands this action to the ITA for (1) collection and review of data up to the date of its tentative determination; (2) collection and review of additional home market sales data for the period of time already reviewed by the ITA, and for reassessment of proper TRB model comparisons; (3) review of the accuracy of all pertinent NTN production costs; (4) correction of all errors that may have occurred below; and (5) recalculation of dumping margins and rescission of the partial revocation of the dumping finding, if warranted.

I. *Background*

The dumping finding in question had been published by the United States Treasury Department on August 18, 1976. 41 Fed. Reg. 34,974. On November 14, 1979, Treasury published a notice of a tentative determination to modify or revoke the finding. 44 Fed. Reg. 65,690. That tentative determination was largely based upon

information supplied to the Customs Service to the effect that there had been no sales at less than fair value between April 1, 1974 and March 31, 1978 of TRBs manufactured by NTN and sold by NBCA. *See id.* However, before Treasury had an opportunity to make a final determination regarding modification or revocation of the dumping finding, administration of the antidumping law was transferred from the Secretary of the Treasury to the Secretary of Commerce. Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,273, *reprinted in* 19 U.S.C. at 963-64 (1982), *and in* 93 Stat. 1381, effective January 2, 1980, as provided by § 1-107(a) of Exec. Order No. 12,188, 45 Fed. Reg. 989, 993 (1980), *reprinted in* 19 U.S.C. at 968 (1982). Additionally, the Trade Agreements Act of 1979, which became effective on January 1, 1980, repealed the Antidumping Act of 1921 and replaced it with a new antidumping law. Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. 1, § 106(a), 93 Stat. 144, 193.

Following transfer of administration of Commerce, the ITA conducted reviews of outstanding dumping findings pursuant to the annual review requirement of the Trade Agreements Act of 1979. *See* 19 U.S.C. § 1675 (1982), *amended by* 19 U.S.C.A. § 1675 (West Supp. 1985). During review of the Treasury dumping finding on TRBs from Japan, the ITA reviewed production and sale of TRBs by NTN and NBCA for the period April 1, 1978 through November 14, 1979. On February 27, 1981, the ITA published a notice of preliminary results of administrative review and tentative determination to revoke in part the dumping finding, 46 Fed. Reg. 14,371, and on June 15, 1982, it published a final determination revoking the outstanding dumping finding insofar as it pertained to TRBs produced and sold by NTN and NBCA, 47 Fed. Reg. 25,757. Timken challenged this final determination by commencing the present action on June 25, 1982.

In the course of this action, the government itself moved to remand the case to the ITA for recalculation of dumping margins. In support of this motion, which was agreed to by Timken and opposed by NBCA, the government advised the court that the ITA had taken the position that its method of calculating dumping margins had not been in accordance with its normal practice and was probably not in accordance with the applicable law and regulations. The court granted the motion for remand. *Timken Co.* v. *United States*, 7 CIT —, Slip Op. 84-63 (June 5, 1984). Thereafter, the government and Timken stipulated as to an order of remand, which was entered on June 26, 1984. Among other things, that order directed the ITA to recalculate dumping margins (1) using actual selling prices to the United States, (2) deducting an amount for United States import duties based on actual United States price, (3) weight-averaging home market prices on a monthly basis, and (4) using currency conversion factors applicable specifically to the date of exportation of the imported merchandise.

On February 5, 1985, the ITA submitted to the court the final results of its recalculation, which included a finding that the weighted-average dumping margin was 0.33%. Since the ITA considered this recomputed dumping margin to be *de minimis*, it did not rescind its partial revocation of the dumping finding.

Now before the court are two motions by Timken for partial judgment on the agency record. Timken's first motion requests that the case be remanded so that the ITA may (1) obtain from NTN a complete listing of its home market sales of TRBs during the period under investigation; (2) itself select from among NTN's home market sales the most appropriate "similar" merchandise for comparison with TRBs exported to the United States; (3) investigate and verify NTN's production cost figures for the period prior to March 21, 1978; (4) investigate and verify NTN's claimed adjustments for differences in merchandise; and (5) reject any partial submissions by NTN in response to investigation of the areas just identified and instead use the best information otherwise available.

Timken's second motion for partial judgment on the agency record alleges that the ITA erred in (1) revoking the antidumping duty order on the basis of an analysis of only a 19-month rather that a two-year period; (2) failing to deduct from exporter's sales price (ESP) an amount for reasonable profits; (3) adjusting foreign market value for certain advertising expenses and inland freight costs; (4) failing to investigate issues raised in a market-research report submitted by Timken; (5) deducting indirect selling expenses from foreign market value ("ESP offset"); (6) making deductions for differences in circumstances of sale in alleged contravention of a statutory requirement that there be a casual relationship between claimed differences in circumstances of sale and differences in value; and (7) failing to deduct from ESP selling expenses properly allocable to United States sales. Given these allegations of error, Timken seeks, in its second motion, a remand for recalculation of dumping margins, and reversal of the ITA's revocation of the dumping finding.

Supplementing its two motions for partial judgment, Timken has failed a brief arguing that the action should be remanded to the ITA on the additional ground that further review is required in light of the recent decision of the Court of Appeals for the Federal Circuit in *Freeport Minerals Co.* v. *United States*, 776 F.2d 1029 (Fed. Cir. 1985).

The government disputes a number of the claims made by Timken, but agrees that the action should be remanded to the ITA a second time so that the agency may (1) determine NTN prices for all TRBs sold in the home market during the relevant time period; (2) consider whether the proper TRB models were compared; (3) review the accuracy of all pertinent NTN production costs; (4) decide whether adjustments of foreign market value for advertising expenses and inland freight costs were justified; and (5) recalculate

dumping margins and rescind the partial revocation of the dumping finding, if appropriate.

NBCA opposes Timken's and the ITA's request for remand, contending, among other things, that the methods used by the ITA were lawful and that the final revocation determination was based on substantial evidence.

II. *Res Judicata*

NBCA also contends that a remand for reconsideration of the ITA determination is barred by the doctrine of administrative res judicata. The court does not agree. As the court noted in its decision ordering the first remand in this action, the law is clear that a remand is appropriate where an agency followed an improper method in making a determination or where there is a defect in the agency's findings. *See Timken Co.* v. *United States,* 7 CIT 2 ——, Slip Op. 84-63 (June 5, 1984); *Ford Motor Co.* v. *NLRB,* 305 U.S. 364, 372-76 (1939). It is true that res judicata principles may apply to administrative proceedings. *See United States* v. *Utah Construction & Mining Co.,* 384 U.S. 394, 421-22 (1966). However, administrative agency orders do not have the force and effect of law unless they have been "unequivocally affirmed by a court of law." *MGPC, Inc.* v. *Department of Energy,* 763 F.2d 422, 429 (Temp. Emer. Ct. App.), *cert. denied,* —— U.S. ——, 106 S. Ct. 76 (1985); *see Taunton Municipal Lighting Plant* v. *Department of Energy,* 669 F.2d 710, 715 (Temp. Emer. Ct. App. 1982). Prior to such affirmation, "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order," *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223, 229 (1965) (Federal Power Commission could order payment of refunds of excess monies collected under FPC order that had not become final and that had been overturned by a reviewing court); *Iowa Power & Light Co.* v. *United States,* 712 F.2d 1292, 1296-97 (8th Cir. 1983), *cert. denied,* 466 U.S. 949 (1984). Therefore, the ITA may reconsider its determinations when error taints the proceedings. *Melamine Chemicals, Inc.* v. *United States,* 8 CIT ——, ——, 592 F. Supp. 1338, 1339-40 (1984).

III. *Agency Failure to Collect Necessary Data*

A. *The Impact of Freeport Minerals*

Timken requests that this action be remanded for further review in light of the recent decision in *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985). Both the government and NBCA oppose that request.[1]

[1] The issue of the applicability of the decision in *Freeport Minerals* to this action was not raised in Timken's complaint, which predated the decisions of this court and of the appellate court in that case. However, the parties have fully briefed the issue, and court finds that the issue has been considered with the implied consent of all parties. Consequently, amendment of the complaint is not required. U.S. Ct. Int'l Trade rule 15(c) (issues not raised by the pleadings that are tried by the express or implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings); *cf. id.* rule 15(a) (leave to amend the pleadings shall be freely given when justice so requires).

In *Freeport Minerals*, the court found that the ITA had abused its discretion in refusing a domestic party's request for collection of data for a period of time extending up to the date of the agency's tentative determination to revoke an antidumping order. The facts of *Freeport Minerals* and of this action are similar in many respects. In both cases the ITA inherited an action from the Treasury Department after Treasury had issued a tentative determination revoking an antidumping order, and then conducted a further review pursuant to the annual review requirement of section 751 of the Tariff Act of 1930, *as amended by* the Trade Agreements Act of 1979, 19 U.S.C. § 1675 (1982), *amended by* 19 U.S.C.A. § 1675 (West Supp. 1985). Also in both cases, over a year had elapsed between the end of the period that was actually reviewed by the ITA and the date of the ITA's own tentative determination to revoke. Thus, in the present case, the ITA reviewed data only for a period extending to the time of *Treasury's* tentative determination, November 14, 1979. Despite this, the ITA's own tentative determination was not issued until February 27, 1981, approximately 16 months later, 46 Fed. Reg. 14,371; and its final determination was not issued until June 15, 1982, approximately two and one-half years after the end of the period that the ITA had reviewed, 47 Fed. Reg. 25,757. In contradistinction to the facts of *Freeport Minerals*, however, the domestic party in this action, Timken, did not request that the ITA obtain and review data updated to the time of the agency's tentative determination, although Timken now requests a remand for such review. Two questions are therefore before the court: (1) whether, under the reasoning of *Freeport Minerals*, the ITA abused its discretion in failing to review data updated to the time of its own tentative determination notwithstanding the absence of a request by a domestic party that it obtain such data, and (2) if so, whether the court should nonetheless decline to remand on the basis of *Freeport Minerals*, in view of Timken's failure to raise the issue below.

The Court of Appeals in *Freeport Minerals* held specifically that the ITA's refusal to comply with a domestic party's request for information updated to the time of the agency's preliminary determination placed an impermissible burden of proof upon the domestic party "contrary to the policies underlying the applicable statute and regulations," *id.* at 1033, and thus constituted an abuse of discretion. *Id.* at 1033–34. The ITA's failure here to obtain data updated to the time of its preliminary determination similarly constituted an abuse of discretion, despite the absence of a request for such data. That failure was equally contrary to the policies underlying the statutory and regulatory directives relied upon in *Freeport Minerals*.

The grant of discretionary authority to an agency "implies that the exercise of discretion be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regula-

tions." *Id.* at 1032. As stated in *Freeport Minerals,* the legislative history indicates a congressional intent that the administering agency, in reviews conducted under the 1979 Trade Agreements Act, "*always* use the most up-to-date information available." *Id.* (emphasis added); H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979) (H.R. Rep. No. 317).

The burden of ensuring such up-to-date review should not rest upon a domestic party. Antidumping proceedings are investigatory, not adjudicatory. H.R. Rep. No. 317 at 77; *see Sacilor, Acieries et Laminoirs de Lorraine* v. *United States,* 3 CIT 191, 195, 542 F. Supp. 1020, 1025 (1982). The responsibility for making findings pursuant to section 1675 rests upon the ITA. *Freeport Minerals,* 776 F. 2d at 1032. Thus, a request by a domestic party is not a precondition of the ITA's obligation to obtain updated information.

The government notes, though, that section 1675 was amended in October 1984, and that reviews under that section are now mandated only if a *request* for review has been received by the ITA. 19 U.S.C. § 1675(a)(1) (1982), *as amended,* 19 U.S.C.A. § 1675(a)(1) (West Supp. 1985). The purpose of the amendment was to reduce the burden on the ITA "of automatically reviewing every outstanding order even though circumstances do not warrant it or parties to the case are satisfied with the existing order." H.R. Rep. No. 725, 98th Cong., 2d Sess. 22-23 (1984). However, that amendment was enacted several years after the ITA preliminary determination in this action. Whether the ITA abused its discretion is a determination that must be made not in light of the amendment, but in light of the law existing at the time of the alleged abuse. In sum, the court holds that the ITA abused its discretion in reaching a determination based on stale data.

1. Exhaustion—Freeport Minerals

Given the ITA's abuse of discretion in relying on stale data, the question remains as to whether the court should remand for further review in light of *Freeport Minerals* despite Timken's failure to exhaust its administrative remedies on this issue. "[A]s a general rule * * * courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952). However, unless exhaustion of administrative remedies is mandated by statute, application of the exhaustion doctrine is within the discretion of the court. *SEC* v. *G.C. George Securities, Inc.,* 637 F.2d 685, 688 n.4 (9th Cir. 1981); *Association of National Advertisers, Inc.* v. *FTC,* 627 F.2d 1151, 1157 (D.C. Cir. 1979) (jurisprudential considerations such as the exhaustion doctrine do not bear on whether court has jurisdiction but only on whether it

should exercise that jurisdiction), *cert. denied,* 447 U.S. 921 (1980).[2] Like most other judicial doctrines, the doctrine of exhaustion is subject to numerous exceptions. *McKart* v. *United States,* 395 U.S. 185, 193 (1969); *see Reid* v. *Engen,* 765 F.2d 1457, 1460–61 (9th Cir. 1985). The doctrine "should not be applied where the obvious result would be a plain miscarriage of justice." *Hormel* v. *Helvering,* 312 U.S. 552, 558 (1941).

Among the exceptional cases are "those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result." *Id.* at 558–59 (footnote omitted); *see Philipp Brothers, Inc.* v. *United States,* 10 CIT ——, ——, Slip Op. 86–16, at 5–9 (Feb. 14, 1986); *Rhone Poulenc, S.A.* v. *United States,* 7 CIT ——, ——, 583 F. Supp. 607, 610 (1984). This is such a case. The interpretation of existing law set forth in *Freeport Minerals,* if applied in this action, could have a substantial impact upon the ITA's determination, since it would require review of data for an additional 16 months. Moreover, certain of the policies underlying the doctrine of exhaustion are not applicable to the present issue. For one thing, the question of what time period should have been reviewed by the ITA is one of law rather than one requiring analysis of a factual record; consequently, the court, in addressing the issue, does not usurp the factfinding function of the agency. *See Railroad Yardmasters of America* v. *Harris,* 721 F.2d 1332, 1337–39 (D.C. Cir. 1983) (appellate court would consider issue not raised before National Mediation Board or before district court where the substantive issue was one of law, did not require further factual development, and had been fully briefed). Furthermore, because the issue is one of law and because the decision in *Freeport Minerals* postdated the proceeding below, there is no danger that Timken intentionally refrained from raising this issue administratively in order to obtain some advantage by review on a sparse record. Timken has arguably been taken by surprise by the *Freeport Minerals* decision; remand is called for so that its interests may be protected by the review appropriate under the law. Accordingly, upon remand the ITA shall obtain and review data for a period terminating with the date of its preliminary determination.[3]

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[2] The relevant statute provides only that the Court of International Trade shall "where appropriate" require exhaustion of administrative remedies, and so does not create a jurisdictional bar to review of issues not raised below. 28 U.S.C. § 2637(d) (1982); *see Rhone Poulenc, S.A.* v. *United States,* 7 CIT ——, ——, 583 F. Supp. 607, 611 (1984).

[3] Timken has contended that the ITA also erred in reviewing data from only April 1978 to November 1979, a period of less than two years. In this connection, an agency regulation provides that an application for revocation of an antidumping order will "[o]rdinarily * * * be considered only if there have been no sales at less than fair value *for at least a two-year period* following the date of publication * * * of an Antidumping Duty Finding * * * ." 19 C.F.R. § 353.54(b) (1985) (emphasis added). In view of the court's determination that this action should be remanded for collection of additional data pursuant to *Freeport Minerals,* the issue of whether the ITA was obliged to review data for a two year period becomes moot since such a period will of necessity be reviewed upon remand.

B. *Failure to Collect Data for Period Already Reviewed*

Both the government and Timken ask this court for a remand to permit the ITA to obtain additional home market data for the period already reviewed; to investigate and verify cost of production data already on the record; and to reassess appropriate TRM model comparisons. NBCA argues against remand.

In its initial proceeding, the ITA reviewed data for the period from April 1, 1978 through November 14, 1979 to determine if there had been sales at less than fair value in that period. *See* 47 Fed. Reg. 25,757. During its review, the ITA used home market sales data that had been provided by NTN in response to Treasury Department questionnaires. Those questionnaires had requested not data on all home market sales of TRBs, but rather only data on sales of TRBs identical or "similar" to those sold for export to the United States. Thus, *NTN* made the initial determination of what constituted identical or similar TRB models, and provided home market data only as to those models. Also, NTN set forth the basis for its selection of similar models: the inside diameter, outside diameter, and width of the TRBs. The ITA accepted NTN's model comparisons and did not question the basis of the comparisons presented.

During the proceeding before the ITA followed the initial remand by the court, Timken for the first time contested the appropriateness of NTN's assertions as to what constituted "similar" TRB models. It presented a specific analysis of TRB parameters, and argued that performance parameters as well as geometric parameters were relevant for proper model selection. The ITA believed that Timken had raised substantial questions as to the appropriateness of model comparisons. It concluded, however, that the limited nature of the remand prevented it from requesting additional data from NTN, and found it could not address these model comparison questions in the absence of complete home market sales data. Also because of the absence of complete data, the ITA was not able to address other contentions made by Timken on remand as to the appropriateness of NTN's home market sales data selection although it believed that Timken's contentions cast doubt on the reliability of the sales information reported by NTN.

The data used by the ITA was not only incomplete in that it did not reflect home market sales of all TRB models, it was also incomplete in that it did not cover the entire time period that the agency should have reviewed under then existing law. Only on remand did the ITA realize that because there had been delays between the dates of export of TRBs and the dates of their resale in the United States, it should in the original proceeding have reviewed home market sales not only for the period beginning April 1, 1978, but also home market sales for an earlier period. Assuming for example that a TRB sold in the United States on April 1 had been exported to the United States four months earlier, the United States price of that TRB should have been compared with the value of an

identical or similar TRB sold in the home market four months earlier. *See* 19 C.F.R. § 153.2(a) (1979); *cf.* 19 U.S.C. § 1677b(a)(1) (1982), *amended by* 19 U.S.C.A. § 1677b(a)(1) (West Supp. 1985). In order to remedy its failure in the original proceeding to collect home market sales data for the earlier period, the ITA on the remand *added* to the administrative record home market sales data for the period from September 27, 1977 to March 20, 1978. That added data had earlier been provided to the Treasury Department in connection with its review. However, Treasury had not verified the data and the ITA did not verify it either, viewing verification procedures as outside the scope of the remand.

The ITA also added to the record on remand data on production costs for the same period, September 27, 1977 to March 20, 1978, that had also been provided to Treasury in connection with its review, but that had never been verified. Timken questioned the reliability of the added data, but, again, although the ITA believed that Timken had raised significant questions, it did not verify the data. It did, however, use the data on remand both to calculate appropriate adjustments for differences in merchandise and to address new contentions by Timken that NTN had sold TRBs in the home market at less than the cost of production.[4]

The government now cites the incompleteness and lack of verification of the data used below, and the related issue of the appropriateness of model comparisons, as the basis for its request that the case be remanded a second time to permit the ITA to determine, among other things, (1) NTN prices for all TRBs sold in the home market during the relevant period, (2) whether the proper TRB models were compared, and (3) the accuracy of all pertinent NTN production costs. Timken concurs in this request for remand; NBCA opposes.

1. Necessity of Complete Home Market Data

The ITA abused its discretion in failing to collect the data necessary to ascertain the appropriateness of NTN's selection of similar TRB models. The issue of what constitutes proper model comparisons and the related issue of home market data selection go to the heart of the ITA's determination, concerning as they do the identity of the merchandise the ITA compared for the purpose of determining dumping margins. The basic task of the ITA in an action such as this is to compare the price of merchandise exported to the United States to the value of "such or similar merchandise" sold in the foreign market. *See* Antidumping Act of 1921, § 205(a), 19 U.S.C. § 164 (1976) (foreign market value is, among other things, the price at the time of exportation of merchandise to the United States at which "such or similar merchandise" is sold in the for-

[4] The ITA found that in fact NTN had in various periods sold TRBs in the home market at less than the cost of production. *See* 19 C.F.R. § 153.5 (1979); 19 C.F.R. § 353.7 (1985). This suggests the importance to the ITA's determination of the data added on remand, and hence the importance of verification.

eign market), *repealed by* the Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. 1, § 106, 93 Stat. 144, 193.[5] Where identical merchandise was not sold in both the foreign market and in the United States, a determination as to which foreign market merchandise is "similar" to merchandise sold in the United States may be of great importance in a determination of whether there are dumping margins.

The statute defining "such or similar merchandise" sets forth three categories, or definitions, each of which describes increasingly dissimilar merchandise; the ITA must select merchandise from the first applicable category. Thus, pursuant to this statute, the ITA must select merchandise *identical* to that sold in the United States if it is available, 19 U.S.C. § 170a(3)(A) (1976); if that is not available, the ITA must select merchandise *like* the merchandise under consideration in materials and use, and approximately equal in value to the merchandise sold in the United States, *id.* § 170a(3)(B); only if that is not available may the ITA select merchandise of the *same general class or kind* as the merchandise sold in the United States, and like that merchandise in its use, if the ITA determines that such merchandise may reasonably be used for comparison, *id.* § 170a(3)(C).

The statute does not make explicit whether, if two or more products fall within the definition of a given subsection of the statute, the ITA must determine which of those products is *most* similar to merchandise sold in the United States. However, such a requirement is implicit in the statutory scheme. The arrangement of definitions in the statute is such that the requirement that the ITA choose merchandise within the first applicable definition amounts to a requirement that it choose the most similar merchandise—at least insofar as the broad statutory definitions of "such or similar merchandise" are concerned. The spirit if not the letter of this requirement obligates the agency to also ascertain what constitutes the most similar merchandise from within a given definition. Thus, in *B.A. McKenzie & Co.* v. *United States,* 42 Cust. Ct. 718, 724, A.R.D. 103 (1959), *aff'd,* 47 CCPA 143, C.A.D. 748 (1960), the court observed that if values can be found both for "such" and for "similar" merchandise, the law requires that the value of "such" merchandise should be adopted because it more nearly represents the value of the merchandise under appraisement. Accordingly, the court held that, for the same reason, if values can be found only for items of "similar" merchandise, the value of the item *most* similar to that under appraisement should be adopted. Moreover, an inter-

[5] Although the Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11, was repealed by the Trade Agreements Act of 1979, which became effective on January 1, 1980, the substantive provisions of the 1921 Act apply to unliquidated entries made prior to 1980. Moreover, the substance of the antidumping law under the 1979 Act is in large part identical to the law under the 1921 Act. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 48, 59 (1979) (relatively little change is made by the 1979 Act in the substantive provisions of the antidumping law). Hereinafter, references to sections of the Antidumping Act of 1921 will merely cite to the volume of the United States Code in which they formerly appeared.

pretation of the statute requiring selection of the *most* similar merchandise is most likely to ensure that the ITA "makes the fair value comparison on a fair basis—comparing apples with apples," *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

The second definition set forth in the statute defines "such or similar merchandise" as:

> Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise under consideration.

19 U.S.C. § 170a(3)(B) (1976). As described above, NTN provided to the ITA data on only that merchandise that NTN had *itself* determined to be identical or similar to merchandise sold in the United States. NTN asserts that this selected data established that the TRB models it was characterizing as "similiar" met each of the requirements of similarity set forth in the statutory definition quoted above, and contends that the ITA therefore acted reasonably and upon substantial evidence in determining that those models were "similar" within the meaning of the statute.

The court assumes, without deciding, that the administrative record during the initial proceeding in this action contained substantial evidence supporting NTN's assertion that the merchandise it proposed as "similar" fell within the statutory definition. It does not follow, however, that there was substantial evidence that the proposed merchandise was the *most* similar merchandise of all the TRB models sold by NTN in the home market, including TRBs as to which no data had been provided. Moreover, even an ITA determination that is supported by substantial evidence may be overturned if it is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982); *see Chapman* v. *Donovan*, 9 CIT ——, ——, Slip Op. 85-113, at 4 (Oct. 25, 1985) (in addition to the requirements of substantial evidence there is the further requirement that rulings be in accordance with statute and that there be a showing of reasoned analysis); *cf. Trans-American Van Service, Inc.* v. *United States*, 421 F. Supp. 308, 316 (N.D. Tex. 1976) (an agency's finding may reflect arbitrary and capricious action even though supported by substantial evidence). In certain cases, an agency's failure to collect pertinent data or to consider a relevant aspect of an issue, constitutes an abuse of discretion. *Kelly* v. *Secretary of United States Department of Labor*, 9 CIT ——, ——, Slip Op. 85-132, at 7-8 (Dec. 30, 1985) (failure of OTAA, in determining eligibility of employees for trade adjustment assistance, to collect or consider data from company that accounted for the largest decline in order for the product in question meant that the agency's methodology was not accordance with law); *Rutherford* v. *United States*, 438 F. Supp.

1287, 1291 (W.D. Okla. 1977) (to act without collecting the necessary facts is an abuse of discretion), *aff'd*, 582 F.2d 1234 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 544 (1979); *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (abuse of discretion for agency to fail to examine relevant data); *cf. Natural Resources Defense Council, Inc.* v. *NRC*, 547 F.2d 633, 646 (D.C. Cir. 1976) (agency may abuse its discretion by a decision that the record will not sustain in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers), *rev'd on other grounds sub nom. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

By failing to collect home market sales data on TRB models other than those characterized by NTN as similar or identical, the ITA abdicated to NTN its statutory responsibility for determining what TRB models produced by NTN were the *most* similar to models sold in the United States. As the ITA now acknowledges, it cannot, using the selected data available to it, determine whether there exist home market TRB models that would have been more appropriate for purposes of comparison that were the models selected by NTN.

It is of particular importance that the administering agency itself make the required determination of what constitutes most similar merchandise, rather than delegating that responsibility to an interested party, considering that the issue may be a complex one on which reasonable minds could differ. For example, of two potentially "similar" foreign market products, one product could be most similar to merchandise sold in the United States in its use, while the other might be more similar in its materials. It is the administering agency rather than an interested party that should make the determination as to what "similar" characteristics are of the most significance. Additionally, it is hard to imagine that a foreign manufacturer, given the option of selecting what constitutes similar merchandise, and assuming that there exists more than one product from which such a choice can be made, would not make the choice of merchandise most advantageous to itself.[6]

If, for example, there were two foreign market products that could be considered "similar" but which differed in value, a foreign manufacturer would have an incentive to select as "similar" the product that was of lower value, as such selection could result in lower margins. Congress could not have intended that an interested party be accorded so much control over a determination of such importance. Indeed, by accepting a foreign manufacturer's assertions as to what constitutes most similar merchandise without ob-

[6] The court is in no way indicating that NTN has acted in bad faith in its production of data. NTN was asked to provide information only on those models that NTN determined were identical or similar; the court concludes not that NTN erred in producing incomplete home market sales data, but rather that the ITA erred as a matter of law in not requesting complete data where that data was necessary.

taining the complete data needed to determine the appropriateness of those assertions, the ITA in this action violated the spirit of the statutory requirement that it verify the data relied upon in proceedings involving revocation of antidumping orders. *See Al Tech Specialty Steel Corp.* v. *United States*, 745 F.2d 632, 634 (Fed. Cir. 1984); 19 U.S.C. § 1677e(a) (1982), *as amended*, Pub. L. No. 98-573, tit. VI, § 618, 98 Stat. 3037 (1984), *reprinted in* 19 U.S.C.A. § 1675e(a) (West Supp. 1985); H.R. Rep. No. 725, 98th Cong., 2d Sess. 42-43 (1984) (the Committee on Ways and Means believes it is essential that whenever the ITA revokes an antidumping duty order, the interests of domestic industry be protected by full verification of the information relied upon in making that determination). What is more, the failure to collect complete data deprived Timken of information essential to the assertion of its rights. *See Freeport Minerals*, 776 F.2d at 1033 (Congress intended that the ITA provide the maximum availability of information to an interested party because access to information is imperative for offensive assertion of its rights).

NBCA contends, however, that the government, by its present request for a remand to permit the ITA to obtain complete home market data and to reassess model comparisons, is attempting to apply a new policy not in effect at the time of the ITA's original determination. *See American Trucking Associations, Inc.* v. *Frisco Transportation Co.*, 358 U.S. 133, 146 (1958) (agency power to correct ministerial errors may not be used as guise for changing previous decisions because the wisdom of those decisions appears doubtful in light of changing policies); *Upjohn Co.* v. *Pennsylvania Railroad*, 381 F.2d 4, 5 (6th Cir. 1967) (agency may not apply new policy retroactively to a proceeding concluded three years previously). The ITA apparently has a current practice of obtaining complete home market sales data and itself determining what constitutes most similar merchandise. *See generally Bicycle Speedometers From Japan; Final Results of Administrative Review of Antidumping Finding*, 47 Fed. Reg. 28,978, 28,980 (1982); *Stainless Clad Steel Plate From Japan: Preliminary Determination of Sales at Less Than Fair Value and Suspension of Liquidation*, 47 Fed. Reg. 12,200 (1982). But here, the government, in seeking remand on this issue, is not attempting to substitute use of a current ITA policy for use of an earlier, reasonable policy. Rather, the method *originally* used in this action by the ITA to fulfill its statutory obligation to determine the value of merchandise most similar to that sold in the United States—*i.e.*, collection of data so incomplete that the ITA could not in fact determine what constituted most similar merchandise—was unreasonable and an abuse of discretion.

The ITA also abused its discretion by failing in the initial proceeding to obtain *any* data for a substantial period of time relevant to its determination, *i.e.*, the data from September 1977 to March 1978. *See supra* pp. 19-20. The government has presented no expla-

nation for the ITA's failure to collect that data, which was necessary for the performance of significant statutorily mandated calculations. Nor was that error sufficiently remedied on remand, for while the ITA did on remand add the necessary data to the record, that data was never verified.

These errors in data collection and model selection go to the heart of the ITA's determination. In addition, the government acknowledges a number of other errors in the proceedings below. For example, it agrees with Timken that there is a lack of evidence on the administrative record to support the ITA's determinations regarding adjustments to foreign market value for advertising and inland freight expenses, and regarding certain deductions from ESP for administrative salaries and warehouse expenses.[7] Moreover, the first remand resulted from the government's and ITA's assertion that the ITA had failed to adhere to statutory requirements and to its own precedent regarding the methodology used in a number of other significant calculations. As the government itself suggests, the nature and number of the errors that marred the proceedings below call into question the very integrity of the ITA's determination.

The errors committed below—and particularly those in data and model selection, as well as the ITA's error under *Freeport Minerals*—cannot be remedied by addressing each in isolation. For these errors affect the entirety of the data base thus far used by the ITA. The vice of a poor data base is that it taints even good methodology. Thus, even if the ITA used appropriate methodology below, its computations were necessarily flawed, if the data base was fundamentally inadequate. A remand order that fails to direct a review of *all* ITA calculations will therefore risk a final determination containing error and internal inconsistency. Hence, a remand for all purposes is appropriate. *See Tenneco Oil Co.* v. *Department of Energy*, 475 F. Supp. 299, 309 (D. Del. 1979) (court would consider a claim not raised below where to do otherwise would create the anomaly of requiring the reviewing court, or the administrative agency on remand, to apply an arguably erroneous standard in deciding those claims that had been properly raised); *cf. Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 372 (1939) (circuit court acted properly in remanding action to NLRB for reconsideration of entire case).

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[7] With regard to advertising, the ITA deducted certain advertising costs as representing differences in circumstances of sale, yet the administrative record reveals evidence of only corporate image or of general product line advertising rather than of advertising directly related to the TRB sales under consideration or attributable to later sales of those TRBs by a purchaser. This was contrary to agency regulation. *See* 19 C.F.R. §153.10 (1979); 19 C.F.R. §353.15 (1981); *Carlisle Tire & Rubber Co.* v. *United States*, 3 CIT 163, 167–68 (1982); *Brother Industries, Ltd.* v. *United States*, 3 CIT 125, 151, 540 F. Supp. 1341, 1365 (1982), *aff'd sub nom. Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). Regarding inland freight costs, the ITA now states that certain freight costs for the transportation of TRBs from a manufacturing plant to a distribution center were improperly allowed as costs of differences in circumstances of sale because those costs represented a general overhead expense rather than an expense directly related to the sales under consideration. *See* 19 C.F.R. §153.10(a) (1979); 19 C.F.R. §353.15(a) (1985).

2. Exhaustion—Incomplete Data

A remand is appropriate even though Timken, in the initial proceeding before the ITA, failed to raise a number of the contentions raised in this action, including those involving the ITA's failure to obtain complete data and to determine what constituted most similar merchandise. As discussed above, application of the doctrine of exhaustion of administrative remedies is within the discretion of the court. "Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other." *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961) (footnote omitted); *cf.* 4 K. Davis, Administrative Law Treatise § 26:2, at 420–21 (2d ed. 1983) (courts should consider the merits in deciding exhaustion issues and should acknowledge that they do so); *see also Hormel* v. *Helvering*, 312 U.S. at 558 (Court stated that implication of an earlier case was that unexhausted issue would have been remanded had the newly raised issue been of sufficient merit).

The gravity of the errors in this action, when considered with the fact that the government itself is requesting a remand and representing that the ITA's errors call into question the integrity of its determination, suggests that in this action, "the public interest in reaching what ultimately appears to be the right result" outweighs the desirability of finality. Then too, since the government itself is asking for a remand despite Timken's failure to exhaust its remedies, the significance of one of the policies underlying the exhaustion doctrine, namely, that a court should not usurp an agency's function by considering issues the agency has not first considered, is of reduced significance. *See McKart* v. *United States*, 395 U.S. 185, 195 (1969) (notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors). *Cf. Mathews* v. *Eldridge*, 424 U.S. 319, 326–28 (1976) (Secretary of HEW may waive exhaustion requirement regarding the necessity of a final administrative decision).

Also relevant is the ITA's explanation that its errors in data collection and model selection arose from the transitional nature of this case, which was inherited from the Treasury Department. These errors thus resulted from a violation of a significant public policy, namely, that the ITA should provide the same quality of review in all cases, regardless of whether it handled the cases from their inception. *See Freeport Minerals*, 776 F.2d at 1033–34; *Board of Public Instruction* v. *Finch*, 414 F.2d 1068, 1073 (5th Cir. 1969) (court would disregard failure to exhaust remedies where, *inter alia*, agency action was contrary to a public policy extending beyond the rights of the individual litigants).

A number of the policy considerations underlying the exhaustion doctrine are pertinent here, including the consideration of fairness to litigants and the fact that litigants should not be encouraged to

delay raising claims. *See McKart* v. *United States,* 395 U.S. at 195 (one reason for exhaustion doctrine is that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its administrative procedures). The court is also aware that NTN and NBCA may incur substantial cost and inconvenience as a result of a second remand. It is also aware that Timken could and should have raised its concerns as to the completeness of home market sales data and as to model similarity during the original proceeding before the ITA. Despite these concerns, however, the court, for the reasons set forth above, finds on balance that the interests of justice require a remand.

IV. *Legal Issues Raised Below*

During this action, Timken has raised two legal issues that it also raised below, first, the issue of whether the statute governing calculation of exporter's sales price (ESP) requires a deduction of a subsidiary's profit, and, second, the issue of the type of evidence needed to establish a relationship between cost and value, in the context of calculations concerning differences in circumstances of sale. These issues are addressed below.

A. *Deduction of Profit From ESP*

Timken contends that in calculating the exporter's sales price of TRBs produced by NTN and sold by NBCA in the United States, the ITA should have deducted any profits earned by NBCA.

Under the Antidumping Act of 1921, the United States price of imported merchandise must be compared with the foreign market value of identical or similar merchandise to determine whether there were sales in the United States at less than fair value. When imported merchandise is initially sold to an *unrelated* purchaser in the United States, "purchase price"—the price paid by the purchaser minus various deductions specified by statute—is used as the United States price. Antidumping Act of 1921, § 203, 19 U.S.C. § 162 (1976). However, when, as in this case, the merchandise is first sold to a *related* purchaser in the United States, *e.g.,* to a subsidiary of the exporter, "exporter's sales price" is used as the United States price. ESP is the price at which the merchandise is subsequently sold by the related party in an arm's length transaction, minus deductions specified in section 204 of the 1921 Act. 19 U.S.C. § 163 (1976).

One of the deductions from ESP required by section 204 is "the amount of the *commissions,* if any, for selling in the United States the particular merchandise under consideration" (emphasis added). The ITA in this action interpreted the word "commissions" literally, taking the position that "[t]here is no statutory provision for a deduction from the ESP of a U.S. subsidiary's profit." 47 Fed. Reg. at 25,758. It therefore deducted from ESP commissions paid out by

NBCA to its selling agents, but refused to deduct *profits* earned by NBCA on resale of the imported merchandise. Timken claims that this error, contending that the term "commissions," as understood when the 1921 Act became law, encompasses a subsidiary's profits.

1. Standard of Review

The interpretation of a statute by the agency entrusted with its administration is entitled to weight, especially where that interpretation represents longstanding administrative practice. *See Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978); *Ambassador Division of Florsheim Shoe* v. *United States,* 748 F.2d 1560, 1563 (Fed. Cir. 1984); *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1576-77, 1579 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984); *Carlisle Tire & Rubber Co.* v. *United States,* 5 CIT 229, 232, 564 F. Supp. 834, 837 (1983). An agency's interpretation of a statute it administers need only be reasonable; there is no requirement that it be the only possible interpretation. *Asahi Chemical Industry Co.* v. *United States,* 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982); *see Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 75. 87 (1975); *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153-54 (1946).

Moreover, if the language of a statute is clear and unambiguous, that language must ordinarily be regarded as conclusive, absent clearly expressed legislative intent to the contrary. *See Bread Political Action Committee* v. *Federal Election Commission,* 455 U.S. 577, 580 (1982); *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.,* —— U.S. ——, ——, 54 U.S.L.W. 4101, 4103, 4105 (1986) (courts must give effect to the unambiguously expressed intent of Congress; application of the "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address). Courts may in rare cases override the literal terms of a statute where application of those terms would lead to an absurd result. *Crooks* v. *Harrelson,* 282 U.S. 55, 59-60 (1930).

Against this background, the court finds, for the reasons that follow, that the ITA's interpretation of the word "commissions" to mean only commissions—and not profits—represents longstanding administrative practice; that the meaning of the term "commissions" is clear; that there is no basis in legislative history or in the terminology in use at the time of passage of the Antidumping Act for disregarding that meaning; and that adherence to the clear meaning of the word "commissions" does not create an absurd result. The ITA's interpretation is therefore upheld.

2. Agency Interpretation

During oral argument, the government indicated to the court that the ITA's interpretation of the word "commissions" represents longstanding administrative practice. Timken has not brought to the court's attention any decisions to the contrary. Beyond that,

various documents suggest that the ITA's position indeed represents a longterm practice with its inception in the Treasury Department, the previous administering agency.

Specifically, two bills have in the past been introduced that would, among other things, have modified section 204 to require deduction of "the amount of commissions *and profits*" from ESP. S. 1726, 90th Cong., 1st Sess., § 3 (1967) (bill introduced by Sen. Hartke); S. 3606, 87th Cong., 2d Sess., § 3(b) (1962) (bill introduced by Sen. Humphrey) (emphasis added). It would appear that these attempts to add a deduction for profits were made because the administering agency was in fact *not* deducting profits from ESP.

Additionally, a 1979 report by the Comptroller General indicates that section 204 has been understood literally. U.S. General Accounting Office, *U.S. Administration of the Antidumping Act of 1921; Report to the Congress of the United States by the Comptroller General of the United States,* ID-79-15, at 24-27 (Mar. 15, 1979). Although the report does not directly address the issue here raised, a sample ESP calculation contained in the report is illuminating. ESP as calculated in the report includes the profits made by a United States affiliate; deducted from that ESP are selling expenses, transportation and duties—but *not* the affiliate's profit. *Id.* This sample calculation ostensibly represented Treasury Department practice. *See also* Hemmedinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979,* 6 N.C.J. Int'l L. & Com. Reg. 427, 433-34 (1981) (for the foreign manufacturer, ESP "often is a more favorable basis of calculating fair value because, unlike purchase price, the profit of the U.S. importer is included in the net adjusted price, resulting in a higher United States price").

In light of the ITA's representation to this court and considering the above cited materials, the court finds that the ITA's interpretation of the word "commissions" in section 204 represents longstanding practice.

3. Language of the Statute

The literal language of section 204, calling for the deduction of "the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration," on its face clearly calls for the deduction of commissions, and just as clearly does not call for the deduction of profits. There is no basis in common language usage for a claim that the profit earned by a subsidiary or other related party upon the sale of goods originally purchased from a parent company constitutes a "commission" to that party. A commission is commonly understood to be an allowance or percentage given to an agent for transacting business for another. *See* Funk & Wagnalls New Standard Dictionary of the English Language 537 (I. Funk ed. 1942); 1 J. Bouvier, Law Dictionary and Concise Encyclopedia 548 (F. Rawle 3d rev. 1914). "Profit," by contrast, is the excess of a selling price over an original cost. *See*

Funk and Wagnalls New Standard Dictionary of the English Language 1979 (I. Funk ed. 1942); 3 J. Bouvier, Law Dictionary and Concise Encyclopedia 2737 (F. Rawale 3d rev. 1914).

Timken argues, however, that at the time of passage of the 1921 Act, the word "commission" was a Customs Service term of art denoting generally *any* profit accruing to a related importer as a consequence of the sale of imported goods. In the case of an agent selling on consignment, that profit, according to Timken, generally would accrue in the form of a commission (in the usual sense of that word), but in cases involving other related parties, that benefit might accrue in the form of profit upon sale of the goods in the United States. Under this reading of "commissions," the ITA should deduct from ESP not only commissions *paid* by a United States subsidiary to its selling agents, but also "commissions" *earned* by a United States subsidiary in the form of profits from a resale of imported merchandise.

In support of this argument regarding Customs Service use of the term "commissions," Timken relies primarily upon colloquy before the Senate Finance Committee in 1921 between Senator McCumber and a special agent for the Customs Service, George Davis. In that colloquy, Mr. Davis explained the methodology used in arriving at ESP under the bill that became the 1921 Act. On two occasions, he seemed to identify "commission" with "profit."

> *Mr. Davis* * * *. For instance, there is an agent in this country who sells merchandise in Kansas City for dollars and cents, including duty, ocean freight, the expense of getting it from New York to Kansas City, *and the agent's commission, or his profit.* This order is transmitted to the foreign manufacturer. He knows the merchandise is going to Kansas City. It may come forward on a consigned invoice, consigned to the agent himself, and the Government does not know anything about the sales price to Kansas City. Such price is the foreign exporter's sales price and that should be distinguished from the open purchase price paid by the bona fide American importer who buys direct from the manufacturer. There might be dumping in either instance, but the two prices should be distinguished.
>
> *Senator McCumber.* Where there is not difference in the price, how would you determine which one to follow?
>
> *Mr. Davis.* We would have to subtract from the price in Kansas City the expense of bringing it from foreign markets to Kansas City, the duty, *the foreign agent's commission, or profit,* and the net amount, is the amount that goes back to the other side becomes the exporter's sales price.

S. Comm. on Finance, *Emergency Tariff and Antidumping: Hearing on H.R. 2435,* 67th Cong., 1st Sess. 42-43 (1921) (emphasis added).

Timken does not argue that Mr. Davis, in the above colloquy, actually had in mind the profits earned by a subsidiary of a foreign exporter. It rather argues that Mr. Davis was explaining the general concept involved, namely, that what is deducted from ESP is the

benefit accruing to the related party selling in the United States—whether in the form of a paid commission or other profit. While Timken's reading is plausible, an equally plausible reading of Mr. Davis's remarks is to understand his reference to "commission, or profit" as merely reflecting the fact that a commission received by an agent will generally represent a profit to that agent—a fact that does not necessitate a conclusion that profit in any form that is earned by resale of goods by a subsidiary corporation must therefore be characterized as a "commission." Furthermore, "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.' " *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) (quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977)); *see Garcia* v. *United States*, —— U.S. ——, ——, 105 S. Ct 479, 484 (1984) (isolated statement of floor of House not impressive legislative history); *United States* v. *Taylor*, 752 F.2d 757, 764 (1st Cir.), *jurisdiction postponed to hearing on merits sub nom. Maine* v. *Taylor*, —— U.S. ——, 106 S. Ct. 307 (1985).

Withal, Timken claims to find further support for a reading of the term "commission" to include profits whether earned via commission or otherwise, in the unusually broad meaning ascribed to the word "consignment" under the Tariff Act of 1913, which was in effect at the time of passage of the 1921 Antidumping Act. *See J.H. Cottman & Co.* v. *United States*, 20 CCPA 344, 354-56, 359 T.D. 46,114 (1932) (court looks to meaning of terms in customs valuations law in construing similar language in antidumping law), *cert. denied*, 289 U.S. 750 (1933); R. Sturm, Customs Law and Administration § 47.5, at 366 (2d ed. 1980). Specifically, Timken cites a section of the Tariff Act that provided for the calculation of a United States value by taking a United States sale price and deducting from it certain items including "a *commission* not exceeding 6 per centum if any has been paid or contracted to be paid on *consigned* goods * * *." Tariff Act of 1913, ch. 16 § III, para. L, 38 Stat. 114, 186 (emphasis added). This provision somewhat resembles the provision of section 204 for the calculation of ESP by deduction of commissions from a United States price.

Timken points out that the language in the 1913 Tariff Act section regarding goods "consigned" for sale was understood to refer to goods imported by a related party for sale in the United States, even if the goods in question were not being consigned from a principal to an *agent*. Thus, in *United States* v. *Johnson Co.*, 9 Ct. Cust. App. 258, 266-68, T.D. 38,215 (1919), goods sent from a factory abroad that was owned by the party importing the goods were deemed "consigned." Timken's argument seems to be that because the term "consign" thus has a broader meaning under the Tariff Act of 1913 then it does in common parlance, then the word "commission"—which is often used in conjunction with the word "con-

signment," as the term denoting the benefit accruing to the party receiving consigned goods—also has a broader meaning, and hence encompasses the concept of any profit earned by a related party "consignee." The difficulty is that Timken fails to provide any direct support for this proposition. Therefore, its argument that in Customs Service terminology of 1921, the clear meaning of the word "commissions" *was* "commissions or profits," is insufficiently established.

There is an additional reason for rejecting Timken's argument. Timken does not contend that whatever profits are claimed by a subsidiary should be deducted from ESP, but rather maintains that "*reasonable* profits" should be deducted from ESP. Deduction of "reasonable" profits is advocated to avoid an alleged danger that a related exporter and importer could manipulate profits so as to obtain maximum benefit from an ESP calculation. There is nothing in legislative history to indicate a congressional intent that "reasonable" profits be deducted. Further, Congress knew how to provide for the deduction of only reasonable commissions or profit when it wished to do so. Thus, the 1913 Tariff Act section discussed above include a "lid" on the amount of commissions and profits that could be deducted from the United States price. That "lid" provided that commissions not exceeding six per cent could be deducted when goods were consigned and that profit not exceeding eight percent could be deducted when goods were purchased. Tariff Act of 1913, ch. 16 § III, para. L, 38 Stat, 114, 186.[8] The absence of similar specificity as to a percentage amount of commissions that may be deducted from ESP under section 204 suggests that Congress did not intend to limit the deductions for "commissions" to only "reasonable commissions" and that Timken's reading of "commissions" as "commissions and *reasonable* profits" is unduly creative.

4. International Law

Timken cites a provision of the International Antidumping Code as further evidence that section 204's reference to "commissions" should be understood as a reference to "commissions and profits." The International Antidumping Code is a multilateral agreement signed by the United States in 1979 in the course of the Tokyo Round of Multilateral Trade Negotiations (MTN). Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919 T.I.A.S. 9650, *reprinted in* H.R. Doc. No. 153, part I, 96th Cong., 1st Sess. 313–14 (1979) (International Antidumping Code or Code).

[8] Presumably, these maximum percentages were included in the Tariff Act section because importers would have benefited by large deductions of commissions or profits under the appraisement law, inasmuch as such deductions would have reduced the United States price and so in certain cases reduced dutiable value. By contrast, in calculating ESP under section 204 of the 1921 Antidumping Act, an importer will generally not benefit from a deduction of profits because deduction of profits will decrease ESP and thus increase the possibility that sales at less than fair value will be found. *See* Hemmendinger & Barringer, *supra*, 6 N.C.J. Int'l L. & Com. Reg. 433–34.

The Code, together with other trade agreements negotiated during the MTN, was approved and implemented by passage of the 1979 Trade Agreements Act (1979 Act), which repealed the 1921 Antidumping Act. Trade Agreements Act of 1979, Pub. L. No 96-39, § 2, 93 Stat. 147, 19 U.S.C. § 2503 (1982). The Code provides that where an export price may be unreliable because of an association between the exporter and importer, an export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. When export price is so constructed, "allowance for costs, including duties and taxes, incurred between importation and resale, *and for profits accruing,* should also be made." International Antidumping Code, art. 2, paras. 5-6 (emphasis added). In other words, the Code indicates that "profits accruing" should be deducted from a constructed export price that is the analogue of ESP.[9]

Timken argues that because a provision of this international code—implemented in 1979—provides a deduction from ESP for "profits accruing," section 204 of the Antidumping Act of *1921* should be interpreted similarly to allow for deduction of profits. Timken's argument for such consistency of interpretation is that the Code as a whole has been characterized as "consistent" with the 1979 Act; that the ESP provisions of the 1979 Act and the 1921 Act are in relevant parts identical; and that therefore the ESP provisions of the 1921 Act and of the Code necessarily must be consistent." *See* S. Rep. No. 249, 96th Cong., 1st Sess. 1, 15-16, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 401-02 (S. Rep. No. 249) (bill that became the 1979 Act implements the Tokyo Round of the MTN and adds a comprehensive statute that replaces the Antidumping Act of 1921 and is consistent with the MTN Antidumping Code); Statements of Administrative Action, *reprinted in* H.R. Doc. No 153, 96th Cong., 1st Sess., part II, at 392 (1979), *and in* 1979 U.S. Code Cong. & Ad. News 665, 667 (the 1979 Trade Agreements Act approves and implements the trade agreements negotiated in the MTN and has been developed to be fully consistent with those agreements). *Compare* Tariff Act of 1930, § 772, *as amended,* 19 U.S.C. § 1677a (1982) *with* Antidumping Act of 1921, § 204.

In analyzing the current Code, it is useful to review legislative history pertaining to its *predecessor,* the 1967 International Antidumping Code. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. 6431, *reprinted in* J. Jackson, World Trade and the Law of GATT § 16.6, at 426-28 (1969) (1967 Code). The 1967 Code, unlike the current Code, was never the subject of implementing legislation in the United States. S. Rep. No. 249 at 1. However, like the current Code, it included an ESP provision providing that "al-

[9] Such constructed export price will hereinafter also be referred to as "ESP."

lowance for * * * profits accruing *should also be made."* 1967 Code, art. 2, para. f (emphasis added).

The Executive Branch in a report to Congress in 1968 attempted to demonstrate that the 1967 Code was consistent with the Antidumping Act of 1921. That report related each provision of the Code to the "relevant provisions" of the 1921 Act and to the regulations and administrative practice thereunder. Executive Branch, *Analysis of International Antidumping Code in Relation to Antidumping Act, 1921* (1968), *reprinted in* S. Comm. on Finance, 90th Cong., 2d Sess., *Text of Antidumping Act, 1921, International Dumping Code, and Related Materials* 55, 60 (Comm. Print 1968). With regard to calculation of ESP, the "relevant provision" of the 1921 Act was unquestionably section 204. In the course of an analysis of the here pertinent provision of the 1967 Code, paragraph f, the Executive Branch report stated:

> In addition, paragraph (f) provides that due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. This provision is consistent with the [1921 Antidumping Act]. *Finally, paragraph (f) provides that in the cases involving constructed export price * * * allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. Since this is a hortatory provision, it creates no inconsistency with the Act.*

Comm. Print 60 (emphasis added). The above analysis is notable in that it apparently found the provision of the 1967 Code concerning "profits accruing" to be not inconsistent with the relevant provision of the 1921 Act (section 204) *only* because the Code provision was "hortatory" in nature. Apparently, the word "should" in the Code provision—"allowance * * * for profits accruing, *should* also be made" (emphasis added)—was understood as an exhortation rather than as a requirement. This suggests that the ESP provision of the 1967 Code was never perceived as the equivalent of section 204 of the 1921 Act but, to the contrary, was regarded as "consistent" with that section only because the Code provision was not viewed as mandatory.

Because this legislative history contradicts an argument that section 204 should be viewed as in substance identical to the ESP provision of the *1967* International Antidumping Code, it similarly contradicts Timken's argument that section 204 must be viewed as "consistent with" the ESP provision of the *current* International Antidumping Code.

Timken contends that despite this legislative history, nothing *precludes* requiring a deduction of profits under United States law so as to ensure conformity of that law with the Code provision. It further asserts that many of the trading partners of the United States deduct profit from ESP, and that a failure to interpret

United States law to provide for such a deduction creates a disparity that operates to the detriment of domestic industry in contravention of the general intent of Congress that the antidumping law protect such industy. *Cf. J.C. Penney Co.* v. *United States Treasury Department,* 439 F.2d 63, 64 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971) (the Antidumping Act is designed to prevent actual or threatened harm to a domestic industry caused by the sale of merchandise at prices lower than those in the country of origin). But even assuming, *arguendo,* that the Code provision regarding "profits accruing" should be given effect under the implementing 1979 Trade Agreements Act in order to ensure conformity with the Code, it would not follow that the *1921* Act provision here in question should be interpreted so as to conform with the Code. *Cf. United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348-49 (1963) (views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one); *Giardino* v. *Commissioner,* 776 F.2d 406, 409 (2d Cir. 1985) (court would not venture beyond clear meaning of statute because, although clear meaning was contradicted by subsequent legislative history, it did not result in absurdity). In addition, legislative history indicates that Congress, in passing the 1979 Act, intended to preserve the status quo as to all administrative practice regarding the antidumping laws except where specifically noted. *See* S. Rep. No. 249 at 93, 107, *reprinted in* 1979 U.S. Code Cong. & Ad. News at 479, 493; *Brother Industries, Ltd.* v. *United States,* 3 CIT 125, 136, 540 F. Supp. 1341, 1353-54 (Senate Finance Committee did not disapprove the current regulations and administrative practice under the 1921 Act, but in effect preserved the status quo), *aff'd sub nom. Smith-Corona Group* v. *United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984); *cf. Lorillard* v. *Pons,* 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of administrative or judicial interpretation of a statute).

In short, although Timken raises provocative questions regarding the appropriateness of an antidumping law that conflicits in part with the law of our trading partners in a manner detrimental to United States industry, it has presented no basis for interpreting section 204 in light of the International Antidumping Code provision.

5. Non-absurdity of Results

Finally, Timken argues that unless section 204 is interpreted so as to require the deduction of profits as well as commissions, the consequence is an absurd result, inconsistent with the underlying purpose of the provisions regarding ESP. Thus, Timken points out that if profits are not deducted from ESP, dumping margins may differ substantially depending upon whether a foreign manufacturer elects to sell in the United States through (1) an agent selling the merchandise on consignment and receiving a commission, or (2) through a subsidiary purchasing the imported merchandise and

then reselling it, earning a profit. Timken contends that in substance those import transactions are identical, and that Congress did not intend that the form of transactions could be structured to eliminate or reduce dumping margins.

Timken also notes that ESP is defined in such manner as to make it "[i]n substance, the net amount *returned to the foreign exporter.*" S. Rep. No. 16, 67th Cong., 1st Sess. 12 (1921) (emphasis added); *see Brother Industries, Ltd.* v. *United States,* 3 CIT at 141 n. 13, 540 F. Supp. at 1357 n.13. According to Timken, if profits are not deducted from ESP, ESP will equal "the net amount returned to the foreign exporter" *plus* the subsidiary's profit, and so will be in conflict with this underlying definition. However, Congress could reasonably have determined that a foreign exporter and its United States subsidiary should be treated as one "pocket" for purposes of determining what net amount is "returned to the foreign exporter." Indeed, the very nature of ESP calculation, requiring the deduction from an arm's length resale price of readily verifiable amounts, indicates that in the context of ESP calculation Congress wished to stay away from any assessment of the legitimacy or significance of monetary transactions between related parties. Certainly it is possible, as Timken itself points out, that related corporations could show profit in whatever place—the United States or abroad—was most convenient for them. The fact that such manipulation is theoretically possible is a reasonable basis for including in "net amount returned to the foreign exporter" the profit going to *both* the foreign exporter and to its United States subsidiary.

Another reason for permitting a subsidiary's *profit* on resale of imported goods to *increase* ESP—in effect, treating a subsidiary's profit as part of the "net amount returned to the foreign exporter"—is that, regardless of how the word "commissions" is interpreted, any *loss* incurred by a subsidiary will *decrease* ESP—in effect, decreasing the "net amount returned to the foreign exporter." Congress could reasonably have determined that because, for purposes of calculating ESP, a foreign exporter and its subsidiary are effectively treated as one unit when the subsidiary has incurred a loss, that those parties should similarly be treated as one unit when the subsidiary has made a profit. A statutory scheme under which profit is not deducted from ESP is therefore hardly absurd. Consequently, the ITA's interpretation of the word "commissions" to mean only commissions, and not "commissions and profits," is reasonable.

B. *Cost-value Relationship*

Timken contends that the ITA erred in making adjustments for differences in circumstances of sale based on the *costs* of those differences.

In determining whether goods have been sold in the United States at less than fair value, the ITA must compare the United States price of the goods with the foreign market value of identical

or similar goods. However, United States price and foreign market value may differ for reasons that do not implicate the fairness of the foreign trade practices of the exporter. For example, foreign market value and United States price may be influenced by differences in the chain of commerce by which the goods reached the export or domestic market. Accordingly, in comparing foreign market value with United States price, the ITA must adjust foreign market value for differences in the circumstances of sale of the goods.

Section 202 of the 1921 Act provided in part:

> (c) in determining the foreign market value * * * if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that the fact that the exporter's sales price is the same as the foreign market value) is wholly or partly due to—
>
> * * * * * * *
>
> (2) other differences in circumstances of sale * * *.
>
> * * * * * * *
>
> then due allowance shall be made therefor.

Antidumping Act of 1921, § 202, 19 U.S.C. § 161 (1976). An implementing regulation provided:

> In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the *cost* of such differences to the seller but, where appropriate, may also consider the effect of such differences upon the market value of the merchandise.

19 C.F.R. § 153.10(c) (1979) (emphasis added). In *Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984), the Federal Circuit upheld a regulation virtually identical to section 153.10(c). There Smith-Corona contended that the preference for cost established by the regulation is inconsistent with the underlying statutory requirement that claimed differences of sale must result in differences in price or value—not cost. The court rejected the argument on the ground that the assumption underlying the regulation—that differences in price or value are very likely to exist where there are differences in cost—was reasonable. 713 F.2d at 1577. The court noted that precluding the ITA from making that assumption would require it to engage in "extensive complex econometric analysis," and that making such an assumption "may be the only *practical* way to administer the statute." *Id.* at 1577 n.27 (emphasis in original). Yet, in language now relied upon by Timken, the court also stated:

> The Secretary may not, however, rely on cost *to the exclusion* of its effect on value. The regulation does not *prohibit* reli-

> ance on value, but merely expressed a preference for cost; value may be considered where appropriate.

Id. at 1577 (emphasis in original). The court further stated:

> We do not hold that the Secretary may blindly rely on cost to the exclusion of its effect on value * * *. *[A]bsent evidence that costs do not reflect value,* the Secretary may reasonably conclude that cost and value are directly related.

Id. at 1577 n.26 (emphasis added).

In this case, the ITA made adjustments for differences in circumstances of sale based upon cost information. Timken claims that those adjustments were unwarranted because it had presented evidence to the ITA that the differences in cost did not in fact result in a difference in the value of the goods. The evidence thus referred to is data showing that when certain costs *increased,* including those costs reflecting differences in circumstances of sale, the price of foreign market goods in many cases *decreased* or stayed the same. According to Timken, in only a few instances did prices rise in conjunction with a rise in costs. Hence, Timken argues, it is clear that the costs reflecting differences in circumstances of sale did *not* increase the value of the goods and therefore foreign market value should not have been adjusted to reflect those costs. In so arguing, Timken relies upon the *Smith-Corona* language: "*absent evidence that costs do not reflect value,* the Secretary may reasonably conclude that cost and value are directly related." *Id.* (emphasis added).

In effect, Timken's position is that the data establishing that as certain costs went up, price went down or stayed the same, constitutes evidence that "costs do not reflect value," and so makes unreasonable the ITA's usual assumption that costs are reflected in value. The court disagrees. The ITA's assumption, reflected in its regulation, of a relation between cost and value, does not hold good only in cases in which there is a positive correlation between prices and specific costs. Prices are influenced by many factors other than costs, *e.g.,* market demand, competition, and volume of sales. Furthermore, where the costs in question are not total costs, but merely costs of differences in circumstances of sale, such additional factors may well have a proportionately greater impact on price than do increases in those costs. Thus, costs of differences in circumstances of sale may be directly related to value and yet not control final price. Given this, Timken's evidence that prices did not increase with the rise in certain costs did not establish that values did not increase together with those cost increases; it at most established that values and/or prices were influenced by other factors as well.

Timken contends also that once it had presented data showing the absence of a positive correlation between costs and prices, it became incumbent upon NTN to rebut that evidence by affirma-

tively establishing that cost did indeed influence value. The argument is misplaced. The assumption of a cost-value relation implicit in the regulation and sanctioned by *Smith-Corona* is not a burden-shifting device. *See id.* It is rather an assumption embodying the informed judgment of an agency charged with the responsibility of administering the statute. Upon presentation of Timken's data on cost and price, the ITA's task was to determine whether, in light of that evidence, its assumption of a positive relation between cost and value *continued* valid. The ITA decided that it did, and the court finds that decision reasonable. For, as discussed above, prices may be influenced by many factors, so that an assumption that higher costs result in higher values is not undermined by the fact that certain relatively small cost increases do not coincide with price increases.[10]

V. *Conclusion*

This action is remanded to the ITA for (1) collection and review of data for a period extending up to the date of the ITA's preliminary determination; (2) collection and review of additional home market sales data for the period of time already reviewed by the ITA, and for reassessment of proper TRB model comparisons; (3) review of the accuracy of all pertinent NTN production costs; (4) correction of all errors that may have occurred below; and (5) recalculation of dumping margins in a manner consistent with this opinion. The ITA is directed to report its findings to the court within one hundred twenty (120) days of the date of this order.

(Slip Op. 86-18)

DONNA KELLEY, ET AL., PLAINTIFFS *v.* SECRETARY, U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 85-03-00437

OPINION AND ORDER

[Motion for certification for interlocutory appeal denied.]

(Decided February 20, 1986)

Donna Kelley, pro se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Platte B. Moring, III,* Civil Division, United States Department of Justice, for defendant.

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[10] The court has considered the remaining contentions of the parties and finds either that they are without merit, or that the court's determination to remand this action makes those contentions either moot, or not appropriate for consideration at this time. *See Ford Motor Co.* v. *NLRB,* 305 U.S. 364, 372-76 (1939) (it is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be remedied).

RESTANI, *Judge:* Defendant has moved for certification of the statute of limitations issue as resolved by the court in Slip Op. 85–132, Court No. 85–03–00437. Before addressing the issue raised here, the court believes clarification of the court's decision on the statute of limitations may be helpful. Defendant asserts in its motion for certification that plaintiff-Kelley, and presumably her co-plaintiffs, did not appear before the Secretary of Labor as a petitioner in the investigation leading to denial of eligibility to apply for trade adjustment assistance. Although this appears from the administrative record to be the case, plaintiffs filed their action with this court to contest the Secretary's denial of the petition for eligibility and, therefore, plaintiff-Kelley and her co-plaintiffs stand in the shoes of the actual petitioners.[1] The petition for trade adjustment assistance lists three workers as petitioners and provides the name of the workers' representative by whom the petition was to be filed. Each of these four individuals signed the petition and their respective addresses were provided. Plaintiff alleged and defendant did not deny that Catherine McLeroy, one of the three worker-petitioners, received actual notice of the Secretary of Labor's denial of the petition on February 18, 1985.[2] There has been no indication that any of the other three petitioners received actual notice on an earlier date. Thus, the court determined that February 18, 1985, under the specific circumstances of this case, marks the beginning of the running of the statute of limitations. Thus, although there may be a suggestion in the court's original opinion that plaintiff-Kelley was an actual petitioner, the court concludes that this has no impact on the court's decision in Slip Op. 85–132.

In addition, defendant notes that plaintiff-Kelley knew that the Secretary of Labor's investigation of the petition would probably take six months to complete. That the Department of Labor is apparently unable to comply with the statutory sixty day time period for issuing determinations on such petitions, 19 U.S.C. § 2272 (1982 & Supp. I 1983), may support the need for Congress to amend the requirements of the statute. Informing petitioners of the approximate number of months that an investigation will take to complete, however, is not the same as telling the petitioners exactly when a determination will be issued and is not a substitute for compliance with section 2272. Such a general notification cannot remove the potential procedural consequences of a failure to

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[1] The statute does not limit the parties entitled to challenge the Secretary of Labor's determination on a petition for eligibility to apply for trade adjustment assistance to those who filed the petition. Rather, the statute provides:

> A worker, group of workers, certified or recognized union, or authorized representative of such worker or group aggrieved by a decision of the Secretary of Labor under section 2273 of this title * * * may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.

19 U.S.C. § 2395(a) (1982).

There has been no question raised as to plaintiff-Kelley's status as a "worker" within the meaning of the statute, and her standing to bring suit is unaffected by whether she was a petitioner.

[2] Plaintiff-Kelley, too, received notice on that date.

comply with the statute and relevant regulations concerning notice procedures.

Finally, defendant notes that in *Brunelle* v. *Donovan*, 3 CIT 76 (1982), this court dismissed plaintiff's action for failure to comply with the statute of limitations despite the Secretary of Labor's delinquent issuance of its final determination on the petition for trade adjustment assistance. The court in *Brunelle*, however, did not specifically address the issue of the timeliness of the Secretary's determination and gave no indication that it even considered the issue. Thus, *Brunelle* is not persuasive as to the potential procedural consequences of a late determination.

To certify an issue for interlocutory appeal requires a showing that "a controlling question of law is involved with respect to which there is substantial ground for difference of opinion *and* that an immediate appeal from [the court's] order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(1) (West Supp. 1985) (emphasis added). Interlocutory appeals are to be used only in those exceptional cases that are likely to require lengthy or expensive proceedings. *See National Corn Growers Association* v. *James A. Baker, III*, 9 CIT ——, Slip Op. 85-119 at 21-22 (Nov. 26, 1985); *C.L. Hutchins & Co., Inc.* v. *United States*, 67 Cust. Ct. 354, 358, C.D. 4297, 334 F. Supp. 188, 191 (1971). Defendant offers no facts to support the claim of the Office of Trade Adjustment Assistance that the court's remand order will require a rather lengthy investigation and the expenditure of more than a minimal amount of government resources. The court is not convinced that the burden imposed on defendant in carrying out the court's remand order, in terms of time or expense, is of such magnitude as to justify certification for interlocutory appeal. *See National Corn Growers*, Slip Op. 85-119 at 22 (indicating certification inappropriate where issues raised do not "portend a protracted trial"); *C.L. Hutchins*, 67 Cust. Ct. at 358, 334 F. Supp. at 191-92 (certification denied where proceedings not likely to be "expensive" or "protracted"). In this case, no trial is called for and the court is unable to conclude from defendant's conclusory statement that compliance with the remand order will require anything but ordinary administrative steps of a not particularly burdensome nature.

The normal course is to let litigation proceed on its own until termination by action of the parties or until a final court decision is reached. Interlocutory appeals have their own potential for delay. Therefore, certification should not be permitted unless the court is convinced that the proceedings sought to be avoided would be protracted or expensive. *See Milbert* v. *Bison Laboratories*, 260 F.2d 431, 433 (3d Cir. 1958) (discussing parallel interlocutory appeal provision applicable to federal district courts) (cited in *Caldwell* v. *Chesapeake & Ohio Railway Co.*, 504 F.2d 444, 446 (6th Cir. 1974); *Kraus* v. *Board of County Road Commissioners*, 364 F.2d 919, 922 (6th Cir. 1966)). Here, the potential for delay in termination of the

litigation both in terms of the parties' interests and in terms of judicial economy dictates denial of defendant's motion for certification to file an interlocutory appeal and for stay of the court's order.

(Slip Op. 86-19)

TERUMO CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-8-01089

Before DICARLO, *Judge.*

Plaintiff challenges classification of dialyzers used to filter and purify blood under item 709.17 of the Tariff Schedules of the United States (TSUS), arguing that the merchandise is classifiable under item 661.95, TSUS. Defendant moves for summary judgment.

Held: Medical dialyzers are properly classified under Schedule 7, Part 2, Subpart B, TSUS, rather than under a provision describing nonmedical merchandise.

[Defendant's motion is granted.]

(Decided February 21, 1986)

Stein Shostak Shostak & O'Hara (Robert Glenn White) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Field Office, Department of Justice (*Saul Davis*), for the defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of merchandise invoiced as "Clirans Hollow Fiber Dialyzers" under item 709.17 of the Tariff Schedules of the United States (TSUS) as "Electro-medical apparatus, and parts thereof: * * * Other." Plaintiff claims that the dialyzers are properly classifiable under item 661.95, TSUS, as "filtering and purifying machinery and apparatus * * * for liquids or gases * * * and parts thereof * * * other."

Defendant moves for summary judgment. The parties agree that the dialyzers are used for medical purposes in the filtering and purifying of blood and that there are no questions of fact which prevent the Court from deciding the motion. Defendant's motion is granted.

Defendant asserts that item 661.95, TSUS, comes under Headnote 1(v) to Schedule 6, Part 4, TSUS, which states: "This part does not cover— * * * articles and parts of articles specifically provided for elsewhere in the schedules." Defendant argues that the dialyzers are specifically provided for under item 709.17, TSUS, as other electro-medical apparatus. Further, says defendant, even if item 709.17, TSUS, is not a specific provision within the meaning of Headnote 1(v), the merchandise is still properly classified under that provision.

Plaintiff contends that item 709.17, TSUS, is a broad tariff provision which does not provide "specifically" for the dialyzers within the meaning of Headnote 1(v) to Schedule 6, Part 4. Plaintiff admits that the merchandise comes within the description of item 709.17, TSUS, but argues that item 661.95, TSUS, is more specific. It also argues that the Brussels Nomenclature [1] indicates Congressional intent that dialyzers be classified under item 661.95, TSUS, as filtering and purifying machinery.

The Court holds that the specificity of the competing provisions does not control since Congress intended that medical dialyzers be classified under Part 2 of Schedule 7. "[T]he basic rule of construction of a statute is that the intent of Congress is to be given effect and all other rules of construction must yield * * *." *S & T Imports, Inc.* v. *United States,* 78 Cust. Ct. 45, 49, C.D. 4690 (1977). The Court may look to the intent of Congress when "not entirely certain of the meaning of the statutory language when applied to the particular facts of this case." *Rikfin Textiles Corp.* v. *United States,* 54 CCPA 138, 142, C.A.D. 925, *cert. denied,* 389 U.S. 931 (1967).

The *Explanatory Notes* to the Brussels Nomenclature are a source for ascertaining legislative intent, where the language of the Brussels Nomenclature and the TSUS are similar. *See Toyota Motor Sales, U.S.A., Inc.* v. *United States,* 7 CIT ——, 585 F. Supp. 649, 655 (1984), *aff'd,* 753 F.2d 1061 (Fed. Cir. 1985). Items 661.95 and 709.17 of the TSUS are similar to Headings 84.18 and 90.17 of the Brussels Nomenclature. *See Pharmacia Fine Chemicals, Inc.* v. *United States,* 7 CIT ——, 585 F. Supp. 649, 655 (1984), *aff'd,* 753 F.2d 1061 (Fed. Cir. 1985); *Nippon Kogaku (U.S.A.), Inc.* v. *United States,* 1 CIT 328, 521 F. Supp. 466 (1981).

Plaintiff contends that the dialyzers are classifiable under item 661.95, TSUS, since the *Explanatory Notes* state regarding Brussels Heading 84.18:

> The heading also covers dialysers, special type filters consisting essentially of a semi-permeable membrane through which liquids can pass by diffusion and thus be separated from colloidal particles.

This note, which refers to dialyzers generally, does not indicate that Heading 84.18 covers dialyzers that are chiefly used for medical purposes.[2]

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[1] Customs Co-Operation Council, *Nomenclature for the Classification of Goods in Customs Tariffs* (1955) (Brussels Nomenclature), and *Nomenclature-Explanatory Notes* (1955).

[2] *Webster's Third New International Dictionary* defines the following terms:

dialyzer: an apparatus in which dialysis is carried out consisting essentially of one or more containers for liquids separated into compartments by membranes in any of various forms (as a sheet, bag or tube)

dialysis * * * 1: the separation of substances in solution by means of semipermeable membranes (as of parchment, cellophane, or living cells) through which the smaller molecules and ions diffuse readily whereas the larger molecules and colloidal particles diffuse very slowly or not at all, such separations being important in nature (as in living organisms and in soils) and having many applications (as in blood) fractionation or in the recovery of sodium hydroxide in the manufact of viscose)—used esp. of the separation of noncolloids from colloids (as proteins); * * * 2 bot: the tion of parts which are normally united esp. in the same floral whorl

The *Explanatory Notes* description of Brussels Heading 90.17 indicates that articles described by a term which may be used to describe both medical and nonmedical apparatus should be classified under the heading which describes the term in its general meaning only where the articles in question are not identifiable as being for medical use:

> This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives, etc.), either to make a diagnosis, or * * * to carry out some treatment on the patient.
>
> * * * * * * *
>
> It should be noted that a number of the instruments used in medicine and surgery (human and veterinary) are, in effect, tools * * *. Such articles are classified in the present heading only when they are clearly identifiable as being for medical or surgical use * * *.

Therefore, while nonmedical dialyzers might come under Brussels Heading 84.18, medical dialyzers would be classified under heading 90.17.[3] To the extent that the *Explanatory Notes* are relevant, they support Customs classification.

The intent of Congress is more explicitly shown in the *Tariff Classification Study*. "The *Tariff Classification Study*, published by the United States Tariff Commission pursuant to Congressional delegation (Customs Simplification Act of 1954, Public Law 83-768, 68 Stat. 1136), is regarded by the court as a source of legislative history of the TSUS." *Certified Blood Donor Services, Inc.* v. *United States*, 62 CCPA 66, 69 n.2, C.A.D. 1147, 511 F. 2d 572, 575 (1975).

The *Tariff Classification Study* says that Schedule 7, Part 2, Subpart B, entitled "Medical and Surgical Instruments and Apparatus," which contains item 709.17, encompasses medical instruments and appliances which previously were spread among seven of the schedules of the Tariff Act of 1930.

> This subpart covers a wide variety of instruments and appliances used generally in professional practice for diagnosis, prevention, and treatment of diseases, the correction of deformities and defects, the repair of injuries, etc. These articles are presently dutiable at a number of different rates in a number of widely separated paragraphs in seven of the present tariff schedules. In assimilating the various provisions for these closely related instruments and appliances into this subpart, articles imported in significant quantities have been provided for wherever possible at the existing rates of duty * * *.

9 *Tariff Classification Study*, at 144-46.

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[3] Headnote 1(e) to chapter 84 of the Brussels Nomenclature provides further indication that medical dialyzers would be classified under heading 90.17. The headnote states: "This section does not cover * * * articles falling within chapter 90."

Plaintiff's proposed classification, item 661.95, TSUS, is contained in Schedule 6 of the TSUS, entitled "Metals and Metal Products." Its predecessor, Schedule 3 of the Tariff Act of 1930, entitled "Metals and Manufactures of," was one of the seven schedules from which Schedule 7, Part 2, Subpart B was assimilated.[4]

Schedule 6, Part 4 of the TSUS was intended to cover general-purpose articles rather than medical equipment. Subpart A, which includes item 661.95, TSUS, is entitled "Boilers, Non-Electric Motors and Engines, and Other General-Purpose Machinery." The Tariff Classification Study states:

> This subpart covers a wide variety of machinery and appliances which can be used in numerous industrial applications as set forth in headnote 1 to this subpart. * * * The systematic grouping of general-purpose machines and appliances in this subpart, together with the rule expressed in the headnote, would provide greater stability to the product classifications.

8 *Tariff Classification Study*, at 260. Nothing in the *Tariff Classification Study* indicates that medical equipment is classifiable under item 661.95, TSUS.[5]

The Court concludes that Schedule 6, Part 4 of the TSUS does not provide for the classification of medical dialyzers which are properly classified under Schedule 7, Part 2, Subpart B of the TSUS.

After considering the undisputed facts, the relevant portions of the TSUS, and the intent of Congress, the Court concludes that medical dialyzers fall within Schedule 7, Part 2, Subpart B of the TSUS, and that they are properly classified within that subpart under item 709.17, TSUS.[6] Judgment will be entered accordingly. So ordered.

(Slip Op. No. 86-20)

KENDA RUBBER INDUSTRIAL CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDENT

Court No. 84-7-00949

Before CARMAN, *Judge*.

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[4] *See* 9 *Tariff Classification Study*, at 144. The predecessor provisions to the items contained in Schedule 7, Part 2, Subpart B indicate that this subpart was assimilated from schedules 2, 3, 4, 9, 12, 13, and 15 of the Tariff Act of 1930. *See id.* at 102-03.

[5] The *Tariff Classification Study* lists as predecessor provisions to item 661.95, TSUS, paragraphs 353, 360 and 372 of the Act. 8 *Tariff Classification Study* at 243, 263. Insofar as any medical instruments might previously have been classified under those paragraphs, such articles are currently provided for under Subpart B to part 2 of Schedule 7, since paragraph 360 is cited as a predecessor to item 790.07, TSUS, and paragraph 372 as predecessor to items 709.40 and 709.45, TSUS.

Although paragraph 353 of the Tariff Act of 1930 refers to certain therapeutic and diagnostic apparatus, it provided for non-medical articles as well. Since paragraph 353 is cited as a predecessor provision to item 709.17, as well as item 709.40, 709.45, 709.50, and 709.61-70, TSUS, it is apparent that Congress intended that the portion of that paragraph relating to medical articles be succeeded by provisions contained in Schedule 7, and that the portion relating to non-medical articles be succeeded by provisions contained in Schedule 6.

[6] The Court need not, and does not, address defendant's argument that item 709.17, TSUS, is a provision which describes dialyzers "specifically" within the meaning of Headnote 1(v) Schedule 6, Part 4.

[Judgment for defendant.]

(Decided February 24, 1986)

Myron Solter for the plaintiff.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile*, Assistant General Counsel, and *Brenda A. Jacobs*, United States International Trade Commission, for the defendent.

CARMAN, *Judge:* Before the Court is plaintiffs' motion for judgment upon the agency record, pursuant to Rule 56.1, in this antidumping investigation. Defendant United States opposes the motion. Plaintiffs ask for a review of the International Trade Commission's (Commission) determination in *Bicycle Tires and Tubes from Taiwan*, U.S.I.T.C. Public. 1532, Investigation No. 731-TA-166 (Final) (May 1984), that imports of bicycle tires and tubes from Taiwan are materially injuring industries in the United States.

Plaintiffs challenge the Commission's determination on basically two grounds. First, plaintiffs contend that the Commission improperly found injury to the separate tire and tube industries on the basis of aggregated data. Second, plaintiffs claim that a majority of Commission members based their determination on a period six to nine years before the date of the determination, and that the use of such a period contravenes the language of the relevant statute. Use of the earlier period, plaintiffs claim, made it impossible to determine whether the dumping caused the injury, and a determination based on that period, when applied to present entries, operates as an unlawful penalty. For the reasons given below, the Court sustains the Commission's determination.

BACKGROUND

Before outlining the facts of this case, it may be useful to examine the procedures followed in an antidumping investigation, since much of the controversy in this case arises from a disjointed procedure that resulted from a court remand. To initiate an antidumping investigation, an interested party files a petition with the administering authority, the United States Department of Commerce (Commerce) [1] and simultaneously with the Commission, alleging the sale of imports at less than fair value (LTFV). 19 U.S.C. § 1673a(b) (1982). Within 20 days Commerce determines whether to initiate an investigation and informs the Commission of its determination. If Commerce decides to initiate an investigation, the Commission makes a preliminary determination of whether there is a reasonable indication that the alleged LTFV sales are injuring or threatening to injure a domestic industry. 19 U.S.C. § 1673b(a). If the Commission's determination is affirmative, Commerce conducts an investigation and arrives at a preliminary determination of

[1] The administering authority is currently Commerce, but at the time of the initial investigation in this case it was the Department of Treasury. The administering authority may also initiate its own investigation. 19 U.S.C. § 1673a(a) (1982).

whether there have been LTFV sales. 19 U.S.C. § 1673b(b). Commerce then performs a complete investigation and arrives at a final determination. 19 U.S.C. § 1673d(a). Finally, if Commerce's final determination is affirmative, the Commission performs its complete investigation and makes its final determination of whether the LTFV sales materially injure or threaten to injure a domestic industry. *Id.* at § 1673d(b). The statutory scheme involves a series of interlocking steps by the agencies, the next step of each dependent upon the prior step of the other. The statute clearly contemplates that each step will follow close upon the other, mandating a period of days for the completion of each step. From filing of the petition to the Commission's final injury determination should take 230 days, if verification is waived (*see* 19 U.S.C. § 1673b(b)(2)), to at most 420 days in an extraordinary complicated case (*see* 19 U.S.C. § 1673b(c)).

In this case the administering authority at the time, the United States Department of Treasury (Treasury), made a negative final determination as to LTFV sales, which the petitioner appealed. Upon remand the new administering authority, Commerce, made an affirmative final determination, and the Commission then made an affirmative injury determination, serveral years after Treasury's initial investigation. It is the Commission's determination that plaintiffs now challenge. A more detailed history of the case follows.

In January 1978 Carlisle Tire & Rubber Co. filed a petition with Treasury alleging LTFV sales of bicycle tires and tubes from Taiwan. In December 1978 Treasury made a negative final determination of LTFV sales [2] and Carlisle appealed to this court's predecessor, the United States Customs Court. In May 1982 the court remanded that case, Court No. 79-3-00513, instructing that a different methodology be used to calculate dumping margins.

While that case was under advisement, Carlisle filed a new petition again alleging LTFV sales of bicycle tires and tubes from Taiwan. The Commission conducted a preliminary investigation and determined that there was a reasonable indication that the alleged dumping was injuring a domestic industry. U.S.I.T.C. Public. 1258, Investigation No. 731-TA-94 (Preliminary) (June 1982). In May 1983, however, Commerce made a final negative determination regarding LTFV sales occurring between December 1, 1981 and May 31, 1982. Carlisle's appeal of that determination to this court was designated Court No. 83-5-00773.

In October 1983 Commerce issued its redetermination in the remanded 1978 investigation, finding LTFV sales, and referred the case to the Commission for an injury determination. *See* 49 Fed. Reg. 2492 (1984). At this juncture Carlisle settled its appeal of the 1982 determination, on the basis of Commerce's affirmative rede-

[2] Because Carlisle filed its petition prior to passage of the 1979 Trade Agreements Act, Treasury did not refer the case to the Commission for a preliminary injury determination.

termination in the 1978 case, and the court issued an order dismissing the appeal.

In January 1984 the Commission began its final injury determination in the 1978 case. The Commission sent a questionnaire to Carlisle [3] and to importers and purchasers of imported bicycle tires and tubes, seeking data for the period 1981–1983. During the investigation the Commission also determined that it had in its files data on the domestic industry and imports dating from 1973. The data had been collected in a 1978 investigation under section 201 of the Trade Act of 1974, preliminary antidumping and countervailing duty investigations in 1982, and a 1983 review investigation under section 104 of the Trade Agreements Act of 1979. The Commission determined that the data from these investigations were calculated on the same basis as the data in the ongoing investigation. It therefore incorporated some of the tables and the staff reports from the prior investigations into the record in the ongoing investigation.

Controversy arose during the investigation as to which time period the Commission should examine to determine injury—the period of the initial investigation, around 1978, or the "present" period, 1981–1983. Carlisle argued that the earlier period was appropriate, while the Taiwanese respondents argued for the present period. The Commissioners did not reach a unanimous decision on which time period to use, though whichever period each used, all of them found that the domestic industry was injured by LTFV sales of imports. Commissioners Stern, Haggart, and Rohr based their decision on the period 1975–1978, U.S.I.T.C. Public. 1532, at 3 n.1, although Commissioner Haggart also noted that she had considered the 1981–1983 data and reached the same conclusion. *Id.* Then-Chairman Eckes and Commissioner Lodwick based their injury determination on the period 1975–1983. In January 1984 plaintiffs appealed the Commission's affirmative injury determination. That appeal is now before the Court.

OPINION

Plaintiffs raise a number of challenges to the Commission's determination, all of which fall into basically two categories. First, plaintiffs claim that the Commission improperly found injury to the separate tire and tube industries on the basis of aggregated data. Second, they claim that the determination was based upon data from the period 1975–1978 and that the use of this earlier time period was improper. Plaintiffs claim that in committing these two errors the Commission acted *ultra vires* and its determination is therefore void. An agency action is *ultra vires* when the agency has acted beyond the scope of its defined authority. In this case, the Commission conducted an investigation and issued a de-

[3] Defendant asserts, and plaintiff does not contest, that Carlisle was the only domestic producer of bicycle tires and tubes. *See* Defendant's Brief at 6.

termination within the confines of its statutorily granted authority. Plaintiffs present no evidence that the Commission exceeded that authority. The Court's review of agency determinations in such a case is governed by 19 U.S.C. § 1516a(b)(1)(B) (1982). Thus, under that statute, the issues in this case are whether the Commission's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law" (1) because the agency based its determination of injury to the separate tire and tube industries on data that was not segregated for, 1975–1978 as to the profits for each industry, and (2) because the agency based its determination on an improper time period.

A. *Separate Injury Based on Aggregated Profits Data*

The Commission found that the bicycle tire and bicycle tube industries were separate industries, and that each was separately injured by reason of LTFV imports. U.S.I.T.C. Public. 1532, at 8, 15. To reach this determination, the Commission relied on data in its files compiled in part from previous investigations. *Id.* at 6. For the period 1979–1983 the Commission had before it segregated data regarding all relevant aspects of the domestic industries, including profits data. For the period 1975–1978 the Commission had segregated data on all relevant aspects of the domestic industries except profits. Nothing in the record of the investigation indicates that the Commission made any attempt to obtain segregated profits data for 1975–1978.

Under the appropriate standard of review, the first question the Court must address is whether the Commission acted in accordance with law when it failed to request segregated profits data from Carlisle for the period 1975–1978. In other words, did the Commission have an affirmative duty to attempt to obtain this data? The Court finds that the relevant statute should not be read so strictly as to impose upon the agency an affirmative duty to obtain segregated profits data.

The controlling statute is 19 U.S.C. § 1677 (1982), which contains definitions and special rules governing both countervailing duty and antidumping investigations. In determining "material injury" to a domestic industry, the Commission is required to consider the impact of the LTFV imports on the domestic industry, and is further required to "evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to * * * profits. 19 U.S.C. § 1677(7)(C)(iii)(I) (1982). Thus to determine whether there is material injury to an industry, the Commission must look at a variety of factors, including profits. The statute further instructs the Commission to determine injury for like products separately, where possible.

> The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product if available data permits the separate identification of production

> in terms of such criteria as the production process or the producer's profits.

19 U.S.C. § 1677(4)(D) (1982).

Plaintiff would have the Court construe these provisions to require the Commission to seek separate profits data in every instance where more than one industry is affected. Although ideally an investigation would include such data, neither the legislative history of the statute nor the cases construing it require such a strict reading. The Senate Report accompanying the 1979 amendment that added the present section 1677 indicates that the Commission is to consider a variety of factors relating to each separate product where separate consideration is reasonable.

> In examining the impact of imports on the domestic producers comprising the domestic industry the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of only the like product, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product.

S. Rep. No. 249, 96th Cong., 1st Sess. 83–84 (1979). This Court had occasion to examine this passage of the Senate Report in *Roquette Freres* v. *United States*, 7 CIT ——, 583 F. Supp. 599 (1984). After quoting this passage the Court stated, "It is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors *necessary for its analysis.*" 583 F. Supp. at 604 (emphasis added). Congress did not intend to require the Commission to obtain separate data on every enumerated economic factor; rather, it directed the Commission to obtain such data, where possible, as allows it to make "a reasonably separate consideration."

That the statute does not require the Commission to seek separate data for every factor is supported by the analogous case of *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 155¢ (Fed. Cir. 1984) (*rev'g* 4 CIT 248, 553 F. Supp. 1055 (1982)). That case involved a final injury determination in which the Commission considered impact on regional industries. *See* 19 U.S.C. § 1677(4)(C) (1982). One producer claimed it was unable to provide segregated data for each of its plants, and therefore could not provide data segregated by region. The Commission accordingly applied the "best information" rule, which allows it to use the best information available when a party is unable or refuses to produce requested information. *See* 19 U.S.C. § 1677e(b) (1982). This court found that the Commission's use of the aggregated data was improper, stating that the Commission could not consider data from outside the regional boundaries it had established. *Atlantic Sugar, Ltd.* v. *United States*, 4 CIT 248, 250, 553 F. Supp. 1055, 1058 (1982).

The Court of Appeals for the Federal Circuit reversed on this point. It found that the Commission was not required to obtain

completely segregated data. 744 F.2d at 1562. Instead, the court examined the entire record to determine whether the conclusions the Commission drew from the data were supported by substantial evidence on the record. *Id.*[4] That is the issue that must now be addressed in the instant case.

The "substantial evidence" standard of review has been well explicated in many decisions. *See Carlisle Tire and Rubber Co.* v. *United States,* 9 CIT ——, 622 F. Supp. 1071 (1985). Review of the agency determination is limited, ensuring that agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole. Applying this standard to the Commission's determination of injury to the bicycle tire and tube industries, the Court finds that there is sufficient evidence in the record from which a reasonable mind might draw the conclusions that the Commission drew.

The Commission had before it segregated data for bicycle tires and tubes regarding domestic shipments, production, exports, consumption, capacity, manufacturing costs, prices, inventories, employment, as well as imports for consumption. The Commission also had aggregated data for profits, and segregated data for profits from 1979 forward. The Court finds that this was sufficient data from which the Commission could conclude that the domestic industries were injured during the period 1975–1978.

B. *The Time Period of the Investigation*

The statute under which the Commission makes its injury determination provides in relevant part:

> The Commission shall make a final determination of whether an industry in the United States is materially injured, or is threatened with material injury * * * by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section.

19 U.S.C. § 1673d(b)(1). Plaintiffs contend that this statute requires the Commission to make a present determination of injury and that a majority of the Commission members erroneously based their determination on the period 1975–1978. Plaintiffs also con-

[4] Plaintiffs also cite *Budd Co., Ry. Div.* v. *United States,* 1 CIT 67, 507 F. Supp. 997 (1980), to support their argument. That case involved a preliminary injury determination by the Commission, which the relevant statute requires be made based upon "the best information available." 19 U.S.C. § 1673b(a) (1982). The court construed the statute's command to mean that "all information that is 'accessible or may be obtained,' from whatever its source may be, must be reasonably sought by the Commission." 1 CIT at 75, 507 F. Supp. at 1003–04. The Commission in that investigation had obtained no data on domestic producers of components and parts, yet found that the domestic industry was not injured. The court held that this determination was not supported by substantial evidence in the record, and further found that the Commission had not conducted a thorough investigation as required by statute. *Id.* at 79, 507 F. Supp. at 1006. Thus the court implicitly found that the determination was not in accordance with law, as well as unsupported by substantial evidence.

Although the court in *Budd Co.* used broad language imposing a duty upon the Commission to obtain *all* information, the facts in that case clearly distinguish it from the instant case. There the Commission had gathered essentially no data. Here the Commission had data relating to each of the factors enumerated in the statute, including profits. Lack of certain segregated data might render a determination unsupported by substantial evidence, but it does not make the determination out of accordance with law.

tend that the Commission's use of the earlier period made it impossible to determine the requisite causal connection between the LTFV imports, and that the Commission's use of the earlier period when applied to present entries operates as an unlawful penalty.

Plaintiffs argue that the statute requires the Commission to look at the present period because of the present tense wording of the statute. Although the relevant section is cast in the present tense, the Court does not find this argument compelling. The statutory scheme contemplates that antidumping determinations will be made in a relatively short space of time, usually less than one year, from the time the petition is filed until the final injury determination is made. Thus Congress apparently intended the Commission's determination to follow hard upon Commerce's finding of LTFV imports. In a normal investigation, the present tense language of the statute anticipates that the Commission will examine a time period close to that examined by Commerce. In an unusual case such as this, the statutory scheme has been interrupted. Had Treasury originally found LTFV imports, the Commission would then have examined the earlier period. When this Court remanded to Commerce, it directed Commerce to reexamine the period of the original investigation. There is some logic in the Commission, too, examining that earlier period. Indeed in other cases where this court has remanded to the Commission, it has directed it to look at the early period it originally investigated. *See, e.h., Roquette Freres* v. *United States*, 7 CIT ——, 583 F. Supp. 599 (1984).

The court hesitates, however, to establish an absolute rule that would require the Commission to examine a period years earlier where Commerce finds LTFV imports in a remanded case. It may not always be possible for the Commission to obtain data regarding the earlier period. As the statute does not expressly command the Commission to examine a particular period of time, the Court finds that the Commission has discretion to examine a period that most reasonably allows it to determine whether a domestic industry is injured by LTFV imports.[5]

Plaintiffs further protest that by failing to determine injury during the present period, the Commission made it impossible to find the requisite causality between the injury and the LTFV imports. Plaintiff is correct that the Commission must find that the injury occurred "by reason of" the LTFV imports. This is precisely what the Commission found. *See* U.S.I.T.C. Public. 1532, at 15. Commerce's investigation covered the period September 1, 1977 through February 28, 1978. The Commission majority based its determina-

[5] The Commission's determination in this investigation is rather unusual in that the Commissioners were split over which time period was most appropriate. Three Commissioners considered the 1975–1978 period, while two based their decision on 1975–1983. Of the three who looked at 1975–1978, one said that she also considered the period 1981–1983, and that "she would have reached an affirmative determination based on the period 1981–83 as well." U.S.I.T.C. Public. 1532, at 3 n.l. The Commission's analysis accompanying the determination also discussed the entire period of 1975–1983. One could argue, then, as defendant does, that a majority of the Commission's members looked both at the 1975–1978 period, and at the later 1981–1983 period, which plaintiffs contend applies.

tion on the period 1975–1978. The Court concludes that it was both possible and reasonable for the Commission to determine that the injury it found was caused by the LTFV imports during the time of Commerce's investigation.

Plaintiff finally complains that the Commission's injury determination operates as an unlawful penalty because presumably it will lead to imposition of duties on entries made after 1982, when Commerce found in its later investigation that there were no LTFV imports. The only agency action that the Court is reviewing in this case is an injury determination by the Commission, not a final antidumping duty order issued by Commerce. The Commission's determination that the domestic industries are injured by reason of the LTFV imports found by Commerce does not operate as an unlawful penalty.

Conclusion

The Court finds that the Commission's use of aggregated profits data and its consideration of the 1975–1978 period are in accordance with law. Moreover, the Court finds the Commission's actions reasonable in light of the fact that the Commission had a wealth of data from this early period, and further finds the Commission's conclusion that LTFV imports were injuring a domestic industry is supported by substantial evidence in the record. The Commission's determination, being both supported by substantial evidence and in accordance with law, is therefore sustained.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/7	Carman, J. February 12, 1986	Donner Mountain Corp.	84-11-01652	Item 700.95 12.5%	Item 700.35 8.5%	Agreed statement of facts	San Francisco Donner Mountain Style Nos. 156 and 157
C86/8	Carman, J. February 12, 1986	Honda Industries Inc.	84-3-00382, etc.	Items 716.10-716.29 Various rates for module portion Item 720.20, 720.24, or 720.28 Various rates for case portion Item 740.35 Various rates for watch band portion	Item 688.36 5.5%, 5.3%, or 5.1%	U.S. v. Texas Instruments, Inc., 673 F.2d 1375 (1982)	New York Electronic watches which consist of watch modules, cases and bands; an entirety
C86/9	Carman, J. February 12, 1986	Idea	67/16393-A	Item 737.30 18%	Item 685.22 12.5%	U.S. v. New York Merchandise Co., 58 CCPA 53, C.A.D. 1004	Los Angeles Poodle dog radios
C86/10	Carman, J. February 12, 1986	Jet Sonic Corp.	84-1-00016	Item 740.35 32.4% for bands	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 673 F.2d 1375 (1982)	New York Bands; an entirety with electronic watches

C86/11	Carman, J. February 14, 1986	Lorraine's Importers	82-4-00541	Item 365.91 90% + 25% under item 766.30	Item 766.25 Free of duty for the center portion of the old embroidered mats Item 365.91 90% for the borders and backings of each mat and value of borders and bakings is $3.75 each	Fisher Galleries v. U.S., 593 F. Supp. 436 (1984)	Wilmington "Old" embroidered mats
C86/12	Carman, J. February 12, 1986	Mattel, Inc.	80-3-00426	Item 737.22 17.5% for base stands and leg holders classified as an entirety with dolls with which they were imported	Item 774.60 8.5%	Mattel, Inc. v. U.S. 8 CIT—. Slip Op. 84-133 (1984)	New York Base stands and leg holders
C86/13	Carman, J. February 12, 1986	Zayre Corp.	83-6-00888	Item 735.06 8.6%	Item 735.06 Free of duty pursuant to GSP	Agreed statement of facts	Savannah Men's gloves; product of an eligible beneficiary country
C86/14	Aquilino, J. February 12, 1986	Gelmart Industries, Inc.	83-1-00079	Item 705.86 35%	Item 734.99 Free of duty pursuant to GSP	Stonewall Trading Co. v. U.S., C.D. 4023 (1970)	New York Ski gloves; product of an eligible beneficiary country

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/15	Carman, J. February 18, 1986	Mattel, Inc.	84-3-00351	Items 737.22 16.8% or 16.1% for base stands and leg holders classified as an entirety with dolls with which they were imported	Item A774.55 Free of duty pursuant to GSP Item 774.55 8.5% for merchandise imported in January, 1980 from the Republic of China (Taiwan)	Mattel, Inc. v. U.S. 8 CIT—, Slip Op. 84-133 (1984)	New York Base stands and leg holders
C86/16	Carman, J. February 18, 1986	Coleco Industries, Inc.	84-7-01042	Item 790.39 4.2%	Item A774.55 Free of duty pursuant to GSP	Agreed statement of facts	New York Rigid wall and embossed wall vinyl pools
C86/17	Watson, J. February 19, 1986	Charley's Fishing Supply, Inc.	78-10-01832, etc.	Item 309.06 17.5%	Item 731.44 12.5%	Agreed statement of facts	Honolulu "SEINC" Mono (monofilament fishing) line, 1000 yards per spool
C86/18	Carman, J. February 20, 1986	Mattel, Inc.	84-8-01164	Item 737.22 16.8% or 16.1% or Item 737.24 14.8% for base stands and leg holders classified as an entirety with dolls withwhich they were imported	Item A774.55 Free of duty pursuant to GSP Item 774.55 8.1% for merchandise imported from January 1 to March 29, 1980 from the Republic of China (Taiwan)	Mattel, Inc. v. U.S. 8 CIT—, Slip Op. 84-133 (1984)	New York Base stands and leg holders

C86/19	Carman, J. February 20, 1986	Panasonic Co.	84-3-00312	Item 687.43 15%, 14%, or 13.1%	Item 687.60 or 687.54 6%	Agreed statement of facts	Seattle Monochrome cathode ray tubes
C86/20	Carman, J. February 20, 1986	Torrington Co.	81-3-00313, etc.	Item 672.20 37¢ per thousand plus 10% or 32¢ per thousand plus 9.5%	Item A672.20 Free of duty pursuant to GSP	Torrington Co., 764 F.2d 1563 (Fed. Cir. 1985)	Hartford Sewing machine needles

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/7	Carman, J. February 12, 1986	The De Laval Separator Co.	80-1-00166	Export value	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Miscellaneous items
V86/8	Carman, J. February 12, 1986	The De Laval Separator Co.	80-9-01539	Export value	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Detroit Bulk milk coolers or farm tanks
V86/9	Carman, J. February 18, 1986	The De Laval Separator Co.	80-9-01533	Export value	Represented by invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Buffalo Miscellaneous items
V86/10	Watson, J. February 19, 1986	Nipkow & Kobelt Inc.	R58/4878, etc.	Export value	F.O.B. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics, etc.

Appeals to the U.S. Court of Appeals for the Federal Circuit

NEC Corp. v. United States, 9 CIT —, Slip Op. 86-5 (Jan. 10, 1986), *appeal docketed,* No. 86-912 (Fed. Cir. Feb. 10, 1986).

NEC Corp. v. United States, 9 CIT —, Slip Op. 85-116 (Nov. 19, 1985), *appeal docketed,* No. 86-922 (Fed. Cir. Feb. 13, 1986).

Asta Designs, Inc. v. United States, 9 CIT —, Slip Op. 86-6 (Jan. 10, 1986), *appeal docketed,* No. 86-929 (Fed. Cir. Feb. 18, 1986).

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 6 and 162

(T.D. 86-59)

Customs Regulations Amendments Relating to Penalties for Failure to Manifest Narcotics or Marihuana

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to clarify that the $500 penalty amount set forth for failure to manifest merchandise found aboard or unladen from aircraft does not apply to such violations involving narcotics or marihuana. The penalty amount for failure to manifest these substances is that provided for in 19 U.S.C. 1584, for failure to manifest narcotics or marihuana. This section is made applicable to aircraft by 19 U.S.C. 1431(b) and 1644. This action is necessary in order to avoid any confusion as to the penalties applicable to non-manifesting violations involving narcotics or marihuana.

EFFECTIVE DATE: March 12, 1986.

FOR FURTHER INFORMATION CONTACT: Stuart P. Seidel, Office of Chief Counsel (202-566-2482), U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Sections 6.7 and 6.11, Customs Regulations (19 CFR 6.7, 6.11), provide for civil penalties of $500 for failure to manifest merchandise carried by aircraft and other violations of the Customs laws and regulations respecting aircraft. Section 162.72(b), Customs Regulations (19 CFR 162.72(b)), provides for an identical penalty for failure to manifest merchandise found aboard or unladen from an aircraft, and a $10,000 or domestic value of merchandise penalty for unmanifested merchandise found aboard or unladen from a vessel or vehicle. Section 162.65(b), Customs Regulations (19 CFR 162.65(b)), states that the penalties applicable to violations involv-

ing unmanifested narcotic drugs found aboard or unladen from a vessel or vehicle are those prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584). Since these penalties are based upon a flat rate of $10, $25, or $50 (depending upon the nature of the controlled substance found), times the number of ounces of the controlled substance, they are often greatly in excess of $500.

Customs routinely assesses penalties under 19 U.S.C. 1584 for failure to manifest narcotics and marihuana found aboard or unladen from aircraft. However, persons and some air carriers have alleged that, as written, the Customs Regulations do not permit penalties in excess of $500 for failure to manifest violations involving aircraft, regardless of the nature of the non-manifested merchandise. These parties maintain that §§ 6.7(h)(5) and 6.11, as well as § 162.72(b), mandate $500 penalties for all manifest discrepancy violations involving merchandise carried by aricraft.

We do not agree with these allegations. However, in order to remove any ambiguity and to preclude any misunderstanding that the $500 manifest discrepancy penalties are not applicable to violations involving narcotics or marihuana, we are amending §§ 6.7, 6.11, and 162.72(b), Customs Regulations, to make it clear that manifest discrepancy violations involving narcotics or marihuana are covered by the specific penalty provisions of 19 U.S.C. 1584. We are also amending §§ 162.65 (b) and (e), Customs Regulations, to include marihuana among the substances for which failure to manifest would result in a penalty under the provisions of 19 U.S.C. 1584, and to include aircraft among the conveyances which may be involved in a failure to manifest violation. The penalty provisions of 19 U.S.C. 1584 were made applicable to aircraft by §§ 431(b) and 644, Tariff Act of 1930, as amended (19 U.S.C. 1431(b), 1644).

Other minor non-substantive amendments to Parts 6 and 162, Customs Regulations, are also made to update the regulations and to conform them to the other changes.

Inapplicability of Public Notice and Delayed Effective Date Provisions

Inasmuch as these are minor amendments which merely clarify existing statutes and regulations, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary, and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Executive Order 12291

Because this document will not result in a "major rule" as defined by E.O. 12291, the regulatory analysis and review prescribed by the E.O. is not required.

Regulatory Flexibility Act

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). That Act does not apply to any regulations, such as these, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

Drafting Information

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Lists of Subjects in 19 CFR Parts 6 and 162

Customs duties and inspection, Air carriers, Administrative practice and procedures, Law enforcement, Penalties.

Amendments to the Regulations

Part 6, Customs Regulations (19 CFR Part 6), is amended as set forth below.

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624, 49 U.S.C. 1474, 1509; § 6.2 also issued under 19 U.S.C. 1322, 1448, 1450, 1451, 1644; § 6.6 also issued under 19 U.S.C. 1431; § 6.7 also issued under 19 U.S.C. 1431 and 1644; § 6.8 also issued under 19 U.S.C. 1644, 46 U.S.C. 91, 92; § 6.10 also issued under 19 U.S.C. 1644; § 6.11 also issued under 19 U.S.C. 1431; § 6.17 also issued under 19 U.S.C. 1551, 1552, 1553; §§ 6.18 and 6.20 also issued under 19 U.S.C. 1552, 1553.

2. The first sentence of § 6.7(h)(5) is amended by inserting, after the phrase "under § 584, Tariff Act of 1930, as amended", a parenthetical reference to "(19 U.S.C. 1584)", and by inserting, after the word "overage", the phrase "other than narcotics or marihuana (see § 162.65 of this chapter),".

3. Section 6.10 is amended by removing the word "part" and by inserting, in its place, the word "chapter".

4. The first sentence of § 6.11 is amended by inserting, after the amount "$500," the phrase "except for failure to manifest narcotics or marihuana in which case the penalties set forth in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584) apply,".

5. Section 6.11 is further amended by inserting, in the second sentence, after the phrase "§ 466, Tariff Act of 1930, as amended," a parenthetical reference to "(19 U.S.C. 1466)".

Part 162, Customs Regulations (19 CFR Part 162), is amended as set forth below.

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for Part 162 is revised to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624; § 162.32 also issued under 19 U.S.C. 1603, 1610; § 162.44 also issued under 19 U.S.C. 1614; § 162.46 also issued under 19 U.S.C. 1609, 1611; §§ 162.65 and 162.72 also issued under 19 U.S.C. 1431(b) and 19 U.S.C. 1644.

2. Section 162.65 is amended by revising the heading to paragraph (b), and the text of paragraphs (b), (d), and (e), to read as follows:

§ 162.65 Penalties for failure to manifest narcotic drugs or marihuana.

* * * * * * *

(b) *Unmanifested narcotic drugs or marihuana.* When an unmanifested narcotic drug or marihuana is found on board of, or after having been unladen from, a vessel, vehicle, or aircraft, the penalties prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), shall be assessed. The penalty shall be applied without exception and without regard to any question of negligence or responsibility.

(c) * * *

(d) *Referral to the U.S. attorney.* If the penalty incurred under § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), is not paid, or a petition is not filed as provided in Part 171 of this chapter, or if payment is not made in accordance with the decision on a petition or a supplemental petition, the district director, after required collection action, shall refer the case to the U.S. attorney.

(e) *Withholding clearance of vessel.* Where a penalty has been incurred under § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), for failure to manifest narcotic drugs or marihuana, clearance of the vessel involved shall be withheld until the penalty is paid or a bond satisfactory to the district director is given for the payment thereof unless

(1) The narcotics or marihuana were discovered in a passenger's baggage and the district director is satisfied that neither the master nor any of the officers nor the owner of the vessel knew or had any reason to know or suspect that the narcotics or marihuana had been on board the vessel, or

(2) Prior authority for the clearance without payment of the penalty or the furnishing of the bond is obtained from Customs.

3. Section 162.72(b)(3)(ii) is revised to read as follows:

§ 162.72 Penalties and forfeitures under §§ 466 and 584(a)(1), Tariff Act of 1930, as amended.

* * * * * * *

(b) * * *

(3)(i) * * *

(ii) A penalty of $500 (see § 6.11 of this chapter) if merchandise (other than narcotics or marihuana—see § 162.65 of this chapter) is found on board of or after having been unladen from an aircraft—if the merchandise is not included or described in the manifest or does not agree with the manifest (an "overage").

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 24, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 12, 1986 (51 FR 8488)]

(T.D. 86-60)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
February 3, 1986	$0.006793
February 4, 1986	.006743
February 5, 1986	.006807
February 6, 1986	.006840
February 7, 1986	.006789
Israel shekel:	
February 3-7, 1986	N/A
South Korea won:	
February 3-6, 1986	.001123
February 7, 1986	.001124
Taiwan N.T. dollar:	
February 3, 1986	.025413
February 4, 1986	.025394

February 5, 1986	.025013
February 6, 1986	.025407
February 7, 1986	.025413

(LIQ-03-01 S:COM CIE)

Dated: February 7, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-61)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
February 10, 1986	$0.006840
February 11, 1986	.006859
February 12, 1986	.006899
February 13, 1986	.006897
February 14, 1986	.006925
Israel shekel:	
February 10-14, 1986	N/A
South Korea won:	
February 10-12, 1986	.001124
February 13-14, 1986	.001125
Taiwan N.T. dollar:	
February 10, 1986	.025426
February 11-12, 1986	N/A
February 13, 1986	.025439
February 14, 1986	.025452

(LIQ-03-01 S:COM CIE)

Dated: February 14, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-62)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

February 17, 1986: holiday.

Greece drachma:	
February 18, 1986	$0.006957
February 19, 1986	.007047
February 20, 1986	.007062
February 21, 1986	.007052
Israel shekel:	
February 18-21, 1986	N/A
South Korea won:	
February 18, 1986	.001127
February 19, 1986	.001126
February 20-21, 1986	.001127
Taiwan N.T. dollar:	
February 18, 1986	.025491
February 19, 1986	.025504
February 20, 1986	.025523
February 21, 1986	.025543

(LIQ-03-01 S:COM CIE)

Dated: February 21, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-63)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others con-

cerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
February 24, 1986	$0.007077
February 25, 1986	.007184
February 26, 1986	.007231
February 27, 1986	.007257
February 28, 1986	.007231
Israel shekel:	
February 24–28, 1986	N/A
South Korea won:	
February 24–25, 1986	.001127
February 26–27, 1986	.001128
February 28, 1986	.001129
Taiwan N.T. dollar:	
February 24, 1986	.025641
February 25, 1986	N/A
February 26, 1986	.025602
February 27, 1986	.025575
February 28, 1986	.025549

(LIQ–03–01 S:COM CIE)

Dated: February 28, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–64)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
February 3, 1986	$0.000082
February 4, 1986	.000081
February 5, 1986	.000080

February 6, 1986	.000080
February 7, 1986	.000079
New Zealand dollar:	
February 3, 1986	.53350
February 5, 1986	.53100
February 6, 1986	.53300
February 7, 1986	.53200
Republic of South Africa rand:	
February 3, 1986	.44500
February 4, 1986	.45300
February 5, 1986	.45500
February 6, 1986	.46500
February 7, 1986	.46750
United Kingdom pound:	
February 4, 1986	1.3770

(LIQ-03-01 S:COM CIE)

Dated: February 7, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-65)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
February 10-12, 1986	$0.000079
February 13, 1986	.000078
February 14, 1986	.000077
Japan yen:	
February 10, 1986	.005315
February 11, 1986	.005335
February 12, 1986	.005356
February 13, 1986	.005485
February 14, 1986	.005495

New Zealand dollar:	
February 10, 1986	.54150
February 11, 1986	.54250
February 12, 1986	.54400
February 13, 1986	.53420
February 14, 1986	.53600
Republic of South Africa rand:	
February 10, 1986	.45600
February 11, 1986	.46400
February 12, 1986	.46800
February 13, 1986	.47250
February 14, 1986	.47650
Switzerland franc:	
February 13, 1986	.514007
February 14, 1986	.514139

(LIQ-03-01 S:COM CIE)

Dated: February 14, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-66)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

February 17, 1986: holiday.

Austria schilling:	
February 19, 1986	$0.061996
February 20, 1986	.061728
February 21, 1986	.061690
Belgium franc:	
February 19, 1986	.021142
February 20, 1986	.021173
February 21, 1986	.021164

Brazil cruzeiro:	
February 18, 1986	.000077
February 19, 1986	.000076
February 20–21, 1986	.000075
France franc:	
February 19, 1986	.141044
February 20, 1986	.141133
February 21, 1986	.140994
Germany deutsche mark:	
February 19, 1986	.433463
February 20, 1986	.433369
February 21, 1986	.433088
Ireland pound:	
February 19, 1986	1.3100
February 20, 1986	1.3105
February 21, 1986	1.3085
Italy lira:	
February 19, 1986	.000637
February 20, 1986	.000637
February 21, 1986	.000636
Japan yen:	
February 18, 1986	.005523
February 19, 1986	.005574
February 20, 1986	.005522
February 21, 1986	.005465
Netherlands guilder:	
February 19, 1986	.383730
February 20, 1986	.383583
February 21, 1986	.383289
New Zealand dollar:	
February 18, 1986	.54080
February 19, 1986	.53950
February 20, 1986	.53050
Portugal escudo:	
February 19, 1986	.006658
Republic of South Africa rand:	
February 18, 1986	.48350
February 19, 1986	.49400
February 20, 1986	.49250
February 21, 1986	.49750
Spain peseta:	
February 19, 1986	.006906
February 20, 1986	.006887
February 21, 1986	.006866

Switzerland franc:	
February 18, 1986	.515730
February 19, 1986	.524109
February 20, 1986	.520833
February 21, 1986	.517331

(LIQ-03-01 S:COM CIE)

Dated: February 21, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-67)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
February 24, 1986	$0.062305
February 25, 1986	.063371
February 26, 1986	.063816
February 27, 1986	.064061
February 28, 1986	.063776
Belgium franc:	
February 24, 1986	.021363
February 25, 1986	.021734
February 26, 1986	.021925
February 27, 1986	.021964
February 28, 1986	.021834
Brazil cruzeiro:	
February 24-25, 1986	.000074
February 26-27, 1986	.000073
February 28, 1986	.000072
Denmark krone:	
February 24, 1986	.118448
February 25, 1986	.120482
February 26, 1986	.121344
February 27, 1986	.122100
February 28, 1986	.121212

Finland markka:	
February 25, 1986	.196618
February 26, 1986	.197336
February 27, 1986	.198708
February 28, 1986	.196078
France franc:	
February 24, 1986	.142552
February 25, 1986	.144823
February 26, 1986	.145985
February 27, 1986	.146413
February 28, 1986	.145656
Germany deutsche mark:	
February 24, 1986	.438116
February 25, 1986	.445434
February 26, 1986	.448934
February 27, 1986	.450045
February 28, 1986	.448270
Ireland pound:	
February 24, 1986	1.3225
February 25, 1986	1.3460
February 26, 1986	1.3560
February 27, 1986	1.3610
February 28, 1986	1.3535
Italy lira:	
February 24, 1986	.000643
February 25, 1986	.000654
February 26–27, 1986	.000659
February 28, 1986	.000657
Japan yen:	
February 24, 1986	.005490
February 25, 1986	.005526
February 26, 1986	.005520
February 27, 1986	.005551
February 28, 1986	.005539
Netherlands guilder:	
February 24, 1986	.387222
February 25, 1986	.393468
February 26, 1986	.397377
February 27, 1986	.398010
February 28, 1986	.397062
New Zealand dollar:	
February 25, 1986	.52850
February 26, 1986	.53020
Norway krone:	
February 24, 1986	.139801
February 25, 1986	.142298
February 26, 1986	.143308
February 27, 1986	.143472
February 28, 1986	.142197

Portugal escudo:	
February 24, 1986	.006662
February 25, 1986	.006739
February 26, 1986	.006780
February 27, 1986	.006807
February 28, 1986	.006775
Republic of South Africa rand:	
February 24, 1986	.50050
February 25, 1986	.50550
February 26, 1986	.50430
February 27, 1986	.50400
February 28, 1986	.50350
Singapore dollar:	
February 28, 1986	N/A
Spain peseta:	
February 24, 1986	.006944
February 25, 1986	.007062
February 26, 1986	.006989
February 27, 1986	.007121
Sweden krona:	
February 25, 1986	.138812
February 26, 1986	.139421
February 27, 1986	.139762
February 28, 1986	.138879
Switzerland franc:	
February 24, 1986	.525762
February 25, 1986	.530363
February 26, 1986	.531773
February 27, 1986	.533333
February 28, 1986	.529661

(LIQ-03-01 S:COM CIE)

Dated: February 28, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

[The following document, T.D. 86-16, was originally published in CUSTOMS BULLETIN, Vol. 20, No. 7, dated February 19, 1986, on pages 8 through 84, is being reprinted because of typographical errors.]

19 CFR Parts 18, 24, 112, 113, 141, 144, 146, 178, and 191

(T.D. 86-16)

Foreign Trade Zones; Specialized and General Provisions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document revises Customs Regulations relating to foreign trade zones to provide a new audit-inspection method of zone supervision by Customs. A foreign trade zone is a defined area, considered to be outside the Customs territory of the U.S., where certain lawful activities can be conducted with a minimum of formalities. A zone provides a site at or adjacent to a Customs port of entry where operations involving foreign merchandise can take place, which otherwise might have been done abroad for tariff and trade reasons. The revision sets forth the general provisions applicable to the administration of all zones and other specialized provisions applicable to subzones and zone sites. In addition, changes in the language of the regulations will clarify some provisions, eliminate inconsistencies, and conform the regulations to current administrative practices.

EFFECTIVE DATE: May 12, 1986.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: John Holl, (202-566-8151);

Inventory Control and Recordkeeping System Aspect: Marcus Sircus, (202-566-2812);

Appraisement and Valuation Aspect: Myles Flynn, (202-535-4134);

Liquidated Damages, Penalty and Suspension Aspect: William Lawlor, (202-566-5856);

Economic Aspect: Daniel Norman, (202-535-4138).

All of the above Customs personnel are located at: U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In 1934, Congress enacted the Foreign-Trade Zones Act to expedite and encourage foreign commerce. The Act created domestic foreign trade zones and was designed to stimulate international trade and create jobs in the U.S. At that time, zones were envisioned as storage, manipulation, and transshipment (exportation) centers. In 1950, an amendment to the Act was passed, authorizing manufacturing and exhibition inside zones. Foreign trade zones

(zones) are areas within the U.S. (but outside the "Customs territory of the U.S.," as defined in § 101.1(e), Customs Regulations (19 CFR 101.1(e)), where foreign or domestic merchandise may be brought for manipulation, manufacture, assembly or other processing, or for storage or exhibition, provided that these operations are not otherwise prohibited by law. Foreign merchandise may be brought into a zone without being subject to the usual Customs entry procedures and payment of duty. Foreign or domestic merchandise may be exported or entered into the Customs territory from a zone. Quota restrictions do not normally apply to foreign merchandise in a zone. Merchandise moved to a zone for export may be considered exported upon its admission to a zone for purposes of excise tax rebates and drawback.

Zones are established under the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a–81u), and the general regulations and rules of procedure of the Foreign-Trade Zones Board (the Board), Department of Commerce (15 CFR Part 400). Part 146, Customs Regulations (19 CFR Part 146), governs the admission of merchandise into a zone; the manipulation, manufacture, destruction, or exhibition in a zone; the exportation of merchandise from a zone; and the transfer of merchandise from a zone into the Customs territory.

Typically, a foreign trade zone is a fenced-in area with a general warehouse type building or buildings and access to all modes of transportation. Space is available for leasing to firms for authorized zone activity. Some zones have industrial park characteristics or are located within such facilities and have lots on which zone users can construct their own facilities. Subzones are locations authorized by the Board through zone grantees for operations by individual firms when zone procedures are vital for an operation that is in the public interest but cannot be accommodated within an existing zone.

Between 1934 and 1970, just 12 zones were approved by the Board. At this time, there are 109 general purpose zones and 60 subzones. It has been estimated that the volume of business in zones has multiplied substantially from 1970 to the present with zones now handling about $4.8 billion worth of merchandise each year.

As can be appreciated from the foregoing, the number of zones and the operations conducted therein have increased tremendously in recent years. Historically, Customs has administered zones and their operations by the physical presence of Customs officers at the various zone locations. However, as time has passed, Customs staffing available to supervise zones has declined while zones have continued to proliferate. This has resulted in delays in the approval of activation of a given zone, and has presented problems for Customs in the exercise of effective control over some zone operations, especially subzone manufacturing activities. Therefore, Customs undertook an effort to devise a method to reduce Customs staffing requirements in zones and other areas (notably bonded warehouses)

without endangering the revenue or law enforcement priorities, while also not hampering the growth of those areas and not impeding commerce.

The audit-inspection program approach to administration of those areas of Customs responsibility, which de-emphasizes the physical presence of a Customs officer to supervise each transaction, was successfully implemented in regard to the operation of bonded warehouses (see T.D. 82-204, published in the Federal Register on November 1, 1982 (47 FR 49355)). Audit-inspection is a method of supervision based on spot checks and audits of foreign trade zone activities as represented in records maintained by the zone operator. This method is substituted in lieu of physical on-site supervision by Customs when merchandise is admitted to, transferred from, or processed in the zone.

The principal advantage for Customs of audit-inspection is that it requires fewer Customs personnel to administer the zones. The principal advantages for the importing community are that (1) merchandise may be admitted, transferred, or processed without a Customs officer being present, allowing increased flexibility in zone operations, and (2) for most zones, the reimbursable cost paid to Customs is reduced. Audit-inspection is based on several procedures, which are essential for its proper functioning and success. These procedures are:

1. The determination by Customs of the identity and nature of the merchandise through examination before or upon admission to the zone so that the initial responsibility of the operator for the merchandise can be determined.
2. The issuance of a prior permit by Customs to the zone operator for admission, transfer to the Customs territory, and processing in the zone.
3. The assumption by the zone operator of responsibility for the merchandise, maintaining records concerning the merchandise, and physical supervision of the zone. Quantities of merchandise received at the zone and transferred to the Customs territory are determined jointly by the zone operator and the carrier.
4. The performance by Customs of spot checks and audits to determine whether the zone operator is properly supervising the zone and maintaining records of the merchandise. The cost of the spot checks and audits is reimbursed to Customs through an annual fee charged the zone operator for this service.
5. The assessment of liquidated damages in an amount sufficient to ensure performance of the operator's duties and responsibilities under the rules and regulations needed for proper zone supervision and recordkeeping.
6. The temporary suspension by Customs of zone operations which do not comply with the rules and regulations.

It is noted that Customs initiated use of the audit-inspection method in August 1983, on the basis of voluntary agreements be-

tween Customs and zone operators. At present, 12 subzones and 6 general-purpose zones have entered into voluntary agreements to use the audit-inspection method to administer their operations. Customs has taken that limited experience under the zone audit-inspection method into account in preparing this revision.

To implement the audit-inspection method of supervision in foreign-trade zones, it is necessary to substantially revise Part 146, Customs Regulations (19 CFR Part 146), concerning the administration of foreign trade zones, and to revise to a much lesser extent, Parts 18, 24, 112, 113, 141, 144, 178 and 191, to conform them to changes made by the revision to Part 146. Accordingly, by notice published in the Federal Register on July 17, 1984 (49 FR 28855), an extensive revision of Part 146 and minor conforming revisions of Parts 18, 24, 112, 141, 144 and 191 were proposed. A detailed discussion of the proposed amendments to Part 146 can be found on pages 28856–28859 of the notice.

Interested parties were given until October 15, 1984, to submit written comments. However, by notice published in the Federal Register on September 11, 1984 (49 FR 35658), the comment period was extended to November 30, 1984, as an accommodation to the National Association of Foreign-Trade Zones. Approximately 150 comments were received in response to the notice. A discussion of the comments and our responses to the comments follow.

Discussion of Comments

Most of the commenters commend efforts to improve the regulations. However, many of them have complaints about several provisions of the proposal. Many commenters question the reasonableness of the proposed fees, penalties and liquidated damages provisions. They also allege that the proposal is inconsistent with genrally accepted accounting principles and the Foreign-Trade Zones Act, and that it could impede the flow of commerce. Commenters further complained that the proposed regulations do not provide an orderly transition to the new audit-inspection system and that they were unduly complex and restrictive. Specific comments and our responses are as follows:

Comment: Under the proposed regulations, Customs would treat merchandise destined for a zone as imported and subject to examination prior to admission to the zone, unless a subzone or zone site qualifies under special procedures for exemption from the prior examination requirement. This treatment of zone-destined merchandise may impede or delay shipments.

Response: We disagree. Merchandise which is destined for a zone is imported, within the meaning of § 101.1(h), Customs Regulations. Under § 499, Tariff Act of 1930, as amended (19 U.S.C. 1499), imported merchandise is subject to examination in Customs territory. Therefore, examination of zone-destined merchandise is already provided for under the law. The frequency and intensity of these

examinations, however, will be reduced by selective examination procedures. Also, only occasional examinations will be necessary at certain subzones and zone sites because shipments to these sites are repetitive, liability for violations is known in advance, and elaborate audit trails for checking for diversions of the merchandise exist.

Comment: The proposed regulations do not clearly distinguish between physical and record identification of merchandise. The two systems cannot work together. Record identification is the only viable system under the proposed revision.

Response: We disagree, The physical and record systems of identifying merchandise are compatible. Under the specific identification system, the zone operator maintains a zone lot control system, physically segregating his merchandise by zone lots and controlling identification of merchandise by zone lot records from admission through final zone removal. Under the record identification system, the merchandise is identified by inventory records, using a Customs-approved inventory method, *e.g.*, the first-in, first-out method (FIFO). Both methods require a reconciliation, at least annually, of physical merchandise on hand to quantities reflected by the Customs-approved inventory method. Any discrepancies would require corrective action by the operator.

The physical identification of merchandise is required to ensure reliability of admissions, inventory record accuracy, and proper zone status requests, among other things. For these reasons, it is retained in the regulations.

Comment: The proposal provides no mechanism or guidance for transition to the audit-inspection method of supervision. Serious consideration should be given to grandfathering in some zones or allowing them sufficient time to change over to the new method.

Response: We disagree. Allowing some zone operations to be grandfathered in, *i.e.*, granted an exemption from the new foreign trade zone regulations, is not feasible because it would result in the perpetuation of different sets of rules for some zones. The intent of the proposed regulations is that one set of rules should govern all zone operations.

The regulatory changes will become effective as a final rule 90 days from the date of publication, except that zones with Alternative Inventory Control Systems (AICS) will have either 180 days after the publication date or to the end of their current business year to comply with the new recordkeeping regulations. This 90-day period, instead of the 30-day period ordinarily granted, will allow zone operators a sufficient period of time for bringing their inventory system into compliance with the new regulations.

Zones under the AICS are different from other zones in that the record of inventory is maintained by the zone grantee or operator, or by the individual zone firms or their agents, under the supervision of the grantee or operator, rather than by Customs. The zone

grantee or operator is responsible for the posting of inventory ledgers, the supervision of individual zone firms which maintain their own inventory records, the correction of inventory discrepancies, the conducting of periodic selective inventories of open lots of all zone firms, and various additional tasks which require time and other resources to handle the paperwork associated with these tasks. Because of the complexity of operating this type of inventory control system, these zones will require more time than non-AICS zones to convert to the audit-inspection supervision system under the new regulations. For this reason zones under AICS will be given either 180 days from the date of publication of the new regulations or to the end of their business year to bring their inventory system into compliance with the new regulations. However, they will be subject to the 90-day period for bringing all other aspects of their zone operations into compliance with the new regulations.

Conversion to audit-inspection supervision under the new regulations will occur as follows:

All zone operators, except as noted below, will furnish a certification that their inventory control and recordkeeping system complies with the new regulations, a procedures manual, the date of the end of their business year, and the annual fee on or before the date the new regulations take effect, and the prescribed zone operator's bond. If these requirements are not complied with by the effective date, no further merchandise will be admitted to the zone and the activated status of the zone may be suspended.

In addition, the following actions will be taken with respect to specific zones:

(a) *Zones where Customs has maintained inventory records.* Customs will provide a listing of inventory balances for all lots in the zone on the effective date. The operator will have 30 days to review the lot balances, conduct a physical inventory, and resolve any differences with Customs. On or before the end of the 30-day period, the operator will sign to accept the lot balances as reflecting the inventory on hand on the effective date, with such adjustments as are mutually agreed to between the operator and the district director.

(b) *Zones with voluntary audit-inspection agreements.* Zone operators will have the option of conducting a physical inventory before the effective date and certifying as to specific quantities of merchandise for which they are responsible on the effective date. Otherwise, they will be held responsible for losses and overages unless they can clearly show, with competent evidence, that the losses and/or overages occurred before the effective date.

(c) *Zones with alternative inventory control systems.* Zone operators may request postponement of the procedures manual and certification requirements until one of the following dates:

(i) 90 days after the effective date of the new regulations; or

(ii) end of their current business year.

With respect to paragraph (c), the district director may approve the request for a postponement if he is satisfied that the postponement is necessary for the conversion of the operator's recordkeeping system to comply with the requirements of Subpart B, Part 146, Customs Regulations. During the interim before the procedures manual and certification are received, the operator will be allowed to maintain the inventory and recordkeeping system as agreed under the AICS, and he need not meet the requirements of Subpart B. However, the operator must meet and follow all the other requirements of the new regulations upon their effective date. The same physical inventory option will be available for zones with an AICS as for zones with a voluntary audit-inspection agreement. If that option is not exercised, any losses or overages found after the effective date will be considered to have occurred after the effective date, unless the operator can clearly show, with competent evidence, that the losses and/or overages occurred before the effective date.

Comment: The proposed regulations are inconsistent with generally accepted accounting principles as well as modern business practices.

Response: The commenters do not point to any specific instance of inconsistency. However, we do not that Customs method of identifying merchandise by the first-in, first-out (FIFO) method does not conform to generally accepted accounting principles (GAPP) under which FIFO is used to determine the value of goods in an ending inventory. Customs use of FIFO to indentify merchandise expedites the movement of goods in and out of zones. It is used as an alternative to specific identification of merchandise.

Comment: While the proposed regulations provide for the removal of Customs officers from zones, there are no provisions detailing the methods and the time restraints for transmitting data and documents to Customs, particularly when a zone is remote from a Customs office. There should be a variety of mechanisms to transmit data and documents to expedite zone operations.

Response: We disagree. The regulations need not specify the method of transmittal. Many methods of transmittal, such as mail, messenger delivery, or electronic transmittal, can be accommodated so long as they can be administratively handled by Customs. There should be no problem with timely delivery of the required documentation to Customs on the part of any zone since, in order to be designated a foreign trade zone, it must be in or adjacent to a port of entry.

There are specific provisions for the timing of the transmittal and receipt of documentation by Customs from zone operators, such as in § 146.40(a) and (b), and wherever else specific provisions are necessary. In the absence of any stated provisions, documentation

must be received by Customs before a permit to admit, handle or transfer merchandise can be issued.

Comment: The regulations should include a provision allowing merchandise to be temporarily removed from a zone for repair, restoration, or incidental operations and then returned to the zone.

Response: Customs has been testing such a proposal with, as yet, inconclusive results. If the test has favorable results, the procedure will be implemented on a permanent basis through a separate rulemaking proceeding.

Comment: One commenter states that Customs should not extend its concept of adjacency, in respect to subzones, beyond 35 miles from a port. Other commenters believe that subzones that are distant from ports should not be required to deliver merchandise and documentation to Customs, as is required in proposed § 146.15(a).

Response: The adjacency concept, and its application to subzones which are 35 miles from a port, is under review in a separate rulemaking proceeding at the Department of Commerce. Since this entire issue is under review, proposed § 146.15 is premature. Accordingly, it has been deleted from the final regulations.

Comment: Several commenters believe that the proposed regulations are too complicated, impose unnecessary requirements, and make zones less manageable.

Response: We have simplified the proposed regulations and removed certain requirements. The regulations, as revised, impose minimum requirements for recordkeeping and inventory systems, which zone operators are free to supplement so as to meet their own recordkeeping and inventory control requirements. The requirements for recordkeeping are similar to those any conscientious businessman would adhere to in the supervision of his business. The revised regulations make zones more, not less, manageable. They also allow Customs to carry out its mission of protecting U.S. revenue and enforcing importation laws and regulations more efficiently.

Comment: Many commenters criticize the criteria under proposed § 146.14 for allowing domestic status merchandise to be admitted to a zone without a prior application and permit for each shipment. They believe the criteria are too stringent, particularly those involving commercially identical merchandise and merchandise which has been combined so that it has lost its identity.

Response: We agree with these comments. Therefore, proposed § 146.14 is deleted. The subject matter of § 146.14 is transferred to § 146.43, which is further amended to specify that no prior permit will be required for the admission, handling, or transfer to Customs territory of domestic status merchandise except (1) when mixed or combined with merchandise of another zone status, or (2) when so ordered by the Commissioner of Customs under certain circumstances. This latter authority on the Commissioner's part allows Customs to properly control domestic status merchandise in unusu-

al circumstances. The zone operator must still maintain proper inventory records of domestic status merchandise as prescribed in Subpart B, Part 146, Customs Regulations, even if no permit is required.

Comments: Several commenters inquire as to the authority for Customs allowing activation of a zone under § 146.6. They also question whether this allowance is not more appropriately within the authority of either the Board or the zone grantee.

Response: Authority for Customs approval of activation of zones is found in the individual grants to the zones and subzones, as well as the Act itself. The grants contain provisions to the effect that operations at the zone shall not commence until the grantee obtains all the necessary permits from Federal authorities, and that the grant is subject to an agreement between the grantee and Customs regarding compliance with requirements for the protection of the revenue.

Section 15(b) of the Foreign-Trade Zones Act (19 U.S.C. 81o(b)) gives the Secretary of the Treasury broad authority to approve regulations for the protection of the revenue under the Act, while § 9 (19 U.S.C. § 81(i)) directed the Board to cooperate with Customs. The activation procedure is the method which Customs has chosen for protecting the revenue. Through this procedure Customs is assured that the zone is ready to receive merchandise in zone status.

Comment: Section 146.65 creates a new valuation concept, *i.e.*, "total zone value." There are a substantial number of Customs rulings dealing with zone valuation issues. These rulings should serve as the proper guidance for Customs position on this issue.

Response: "Total zone value" may be a new regulatory term, but it is not a novel regulatory concept. It is the value provided for by current § 146.48(e). Its significance relates to the valuation of recoverable waste or scrap from a zone operation and situations where the rate of duty applicable to nonprivileged foreign merchandise is dependent on the value of the article being transferred from a zone. Section 146.65 therefore, accurately reflects the current Customs position on zone valuation matters.

Comment: Many commenters are concerned with proposed § 146.8, which authorizes the zone operator to affix and break Customs in-bond seals. Heretofore, only Customs officers could affix and break Customs in-bond seals.

Response: Since under the audit-inspection approach a Customs officer will no longer be physically present in most cases, it is necessary that the zone operator be given authority in certain areas to perform functions that were previously conducted by Customs. One of these is the authority to affix and break in-bond seals. Under the new regulation, the zone operator will report to Customs any discrepancies in seal condition. This will protect the zone operator from liability when it is determined that the loss of merchandise occurred prior to arrival of the merchandise at the zone site.

Comment: Special procedures for admitting and removing zone merchandise limited to subzones and zone sites should be extended to general-purpose zones. Also, the criteria for admittance and removal are too stringent for most zones.

Response: We disagree. The audit-inspection requirement is that a permit is required before admission to a zone or transfer to Customs territory. The purpose of proposed § 146.13 is to exempt shipments from this prior permit requirement only when they are repetitive, predictable, and relatively unchanging over a period of time. The exemption was intended to be restrictive because of Customs experience that a major portion of trade destined for zones is non-repetitive and difficult to predict.

In response to the comments on this subject, however, Customs has made a number of changes in the special procedures. First, the criteria for direct delivery are moved to § 146.39 since they are applicable only to merchandise being admitted to a zone, and § 146.13 is deleted.

Secondly, the criteria for direct delivery as they appear in § 146.39 have been simplified. There is now no requirement for direct transmittal of statistical information to the Bureau of the Census. Also, the criteria have been grouped according to those that apply to merchandise and those that apply to the operator. The specific restriction of the direct delivery procedure to subzones and zone sites has been limited. However, we believe that most general-purpose zones will not qualify for the procedure because the zone operator is not the owner or purchaser of the merchandise (as interpreted by Customs in Customs Directive 3530-02, dated November 6, 1984). The criteria for direct delivery ensure that not only are the shipments repetitive and relatively unchanging, but also that the zone operator is in a position to see that they remain so.

Finally, the criteria for direct delivery no longer apply to merchandise transferred from a zone for weekly entry or permit for consumption, transportation, or exportation under proposed §§ 146.63 and 146.69. Instead, the criteria for a weekly permit under the direct delivery procedure in these sections is whether the merchandise is manufactured or changed to its final form just shortly (within 24 hours) before physical transfer from the zone. These sections are necessary for assembly-line type operations where there otherwise would be little time for examination of the merchandise and furnishing of proper entry documentation after the merchandise is in its final form but before physical removal from the zone. By allowing a weekly entry based on an estimate of merchandise to be removed during the week, Customs has prior information as to merchandise to be removed and documentation to serve as the basis of physical examination of the merchandise. At the same time, the assembly-line operation need not be delayed

pending acceptance of an entry and Customs examination of the merchandise.

Comment: To qualify for many of the more liberal procedures, zones must provide statistical data directly to the Bureau of the Census instead of providing a statistical carbon copy of Customs Form 214–A, titled "Application For Foreign Trade Zone Admission And/Or Status Designation" to Customs. This may be very difficult for many zone users, and it abrogates the responsibility of Customs to collect statistics.

Responses: We disagree. Customs responsibility is to support the Census in collecting foreign trade statistics. In some instances, Census has allowed direct transmittal of statistics by zone importers, relieving Customs of the necessity of collecting a copy of Customs Form 214–A. Normally, collection of this form is very important to Census because it ensures that statistical information is collected on each and every shipment to a zone. Direct transmittal of statistics is permitted by Census only when it is satisfied through other means that each and every shipment will be covered by the direct transmittal.

Census has indicated that trade statistics need not be collected for domestic status merchandise admitted to a zone. Therefore, the criteria in proposed § 146.13(b)(1) is not needed. Also, Customs will not, except as ordered by the Commissioner, require a prior permit for the admission of domestic status merchandise to a zone.

Under proposed § 146.13(b), direct transmittal of statistical information to Census is necessary to qualify a zone importer for direct delivery of merchandise to a zone without a prior permit to admit merchandise. Section 146.40 requires importers to submit Customs Form 214 for merchandise recorded into the zone inventory and recordkeeping system the previous business day. The previous business day may not occur until several weeks after the merchandise is physically received in the zone. Census is concerned that statistical information on zone importations may not be reported timely.

To alleviate Census concern, yet reduce barriers to use of the direct delivery procedures by importers under § 146.40, Customs has decided to allow two alternatives to meeting Census statistical reporting requirements. The zone importer must either have a direct transmittal arrangement with Census or he must submit an individual Customs Form 214 and 241–A under § 146.40(c)(2) for each shipment, within 10 days after the end of the month in which the merchandise is physically received in the zone. No extension will be authorized to this statistical reporting requirement. The statistics for each shipment of merchandise to the U.S., including nationality of the shipping vessel or aircraft, date of exportation, and date of importation, must be reported separately.

These requirements are being incorporated into § 146.40 inasmuch as § 146.13 is deleted, as discussed above.

Comment: Many commenters object to proposed regulations concerning Customs examination and documentation requirements before or upon admission to zones. Specifically, the objections are that the examination required by the proposed regulations (1) is contrary to the Act; (2) would unreasonably delay the shipment of merchandise to zones; (3) reduces the advantages to using zones; and (4) would result in insufficient supervision for the proper enforcement of the foreign trade zone regulations. Commenters also state that examination should only be done in zones, that removal of Customs officers from zones would make it impossible to examine merchandise there, that commercial invoices are not usually available for presentation before or upon admission to a zone, further delaying shipments, and that merchandise admitted to a zone but destined only for exportation should not be examined by Customs.

Responses: We do not agree. Physical examination is a key principle of audit-inspection supervision because it enables Customs to determine the initial responsibility of the operator for the merchandise. Proper duty assessment and enforcement of admissibility requirements are also benefits of zone merchandise examination. The authority for such examinations is found in §§ 4, 8, and 15(b) of the Act (19 U.S.C. 81d, h, and o(b)), as well as in § 499 of the Tariff Act of 1930, as amended (19 U.S.C. 1499).

The purpose of providing a commercial invoice or similar documentation is to assist Customs in physical examination by disclosing the purported nature of the merchandise. It also aids in planning examinations under Customs selective examination procedures.

Furthermore, the proposed examination and documentation requirements do not unreasonably delay shipments to zones. First, under selective examination procedures, only about 20–30 percent of shipments are examined. Secondly, merchandise destined for zone sites under direct delivery procedures (§ 146.40) is examined even less frequently. Thirdly, if proper documentation is not available or is incomplete, the merchandise may be temporarily deposited in the zone, pending its receipt and Customs examination (§ 146.35).

Additionally, the examination and documentation requirements do not decrease the advantages of zones. First, there would not be unreasonable delays. Secondly, zone importers would not have to await the arrival of a Customs officer to physically supervise admission, as under the existing system. Thirdly, at worst the delays caused by examination and documentation requirements and those caused by awaiting the arrival of a Customs officer for physical supervision are equal. Zones will have very significant advantages conferred upon them under the Act.

As to the place of examination, we believe that this should be left to the discretion of the district director, so as to allow the most

efficient deployment of personnel to carry out Customs tasks. In many cases, examination can be done more quickly at the dock, where Customs officers may be stationed full time, rather than at a zone with no full-time Customs officers.

The main purpose of audit-inspection supervision is to replace the physical supervision of zones. It does not deal directly with Customs staffing of zones for examination or documentation purposes. If the workload of a zone is large enough to warrant assignment of an officer full-time to examine merchandise and review documentation, the district director may do so. If the zone workload is light and commitments to other segments of the import community heavy, it would be inefficient and unreasonable to assign a full-time officer to a zone. There is nothing in the Act or elsewhere that obliges Customs, in its deployment of personnel, to accord zones more favorable treatment than other segments of the importing community.

Audit-inspection supervision will not result in ineffective enforcement of U.S. laws and regulations in zones. Under this system, Customs does not abandon supervision; rather, it supervises in a different manner, relying on physical supervision and recordkeeping by zone operators, enforced through liquidated damages, penalites, and suspension procedures. Customs believes these deterrents will provide better enforcement than physical supervison.

As to merchandise with no invoice or an incomplete invoice, we note that this merchandise may be sent to a zone for temporary deposit. Customs will accept alternate documentation in lieu of a commercial invoice, providing the documentation provides a clear description of the nature of the merchandise. However, Customs experience has been that commercial invoices exist for most zone shipments.

Finally, with regard to merchandise destined only for exportation, this merchandise is subject to examination for identification purposes under audit-inspection supervision just as any other merchandises destined for zones.

Comment. Proposed § 146.73(d)(2) prohibits duty-paid merchandise from being futher processed in a zone. This provision is contrary to the Act and Customs Headquarters Ruling 215870. It therefore should be deleted.

Response: Whether or not the provision is contrary to Ruling 215870, the regulations take precedence. The prohibition against further processing of duty-paid merchandise is applicable only to merchandise previously in a zone, and not to all duty-paid merchandise.

The purpose of proposed § 146.73(d)(1) was to allow merchandise to remain in a zone after it had been constructively transferred to Customs territory and entered. It was intended to accommodate zone users who wished to make entry for a large amount of merchandise, but for various commercial reasons did not wish to imme-

diately remove all or some of the merchandise from the zone. The prohibition on further processing was intended to avoid abuse of this privilege by an assortment of schemes designed to circumvent high duty rates or import restrictions. Examples of such schemes are as follows:

1. Merchandise is entered for consumption at a duty rate of 5 percent. After entry the merchandise is retained in the zone, or it is removed but shortly thereafter returned to the same or a different zone in domestic status. Then it is further manufactured into a product whose rate of duty is 25 percent. However, the merchandise is no longer subject to duty since it is now wholly in domestic status.

2. There is a quota on sugar products containing over 65 percent sucrose. The importer adds another product to the sugar in a zone to produce a product with less than 65 percent sucrose content, which is not subject to the quota. The importer files an entry on the product in the latter state, but the merchandise is retained in the zone in domestic status. Then the added product is sifted out, leaving a sugar product containing 90 percent sucrose. The merchandise is no longer subject to quota upon its ultimate removal from the zone because it is in domestic status.

3. A firm produces pharmaceutical products in a zone. During an intermediate stage of processing, the merchandise is in a condition subject to a free rate of duty, while the final rate of duty would be 15 percent. The intermediate stage is transitory, lasting no more than an hour. During this period, the firm files an entry at the free rate of duty. The intermediate stage merchandise is left in the zone for continuous processing, or is piped in a loop that runs into Customs territory and immediately back into the zone, whereupon the firm requests readmission in domestic status. By the time Customs accepts the entry and has an opportunity to examine the merchandise, it is no longer in its condition as entered. Besides circumventing the higher rate of duty, the merchandise covered by the entry can no longer be examined for verification or appraisement purposes.

Entry for consumption in these cases is a sham. Merchandise which is entered but not commingled with U.S. commerce is not, in Customs opinion, entered for consumption, and such entries may be declared null and void and cancelled by the district director. We note that there is a line of court decisions in support of the view that entered for consumption means that the merchandise has entered U.S. commerce as an integral part thereof. See *U.S.* v. *Rolls Royce of America, Inc.*, T.D. 41202 and *U.S.* v. *Mussman and Schafer*, C.A.D. 506, C.D. 1367.

Section 3 of the Act permits zones two choices in the rate of duty upon entry for consumption—the rate of duty on the merchandise in its condition when the choice is made, or the rate of duty on the merchandise in its condition when transferred to Customs terri-

tory. A sham consumption entry allows a third choice—the rate applicable to the merchandise in an intermediate stage of processing in the zone.

In lieu of a prohibition on further processing, proposed § 146.73(d)(1) (now § 146.71(d)(1)) is being amended to authorize district directors to reject or cancel consumption entries from zones when the merchandise is not timely removed from the zone after entry, and merchandise removed from the zone does not enter U.S. commerce and is subsequently readmitted to a zone in domestic status. If the merchandise is so readmitted and the entry cancelled, it will be restored to its last zone status and a new entry required upon its transfer to Customs territory. This amendment closes an existing loophole so as to protect the revenue and properly enforce U.S. import laws and regulations.

A determination as to whether merchandise has not entered the commerce will be made by district directors on a case by case basis, considering factors such as the following:

1. Length of time the merchandise was outside the zone before readmission.
2. Whether readmission was requested by the importer of record or his agent, or a person acting in collusion with the importer of record.
3. Credible evidence that there was an intent by the importer or others, at the time of entry, to seek readmission to the zone.
4. The merchandise evades a higher rate of duty or an import restriction because of its having been admitted in domestic status.
5. The merchandise was not used or was not the subject of a bona fide sale by the importer after entry.
6. The merchandise was not further processed or manufactured outside the zone, or such processing or manufacture was minimal or cosmetic in nature.

Entries of merchandise readmitted in zone-restricted status will not be cancelled under this provision. It is noted that the position set forth in § 146.71(d)(1) is consistent with those in §§ 146.61, 146.63(c)(1) and 146.71(d)(2) in that merchandise which was entered but never removed from the zone is treated as constructively transferred back to the zone in its previous zone status.

An exception is made in § 146.71(c) from the general requirement of prompt zone removal for articles for use in a zone, such as production equipment, construction materials, and articles to be consumed in a zone.

A new § 146.71(d)(3) is added to clarify that merchandise which is actually entered into commerce may be readmitted to a zone in domestic status.

Comment: Several commenters were concerned that under the revised regulations, Customs would no longer approve a zone's procedures manual.

Response: Currently, Customs has three methods of supervising zones: (1) Customs maintained zone inventory ledgers; (2) Alternative Inventory Control Systems (AICS) maintained by the zone operator; and (3) the Audit-Inspection Program where the zone operator maintains his inventory control. Only under AICS has Customs approved a zone operator's inventory control system. The reason for Customs allowing the AICS method of operating a zone stems from the fact that Customs did not have regulatory guidelines available for use by zone operators. However, there were some problems with the AICS method due to Customs limited ability to assist in the design of sophisticated data processing systems within short time frames so as to allow zones to be activated. Also, several zone systems were approved where zone operations were delayed sometimes for several years, resulting in the original system either being rendered obsolete or in need of major changes at the time the zone was activated.

Accordingly, Customs decided to provide much needed inventory control guidelines in the regulations and allow the individual zones to adopt their own inventory systems within the guidelines devised by Customs. Questions as to whether particular elements of a proposed inventory control and recordkeeping system meet the criteria in revised Subpart B, Part 146, Customs Regulations, may be referred to the district director for a non-binding ruling, or to Customs Headquarters for a ruling in accordance with Part 177, Customs Regulations (19 CFR Part 177). Customs will not review any system in its entirety to render an opinion as to whether it meets all of the criteria in Subpart B.

Comment: Since the Government's expense in providing Customs officers at the zone is reimbursed by the zone itself, there is no logical reason why Customs personnel cannot be permanently stationed at the zone.

Response: Although the expense of maintaining a Cusoms officer at a zone is a consideration in our decision to implement audit-inspection supervision, there are other considerations of equal value. One is that audit-inspection supervision would provide protection to the revenue, which is equal to or greater than that under the existing systems. This was apparent from a 4-year study of warehouses which had converted to audit-inspection supervision. Another consideration is that the new system allows Customs to assign personnel to other areas which have a higher priority. A great many zone operators, grantees and users do not realize that Customs warehouse and zone officer positions, although they are fully reimburseable, are counted against Customs overall personnel ceiling. If officers are assigned to warehouses and zones, there will be fewer officers for assignment to higher priority tasks.

Comment: The proposed regulations do not reduce recordkeeping and information costs to operators.

Response: We disagree. To meet present document filing requirements, zone operators must gather, maintain, and compile certain data on their zones's admissions and removals and file required documents with Customs. Under the proposal, data gathering and maintenance needs will not change appreciably, but required document filings will be reduced dramatically. We estimate 50,000–70,000 annual form filings will be eliminated by the proposal, resulting in operator data handling and form filing cost reductions of from $600,000 to $700,000. We regard document cost reductions of an average $10,000 per year per activated zone site to be real and significant.

Comment: Since Customs no longer will be approving operator procedures manuals in their entirety, it is not fulfilling its obligations to assist the importing and exporting public. Customs should therefore provide some instruction to zone operators.

Response: We agree. Accordingly, Customs will provide the following assistance to the importing and exporting public:

1. Every attempt has been made to make the new regulations clear and concise.
2. Rewrite the Customs pamphlet on foreign trade zones.
3. Develop a booklet on foreign trade zones for operators and users.
4. Provide informational seminars for the public on the new regulations.
5. Rewrite operational guidelines based upon the new regulations.
6. Provide materials and seminars for Customs personnel, as well as the public.

Comment: Because of its impact, the proposal qualifies as a major rule under E.O. 12291 and thus requires a regulatory analysis.

Response: We disagree. Section 1(b) of E.O. 12291 requires a regulatory impact analysis for a proposal when one or more of the following criteria are met:

(1) A net national economic cost of $100 million or more;

(2) Significant cost increases for consumers; and

(3) Adverse effect upon the international competitiveness of U.S. firms.

In conducting an initial regulatory analysis under the terms of the Regulatory Flexibility Act (5 U.S.C. 603, 604), we concluded that none of the criteria was met.

Comment: Many commenters object to the panalty and liquidated damages provisions of the proposed regulations as excessive, unwarranted and not comparable to the bonded warehouse liquidated damages provisions or the penalties for fraud under § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592). They also question the authority of district directors to suspend a zone's activated status, claiming that this action amounts to revocation of the zone grant.

Response: As to the liquidated damages and penalties provisions of the new regulations not being comparable to those for bonded warehouse, we note that there are considerable differences between zones and bonded warehouses. Merchandise in a bonded warehouses is in Customs territory, has been entered, and is secured by both the warehouse proprietor's bond and the warehouse entry bond, whereas merchandise in a zone is not in Customs territory, is not entered and is not generally subject to the Customs laws or the bonding requirements. Also, there is much greater freedom to manufacture and manipulate merchandise in a zone than in a bonded warehouse. In view of this relative freedom from Customs control of activities in zones as compared to warehouses, the bonding requirements proposed are minimal.

As to the comment that the liquidated damages provisions under the new regulations should be consistent with those for bonded warehouses, we note that the proposed liquidated damages provisions for restricted merchandise or alcoholic beverages are consistent with those for such articles under the importor's and warehouse proprieter's bonds. They are in a higher amount than liquidated damages for other merchandise. This is necessary to remove the economic incentive to breach the bond, in certain cases, in order to evade quota, licensing, labeling or other restrictions.

With respect to liquidated damages claims not relating to merchandise, the liquidated damages proposed were in an amount to be determined by the district director, but not more than $200. Several commenters, however, were of the opinion that liquidated damages for non-merchandise related defaults of the zone operator's bond should be consistent with those for default of the warehouse proprietor's bond. Customs agrees with this position. Therefore, proposed § 146.81 is deleted, and the zone operator's bond in § 113.73, Customs Regulations (19 CFR 113.73), is modified to include the provisions previously appearing in § 146.81. Liquidated damages for merchandise and non-merchandise related defaults of the zone operator's bond will conform to these applicable to the warehouse proprietor's bond as well as other Customs bonds.

The only *penalty* provision in the new regulations is a restatement of 19 U.S.C 81s (§ 19, the Act), which authorizes a fine of not more than $1,000 for violation of the Act or any regulations thereunder. The regulations in Part 146, Customs Regulations, are regulations under the Act. The penalty for fraud under 19 U.S.C. 1592 is the domestic value of the merchandise plus any duties. These two penalty provisions are concerned with preventing two different types of activity which bear no relationship to each other. The penalties can in no way be compared to each other.

With respect to Customs authority to suspend activation of a zone, in proposed § 146.83, we note that §§ 3, 5, 8 and 15(b) of the Act (19 U.S.C. 81c, e, h, o(b)), confer authority upon the Secretary

of the Treasury to make rules and regulations under the Act. Customs derives this authority from the Secretary.

Suspension of activation of a zone is not a revocation of the zone grant, which is the only remedy currently available to Customs for improper activity or continued violations of the foreign trade zones regulations, provided that the Board orders the revocation. Furthermore, under § 18 of the Act (19 U.S.C. 81r), the zone grant cannot be revoked without giving four months notice and taking other actions.

Suspension gives Customs an alternative method for dealing with improper activity in a zone. It allows Customs to single out the improper activity, subzone, or zone site involved and apply certain sanctions, without disturbing other proper zone activities. For example, suspension may be limited to the activities of a particular site, such as suspension of the privilege to admit merchandise for a particular activity, and it may not necessarily be directed at the activation of the zone as a whole. Proposed §§ 146.83 (a) and (b)(1) (now §§ 146.82 (a) and (b)(1)) have been modified to clarify this procedure.

Some commenters also object to the proposed regulations on suspension on the grounds that they recognize only the operator as a party to suspension proceedings. These commenters suggest that grantees and users also be made parties to suspension proceedings. Customs agrees with this suggestion with respect to grantees, and, accordingly, we have added new paragraph (4) to § 146.83(b) to recognize the grantee. However, we do not agree that a user should be a party. Approval of zone activation is given to a grantee or operator, not to users. Suspension, or partial suspension, of that approval is a matter between Customs and the grantee or operator who is responsible for the zone.

Finally, it is noted that suspensions are for a limited period, are designed for fast action to minimize developing problems, and are substantially less onerous than revocation provisions applicable to customs brokers, warehouses proprietors, container station operators, and cartmen.

Comment: Language is not used consistently and accurately throughout the proposal. In describing the process of merchandise flow through a zone, the following words are used: admit, brought, enter, receive, remove, transfer, deliver, and withdraw. Also the terms zone, zone site, noncontiguous zone site, zone user, zone firm and zone seller are used with different intents but without definition.

Response: Customs does not agree with this comment. Nevertheless, it appears that some commenters do not understand, or misunderstand, the use of a number of terms. Accordingly, it has been decided to revise and expand the definitions section and, through editorial changes throughout the proposed regulations, improve clarity. "Secretary", "Board", "State," "Corporation", "Public Cor-

poration", "Private Corporation", "Applicant", "Grantee", and "Zone", are defined in § 1 of the Act (19 U.S.C. 81a), and wherever those terms appear in Part 146, they are used in consonance with their statutory meaning, unless otherwise stated. The statutory definitions will not be repeated in the new regulations.

Definitions of several terms, i.e., "subzone", "operator", and "user" have appeared in the proposed regulations of the Board published on February 18, 1983, in the Federal Register (48 FR 7189). As it is not known when those proposed regulations may become final, and as the use of these words is necessary in these regulations, their definitions have been added to § 146.1. If it appears necessary, the definitions may be modified when the proposed regulations of the Board become final.

The terms "zone site" and "noncontiguous zone site" result from particular grants of authority by the Board to establish and operate a zone. It is believed that grantees and operators of those sites are aware of their meanings. The term "noncontiguous zone" has been deleted from these regulations wherever it appears. A definition of "zone site" has been added.

The exclusion of production equipment, building materials, and supplies from the definition of "merchandise" in § 146.1(h) is consistent with Customs decision on this subject. Production equipment, building materials, and supplies are not "merchandise" within the meaning of § 3 of the Act (19 U.S.C. 81c) for the reasons set forth in Customs Service Decision (C.S.D.) 79-418. Also, in H.R. 98-267 on H.R. 3398 (Trade and Tariff Act of 1984, June 24, 1983), at page 36, it is stated that the Act does not apply to machinery and equipment. They are, therefore, dutiable upon entry.

This position is supported by 19 U.S.C. 1311, the statute establishing bonded manufacturing warehouses, which specifically prohibits the duty-free entry of imported implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein. It would be inconsistent for Customs to prohibit the duty-free entry of such articles into a manufacturing warehouse, from which manufactured goods must be exported, and to permit the duty-free entry of the same articles into a zone. If zones had no such limitation, they would have a distinct advantage over domestic manufacturers since domestic manufacturers are required to enter and pay duty on those articles.

Review does not reveal differing intents in the use of "zone user", "zone firm", and "zone seller" and their meaning is self-evident in context. However, a definition of "user" has been added to § 146.1, and an effort has been made to remove the terms or to further clarify their meaning by editorial changes.

"Enter", where used, refers to the entry of merchandise into the Customs territory of the United States. "Withdrawal" refers to

withdrawal from warehouses. Both words are used in the ordinary tariff sense.

To minimize confusion, and since goods are neither entered into nor withdrawn from a zone in the tariff sense, the words "admit", for bringing goods into a zone in zone status, and "transfer", for taking goods out of a zone, have been used. Definitions of these words have been added. "Brought", "receive", "remove", and "deliver", wherever used, have their ordinary meaning. While inconsistent and inaccurate use of the terms in the proposed regulations is not evident, their use has been reviewed and editorial changes have been made wherever appropriate.

Comment: Several commenters objected to the procedures for appealing decisions of the district director denying applications to activate a zone or suspending the activated status of a zone, but these comments were not specific.

Response: We see no problem with the appeal procedure for suspensions of the activated status of a zone or of certain activities in a zone. The procedures include the right to request a hearing and to obtain the decision of the regional commissioner.

With respect to denial of an application to activate a zone or zone site, the decision of the district director is considered the final adminstrative decision for several reasons. First, there may not even be an appealable right. The grant to establish and operate a zone is conditioned upon the grantee's obtaining all necessary permits and licenses, and securing the permission of the district director to begin operations in the zone. Where the district director denies activation because the conditions have not been complied with, or for other stated reasons, denial of activation does not result in denial of an appealable right since the right to activate the zone has not been granted.

Secondly, the district director is more closely connected with the application for and activation of a zone than Customs regional or headquarters officials. Appeals of denials to the Customs region or to Headquarters would result in little more than delay and inquiries into the factual basis of the decision. We believe that the Board and the courts provide the most suitable forum for appeals from denials of activation on the part of the district director.

Comment: The annual fees proposed for zones are unreasonably high.

Response: We disagree. The purpose of the annual fee is to recover Customs costs incurred in carrying out the audit-inspection supervision program. The annual fee to be charged each zone is a function of the degree of complexity in Customs auditing and inspection of zones.

Under the present inspectional system, Customs bills zone operators approximately $1.3 million annually for inspectional services. Zone operators recover this expense in their fee and rental/lease

billings to zone users. We estimate that the Customs component of these fees paid by zone users averages $870 per year per user.

Under the proposed audit-inspection system with different fee tiers, Customs billings to operators of general purpose zones will amount to approximately $1 million per year, versus the estimated $1.3 million at present. The Customs component of small business users' payment to operators will average $670 per year per user, versus the $870 per year per user at present. Future increases in the annual fee will reflect cost increases incurred by Customs in delivering audit and inspection services. These increases will consist largely of annual rises in labor costs. It is expected that labor costs, and thus annual fees charged zone operators, will rise by a moderate 2-4 percent each year.

The proposed fees, therefore, are not unreasonable. Moreover, the proposed annual fee has been restructured into a three-tiered system with the larger, more active zones set to pay higher fees than the smaller zones. This would provide equitable treatment for the smaller zones in that they would no longer subsidize the larger zones. Appendix B reflects the revised structure of the annual fee.

Comment: Many commenters requested clarification of the respective liabilities to Customs of grantees, operators, and users of zones.

Response: As the privilege of establishing, operating, and maintaining a zone is given to a grantee, Customs is of the opinion that all liabilities to Customs involving zone activities reside ultimately with the grantee of the zone. If the operator is not the grantee, these liabilities can be minimized by the operator's being named as principal on the zone operator's bond. There is no liability to Customs on the part of zone users, other than users that are also operators. It is the grantee or the grantee and operator who have responsibilities to Customs with the attendant liabilities. Grantees are free to make whatever contractual agreements regarding indemnification with operators and users that they choose. Furthermore, Customs is not aware of any way that a grantee can divest itself of all liability, or limit its liability, in the event of loss or damage to Customs resulting from zone activities. While 19 U.S.C. 1623(c) and § 113.51, Customs Regulations (19 CFR 113.51), authorize the cancellation of bonds or bond charges under certain circumstances, that authority does not apply to prospective transactions nor does it extend to the waiver of any lawful claims against the grantee, not secured by bond, that arise from zone activities.

Comment: A few comments were received concerning Subpart D, Part 146. The commenters stated that many of the sections and subsections of Subpart D were definitional in nature and should be in Subpart A.

Response: The subject matter of Subpart D—the status of merchandise in a zone is of sufficient importance to merit its own subpart. The terms "privileged foreign merchandise," "nonprivileged

foreign merchandise," "domestic merchandise," and "zone-restricted merchandise" do not appear in the Act. They were coined to describe the status of certain merchandise in a zone with reference to particular provisos of § 3 of the Act (19 U.S.C. 81c). In that sense, the terms are not definitional but descriptive, in that they simply provide a name for conditions prescribed by law, *e.g.*, "zone-restricted" describes the status of merchandise subject to the fourth proviso of 19 U.S.C. 81c.

One commenter urged that § 146.44 (zone-restricted merchandise) be expanded to include a requirement that merchandise placed in a zone to obtain payment of drawback and subsequently removed for shipment to an insular possession of the U.S. be reported by the zone operator to the district director. Upon consideration, it has been decided not to add that requirement to Part 146. Section 191.13, Customs Regulations (19 CFR 191.13), provides that there is no authority to allow drawback on articles shipped to insular possessions. There is authority to allow drawback on articles placed in a zone in zone-restricted status. Subsequent shipment of such articles to an insular possession would be contrary to the Act since it would not be an exportation, destruction, or storage. The likelihood of such shipments is remote and since § 191.13 essentially covers the situation, there is no need to make allowance for it in § 146.44.

In connection with the deletion of § 146.14, § 146.43 is amended to specify that no permit will be required for the admission, handling, or transfer to Customs territory of domestic status merchandise except (1) when mixed or combined with merchandise of another zone status, and (2) when so ordered by the Commissioner in individual circumstances. The latter residual authority is retained to allow Customs to properly control domestic status merchandise in unusual circumstances. The operator must still maintain proper records of domestic status merchandise under Subpart B, Part 146, even if no permit is required.

Finally, a new § 146.14 has been added. This section is a restatement of the statutory limitation on retail trade in a zone, found in § 15(d) of the Act (19 U.S.C. 81o(d)).

Changes are made throughout the regulations to conform them to the changes made by this document. Also, as a general point, whenever the word "days" appears in this revision, it means calendar days, unless "working days" is specified.

After careful analysis of all the comments received and upon further review of the matter, it has been determined advisable to adopt the proposed regulatory amendments with the various modifications as set forth above.

Executive Order 12291

It has been determined that these amendments are not a "major rule" within the criteria provided in § 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are applicable to this document. An initial regulatory analysis was prepared and included in the NPRM as Appendix C. A final regulatory flexibility analysis is attached to this document as an appendix.

Paperwork Reduction Act

The collection of information requirements contained in § 146.25 and the recordkeeping requirement contained in § 146.4, are subject to the provisions of the Paperwork Reduction Act (44 U.S.C. 3504(h)) and have been cleared by the Office of Management and Budget (OMB). Accordingly, Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and the control numbers assigned by OMB, is being amended to include OMB control number 1515-0151.

Drafting Information

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Parts 146 and 178

Customs duties and inspection, Exports, Foreign trade zones, Imports, Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

Amendments to the Regulations

Chapter 1, Title 19, Code of Federal Regulations, is amended by revising Part 146 to read as follows:

PART 146—FOREIGN TRADE ZONES

Sec.

146.0 Scope.

SUBPART A—GENERAL PROVISIONS

Sec.
146.1 Definitions.
146.2 District director as Board representative.
146.3 Customs supervision.
146.4 Operator responsibility and supervision.
146.5 Activation fee and annual fee.
146.6 Procedure for activation.
146.7 Zone changes.
146.8 Seals; authority of operator to break and affix.
146.9 Permission of operator
146.10 Authority to examine merchandise.
146.11 Transportation of merchandise to a zone.
146.12 Use of zone by carrier.
146.13 Customs forms and procedures.
146.14 Retail trade within a zone.

SUBPART B—INVENTORY CONTROL AND RECORDKEEPING SYSTEM

146.21 General requirements.
146.22 Admission of merchandise to a zone.
146.23 Accountability for merchandise in a zone.
146.24 Transfer of merchandise from a zone.
146.25 Annual reconciliation.
146.26 System review.

SUBPART C—ADMISSION OF MERCHANDISE TO A ZONE

146.31 Admissibility of merchandise into a zone.
146.32 Application and permit for admission of merchandise.
146.33 Temporary deposit for manipulation.
146.34 Merchandise transiting a zone.
146.35 Temporary deposit in a zone; Incomplete documentation.
146.36 Examination of merchandise.
146.37 Operator admission responsibilities.
146.38 Certificate of arrival of merchandise.
146.39 Direct delivery procedures.
146.40 Operator responsibilities for direct delivery.

SUBPART D—STATUS OF MERCHANDISE IN A ZONE

146.41 Privileged foreign status.
146.42 Nonprivileged foreign status.
146.43 Domestic status.
146.44 Zone-restricted status.

Sec.

SUBPART E--HANDLING OF MERCHANDISE IN A ZONE

146.51 Customs control of merchandise.
146.52 Manipulation, manufacture, exhibition, or destruction; Customs Form 216.
146.53 Shortages and overages.

SUBPART F—TRANSFER OF MERCHANDISE FROM A ZONE

146.61 Constructive transfer to Customs territory.
146.62 Entry.
146.63 Entry for consumption.
146.64 Entry for warehouse.
146.65 Classification, valuation, and liquidation.
146.66 Transfer of merchandise from one zone to another.
146.67 Transfer of merchandise for exportation.
146.68 Transfer for transportation or exportation; estimated production.
146.69 Supplies, equipment, and repair material for vessels or aircraft.
146.70 Transfer of zone-restricted merchandise into Customs territory.
146.71 Release and removal of merchandise from zone.

SUBPART G—PENALTIES; SUSPENSION; REVOCATION

146.81 Penalties.
146.82 Suspension.
146.83 Revocation of zone grant.

AUTHORITY: 19 U.S.C. 66, 81a–81u, 1202 (Gen. Hdnote 11), 1623, 1624, § 146.5 also issued under 31 U.S.C. 9701.

SOURCE: T.D. 86–16 unless otherwise noted.

§ 146.0 Scope.

Foreign trade zones are established under the Foreign Trade Zones Act and the general regulations and rules of procedure of the Foreign Trade Zones Board contained in 15 CFR Part 400. This Part 146 of the Customs Regulations governs the admission of merchandise into a foreign trade zone, manipulation, manufacture, or exhibition in a zone; exportation of the merchandise from a zone; and transfer of merchandise from a zone into Customs territory.

SUBPART A—GENERAL PROVISIONS

§ 146.1 Definitions.

(a) The following words, defined in § 1 of the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a), are given the same meaning when used in this part, unless otherwise stated: "Board", "Grantee", and "Zones".

(b) The following are general definitions for the purpose of this part:

(1) *Act.* "Act" means the Foreign-Trade Zones Act of June 18, 1934, as amended (48 Stat. 998–1003; 19 U.S.C. 81a–u).

(2) *Activation.* "Activation" means approval by the grantee and district director for operations and for the admission and handling of merchandise in zone status.

(3) *Admit.* "Admit" means to bring merchandise into a zone with zone status.

(4) *Alteration.* "Alteration" means a change in the boundaries of an activated zone or subzone; activation of a separate site of an already-activated zone or subzone with the same operator at the same port; or the relocation of an already-activated site with the same operator.

(5) *Customs territory.* "Customs territory" is the territory of the U.S. in which the general tariff laws of the U.S. apply. "Customs territory of the United States" includes only the States, the District of Columbia, and Puerto Rico. (General Headnote 2, Tariff Schedules of the United States (19 U.S.C. 1202)).

(6) *Constructive transfer.* "Constructive transfer" is a legal fiction which permits acceptance of a Customs entry for merchandise in a zone before its physical transfer to the Customs territory.

(7) *Deactivation.* "Deactivation" means voluntary discontinuation of the activation of an entire zone or subzone by the grantee or operator. Discontinuance of the activated status of only a part of a zone site is an alteration.

(8) *Default.* "Default" means an action or omission that will result in a claim for duties, taxes, charges, or liquidated damages under the Foregn Trade Zone Operator Bond.

(9) *Merchandise.* "Merchandise" includes goods, wares and chattels of every description, except prohibited merchandise. Building materials, production equipment, and supplies for use in operation of a zone are not "merchandise" for the purpose of this part.

(10) *Domestic merchandise.* "Domestic merchandise" is merchandise which has been (1) produced in the U.S. and not exported therefrom, or (2) previously imported into Customs territory and properly released from Customs custody.

(11) *Foreign merchandise.* "Foreign merchandise" is imported merchandise which has not been properly released from Customs custody in Customs territory.

(12) *Conditionally admissible merchandise.* "Conditionally admissible merchandise" is merchandise which may be imported into the U.S. under certain conditions. Merchandise which is subject to permits or licenses, or which may be reconditioned to bring it into compliance with the laws administered by various Federal agencies, is an example of conditionally admissible merchandise.

(13) *Prohibited merchandise.* "Prohibited merchandise" is merchandise the importation of which is prohibited by law on grounds

of public policy or morals, or any merchandise which is excluded from a zone by order of the Board. Books urging treason or insurrection against the U.S., obscene pictures, and lottery tickets are examples of prohibited merchandise.

(14) *Fungible merchandise.* "Fungible merchandise" means merchandise which for commercial purposes is identical and interchangeable in all situations.

(15) *Operator.* "Operator" is a corporation, partnership, or person that operates a zone or subzone under the terms of an agreement with the zone grantee. Where used in this part the term "operator" also applies to a "grantee" that operates its own zone.

(16) *Reactivation.* "Reactivation" means a resumption of the activated status of an entire area that was previously deactivated without any change in the operator or the area boundaries. If the boundaries are different, the action is an alteration. If the operator is different, it is an activation.

(17) *Subzone.* "Subzone" is a special-purpose zone established as part of a zone project for a limited purpose, that cannot be accommodated within an existing zone. The term "zone" also applies to a subzone, unless specified otherwise.

(18) *Transfer.* "Transfer" means to take merchandise with zone status from a zone for consumption, transportation, exportation, warehousing, cartage or lighterage, vessel supplies and equipment, admission to another zone, and like purposes.

(19) *Unique identifier.* "Unique identifier" means the numbers, letters, or combination of numbers and letters that identify merchandise admitted to a zone with zone status.

(20) *User.* "User" means a person or firm using a zone or subzone for storage, handling, or processing of merchandise.

(21) *Zone lot.* "Zone lot" means a collection of merchandise maintained under an inventory control method based on specific identification of merchandise admitted to a zone by lot.

(22) *Zone site.* "Zone site" means the physical location of a zone or subzone.

(23) *Zone status.* "Zone status" means the status of merchandise admitted to a zone, i.e., nonprivileged foreign, privileged foreign, zone restricted, or domestic.

§ 146.2 District director as Board representative.

The district director in whose district the zone is located shall be in charge of the zone as the representative of the Board.

§ 146.3 Customs supervision.

(a) *Assignment of Customs officers.* Customs officers will be assigned or detailed to a zone as necessary to maintain appropriate Customs supervision of merchandise and records pertaining thereto in the zone, and to protect the revenue.

(b) *Supervision.* Customs supervision over any zone or transaction provided for in this part will be in accordance with § 161.1 of this

chapter. The district director may direct a Customs officer to Supervise any transaction or procedure at a zone. Supervision may be performed through a periodic audit of the operator's records, guantity count of goods in a zone inventory, spot check of selected transactions or procedures, or review of recordkeeping, security, or conditions of storage in a zone.

§ 146.4 Operator responsibility and supervision.

(a) *Supervision.* The operator shall supervise all admissions, transfers, removals, recordkeeping, manipulations, manufacturing, destruction, exhibition, physical and procedural security, and conditions of storage in the zone as required by law and regulations. Supervision by the operator shall be that which a prudent manager of a storage, manipulation, or manufacturing facility would be expected to exercise, and may take into account the degree of supervision exercised by the zone user having physical possession of zone merchandise.

(b) *Customs access.* The operator shall permit any Customs officer access to a zone.

(c) *Safekeeping of merchandise and records.* The operator responsible for safekeeping of merchandise and records concerning merchandise admitted to a zone. The operator, at its liability, may allow the zone importer or owner of the goods to store, safeguard, and otherwise maintain or handle the goods and the inventory records pertaining to them.

(d) *Records maintenance.* The operator shall (i) maintain the inventory control and recordkeeping system in accordance with the provisions of Subpart B, (ii) retain all records required in this Part and defined In § 162.1(a) of this chapter, pertaining to zone merchandise for 5 years after the merchandise is removed from the zone, and (iii) protect proprietary information in its custody from unauthorized disclosure. Records shall be readily available for Customs review at the zone.

(e) *Merchandise security.* The operator shall maintain the zone and establish procedures adequate to ensure the security of merchandise located in the zone in accordance with applicable Customs security standards and specifications.

(f) *Storage and handling.* The operator shall store and handle merchandise in a zone in a safe and sanitary manner to minimize damage to the merchandise, avoid hazard to persons, and meet local, state, and Federal requirements applicable to a specific kind of goods. All trash and waste will be promptly removed from a zone. Aisles will be established and maintained, and doors and entrances left unblocked for access by Customs officers and other persons in the performance of their official duties.

(g) *Guard service.* The operator is authorized to provide guards or contract for guard service to safeguard the merchandise and ensure the security of the zone. This authorization does not limit the au-

thority of the district director to assign Customs guards to protect the revenue under section 4 of the Act (19 U.S.C. 81d).

(h) *Miscellaneous responsibilities.* The operator is responsible for complying with requirements for admission, manipulation, manufacture, exhibition, or destruction, shortage, or overage; inventory control and recordkeeping systems, transfer to Customs territory, and other requirements as specified in this part.

§ 146.5 Activation fee and annual fee.

The operator, or where there is no operator, the grantee, will be charged a nonrefundable fee to activate a zone or any portion of a zone, or to alter or relocate an activated portion of a zone, under the provisions of 31 U.S.C. 9701. The operator of an activated zone will be charged a nonrefundable annual fee for each activated zone as payment of the cost of the additional Customs service required under the Act as provided in 19 U.S.C. 81n and the regulations in this part. The operator or grantee shall pay the annual fee to the district director of the district in which the zone is located within 14 days after activation and within 14 days after the effective date of the published fee schedule for each year thereafter that the area remains activated. The fee schedule will be revised annually and published in the Federal Register and the CUSTOMS BULLETIN.

§ 146.6 Procedure for activation.

(a) *Application.* A zone operator, or where there is no operator, a grantee, shall make written application to the district director of the district in which the zone is located to obtain approval of activation of a zone or zone site. The area to be activated may be all or any portion of the zone approved by the Board. The application must include a description of all the zone sites covered by the application, any operation to be conducted therein, and a statement of the general character of the merchandise to be admitted.

(b) *Supporting documents.* The appliclation must be accompanied by the following:

(1) The application fee required by § 146.5;

(2) A blueprint of the area approved by the Board to be activated showing area measurements, including all openings and buildings; and all outlets, inlets, and pipelines to any tank for the storage of liquid or similar product, that portion of the blueprint certified to be correct by the operator of the tank;

(3) A gauge table, when appropriate, showing the capacity, in the appropriate unit, of any tank, certified to be correct by the operator of the tank;

(4) A procedures manual describing the Inventory control and recordkeeping system that will be used in the zone, certified by the operator or grantee to meet the requirements of Subpart B; and

(5) The written concurrence of the grantee, when the operator applies for activation, in the requested zone activation.

(c) *Inquiry by district director.* As a condition of approval of the application, the district director may order an inquiry by a Customs officer into:

(1) The qualifications, character, and experience of an operator and/or grantee and their principal officers; and

(2) The security, suitability, and fitness of the facility to receive merchandise in a zone status.

(d) *Decision of the district director.* The district director shall promptly notify the applicant in writing of his decision to approve or deny the application to activate the zone. If the application is denied, the notification will state the grounds for denial which need not be limited to those listed in § 146.82. The decision of the district director will be the final Customs administrative determination in the matter. On approval of the application, a Foreign Trade Zone Operator's Bond shall be executed on Customs Form 301, containing the bond conditions of § 113.73 of this chapter.

(e) *Activation.* Upon the district director's approval of the application and acceptance of the executed bond the zone or zone site will be considered activated; and merchandise may be admitted to the zone. Execution of the bond by an operator does not lessen the liability of the grantee to comply with the Act and implementing regulations.

§ 146.7 Zone changes.

(a) *Alteration of an activated area.* An operator shall make written application to the district director for approval of an alteration of an activated area, including an alteration resulting from a zone boundary modification. The application must be accompanied by the fee required in § 146.5 and the supporting document requirements specified in § 146.6, as applicable. The district director may review the security, suitability, and fitness of the area, and shall reply to the applicant as provided for in § 146.6.

(b) *Deactivation or reactivation.* A grantee, or an operator with the concurrence of a grantee, shall make written application to the district director for deactivation of a zone site, indicating by layout or blueprint the exact site to be deactivated. The district director shall not approve the application unless all merchandise in the site in zone status (other than domestic status) has been removed at the risk and expense of the operator. The district director may require an accounting of all merchandise in a zone as a condition of approving the deactivation. A zone may be reactivated using the above procedure if a sufficient bond is on file under § 146.6(d). No fee is required for deactivation or reactivation.

(c) *Suspenson of activated site.* When approval of an activated status has been suspended through the procedure in Subpart G, the district director may require all goods in that area in zone status (other than domestic status) to be transferred to another zone, a bonded warehouse, or other location where they may lawfully be

stored, if the district director considers that transfer advisable to protect the revenue or administer any Federal law or regulation.

(d) *New bond.* The district director may require an operator to furnish, on 10 days notice, a new Foreign Trade Zone Operator's Bond on Customs Form 301. If the operator fails to furnish the new bond, no more merchandise will be received in the zone in zone status. Merchandise in zone status (other than domestic status) will be removed at the risk and expense of the operator. A new bond may be required if (i) the activated zone area is substantially altered; (ii) the character of merchandise admitted to the zone or operations performed in the zone are substantially changed; (iii) the existing bond lacks good and sufficient surety; or (iv) for any other reason that substantially affects the liability of the operator under the bond. Although a new bond may not be required, the operator shall obtain the consent of the surety to any material alteration in the boundaries of the zone.

(e) *New operator.* A grantee of an activated zone site shall make written application to the district director for approval of a new operator, submitting with the application a certification by the new operator that the inventory control and recordkeeping system meets the requirements of Subpart B, and a copy of the system procedures manual if different from the previous operator's manual. The district director may order an inquiry into the qualifications, character, and experience of the operator and its principal officers.

(f) The bond in § 146.6 shall be submitted by the operator before the operating agreement may become effective in respect to merchandise in zone status. The district director shall promptly notify the grantee, in writing, of the approval or disapproval of the application.

(g) *List of officers, employees, and other persons.* The district director may make a written demand upon the operator to submit, within 30 days after the date of the demand, a written list of the names, addresses, social security numbers, and dates and places of birth of officers and persons having a direct or indirect financial interest in the operator, and of persons employed in the carriage, receipt or delivery of merchandise in zone status, whether employed by the zone operator or a zone user. If a list was previously furnished, the district director may make a written demand for the same informaton in respect to new persons employed in the carriage, receipt, or delivery of zone status merchandise within 10 days after such employment. The list need not include employees of common or contract carriers transporting goods to or from the zone.

§ 146.8 Seals, authority of operator to break and affix.

The district director may authorize an operator to break a Customs in-bond seal affixed under § 18.4 of this chapter, or under any Customs order or directive, on any vehicle or intermodal container containing merchandise approved for admission to the zone upon

its arrival at the zone; or to affix a Customs in-bond seal to any vehicle or intermodal container of merchandise for which an entry, withdrawal, or other approval document has been obtained for movement in-bond from the zone. The authorized affixing or breaking of that seal will be considered to have been done under Customs supervision. The operator shall report to the district director, upon arrival of the vehicle or container at the zone, any seal found to be broken, missing, or improperly affixed, and hold the vehicle or container and its contents intact pending instructions from the district director. If the operator does not obtain the written concurrence of the carrier as to the condition of the seal or delivering conveyance, the district director shall deem the seal or delivering conveyance to be intact.

§ 146.9 Permission of operator.

An application for permission to admit merchandise into a zone, or to manipulate, manufacture, exhibit, or destroy merchandise in a zone must include the written concurrence of the operator, except where the regulations of this part provide for the making of application by the operator itself or where the operator files a separate specific or blanket application. The written concurrence of the operator in the removal of merchandise from a zone is not required because the merchandise is released by the district director to the operator for delivery from the zone, as provided in § 146.71(a).

§ 146.10 Authority to examine merchandise.

The district director may cause any merchandise to be examined before or at the time of admission to a zone, or at any time thereafter, if the examination is considered necessary to facilitate the proper administration of any law, regulation, or instruction which Customs is authorized to enforce.

§ 146.11 Transportation of merchandise to a zone.

(a) *From outside Customs territory.* Merchandise may be admitted directly to a zone from any place outside Customs territory.

(b) *Through Customs territory, foreign merchandise.* Foreign merchandise destined to a zone and transported in-bond through Customs territory will be subject to the laws and regulations applicable to other merchandise transported in-bond between two places in Customs territory.

(c) *From Customs territory, domestic merchandise.* Domestic merchandise may be admitted to a zone from Customs territory by any means of transportation which will not interfere with the orderly conduct of business in the zone.

(d) *From a bonded warehouse.* Merchandise may be withdrawn from a bonded warehouse under the procedure in § 144.37(g) of this chapter and transferred to a zone for admission in zone restricted status.

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§ 146.12 Use of zone by carrier.

(a) *Primary use; lading and unlading.* The water area docking facilities, and any lading and unlading stations of a zone are intended primarily for the unlading of merchandise into the zone or the lading of merchandise for removal from the zone. Their use for other purposes may be terminated by Customs if found to endanger the revenue, or by the Board if found to impede the primary use of the zone.

(b) *Carrier in zone not exempt from law or regulations.* Nothing in the Act or the regulations in this part shall be construed as excepting any carrier entering, remaining in, or leaving a zone from the application of any other law or regulation.

§ 146.13 Customs forms and procedures.

Where a Customs form or other document is required in this part, the number of copies of the form or document required to be presented and their manner of distribution and processing shall be determined by the district director, except as otherwise specified in this part.

§ 146.14 Retail trade within a zone.

Retail trade is prohibited within a zone except as provided in 19 U.S.C. 81o(d). See also the regulations of the Board as contained in 15 CFR Part 400.

SUBPART B—INVENTORY CONTROL AND RECORDKEEPING SYSTEM

§ 146.21 General requirements.

(a) *Systems capability.* The operator shall maintain either manual or automated inventory control and recordkeeping systems or combination manual and automated systems capable of:

(1) Accounting for all merchandise, including domestic status merchandise, temporarily deposited, admitted, granted a zone status and/or status change, stored, exhibited, manipulated, manufactured, destroyed, transferred, and/or removed from a zone;

(2) Producing accurate and timely reports and documents as required by this part;

(3) Identifying shortages and overages of merchandise in a zone in sufficient detail to determine the quantity, description, tariff classification, zone status, and value of the missing or excess merchandise;

(4) Providing all the information necessary to make entry for merchandise being transferred to the Customs territory;

(5) Providing an audit trail to Customs forms from admission through manipulation, manufacture, destruction or transfer of merchandise from a zone either by zone lot or Customs authorized inventory method.

(b) *Procedures manual.*

(1) The operator shall provide the district director with an English language copy of its written inventory control and recordkeeping systems procedures manual in accordance with the requirements of this part.

(2) The operator shall keep current its procedures manual and shall submit to the district director any change at the time of its implementation.

(3) The operator may authorize a zone user to maintain its individual inventory control and recordkeeping system and procedures manual. The operator shall furnish a copy of the zone user's procedures manual, including any subsequent changes, to the district director. However, the operator will remain responsible to Customs and liable under its bond for supervision, defects in, or failures of a system.

(4) The operator's procedures manual and subsequent changes will be furnished to the district director for information purposes only. Customs receipt of a manual does not indicate approval or rejection of a system.

(c) *Liability of operator.* Upon zone activation approval the operator remains liable for complying with all inventory control and recordkeeping system requirements set forth in this part.

§ 146.22 Admission of merchandise to a zone.

(a) *Identification.* All merchandise will be recorded in a receiving report or document using a zone lot number or unique identifier. All merchandise, except domestic status merchandise for which no permit for admission is required under § 146.43, will be traceable to a Customs Form 214 and accompanying documentation.

(b) *Reconciliation.* Quantities received will be reconciled to a receiving report or document such as an invoice with any discrepancy reported to the district director as provided in §146.37.

(c) *Incomplete documentation.* Merchandise received without complete Customs documentation or which is unacceptable to the inventory control and recordkeeping system will be recorded in a suspense account or record until documentation is complete or the system is capable of accepting the information, at which time it will be formally admitted to the zone under § 146.32 or 146.40. The receiving report or document will provide sufficient information to identify the merchandise and distinguish it from other merchandise. The suspense account or record will be completely documented for Customs review to explain the differences noted and corrections made.

(d) *Recordation.* Merchandise received will be accurately recorded in the inventory system records from the receiving report or document using the zone lot number or unique identifier for traceability. The inventory record will state the quantity and date admitted, cost or value where applicable, zone status, and description of the merchandise, including any part or stock number.

§ 146.23 Accountability for merchandise in a zone.

(a) *Identification of merchandise.*

(1) *General.* A zone lot number or unique identifier will be used to identify and trace merchandise.

(2) *Fungible merchansise.* Fungible merchandise may be identified by an inventory method authorized by Customs, which is consistently applied, such as First-In-First-Out (FIFO) and using an unique identifier.

(b) *Inventory records.* The inventory records will specify by zone lot number or unique identifier:

(1) Location of merchandise;

(2) Zone status;

(3) Cost or value, unless operator's or user's financial records maintain cost or value and the records are made available for Customs review,

(4) Beginning balance, cumulative receipts and removals, adjustments, and current balance on hand by date and quantity;

(5) Destruction of merchandise; and

(6) Scrap, waste, and by-products.

(c) *Physical inventory.* The operator shall take at least an annual physical inventory of all merchandise in the zone (unless continuous cycle counts are taken as part of an ongoing inventory control program) with prior notification of the date(s) given to Customs for any supervision of the inventory deemed necessary. The operator shall notify the district director of any discrepancies in accordance with §146.53.

§ 146.24 Transfer of merchandise from a zone.

(a) *Accountability.*

(1) All zone status merchandise transferred from a zone will be accurately recorded within the inventory control and recordkeeping system.

(2) The inventory control and recordkeeping system for merchandise transfers must have the capability to trace all transfers back to a zone admission under a Customs authorized inventory method.

(b) *Information.* The inventory control and recordkeeping system must be capable of providing all information necessary to make entry for transfer of merchandise from the zone.

§ 146.25 Annual reconciliation.

(a) *Report.* The operator shall prepare a reconciliation report within 90 days after the end of the zone/subzone year unless the district director authorizes an extension for reasonable cause. The operator shall retain that annual reconciliation report for a spot check or audit by Customs, and need not furnish it to Customs unless requested. There is no form specified for the preparation of the report.

(b) *Information required.* The report must contain a description of merchandise for each zone lot or unique identifier, zone status,

quantity on hand at the beginning of the year, cumulative receipts and transfers (by unit), quantity on hand at the end of the year, and cumulative positive and negative adjustments (by unit) made during the year.

(c) *Certification.* The operator shall submit to the district director within 10 working days after the annual reconciliation report, a letter signed by the operator certifying that the annual reconciliation has been prepared, is available for Customs review, and is accurate. The certification letter must contain the name and street address of the operator, where the required records are available for Customs review; and the name, title, and telephone number of the person having custody of the records. Reporting of shortages and overages based on the annual reconciliation will be made in accordance with § 146.53. These reports must accompany the certification letter.

§ 146.26 System review.

The operator shall perform an annual internal review of the inventory control and recordkeeping system and shall report to the district director any deficiency discovered and corrective action taken, to ensure that the system meets the requirements of this part.

Subpart C—Admission of Merchandise to a Zone

§ 146.31 Admissibility of merchandise into a zone.

Merchandise of every description may be admitted into a zone unless prohibited by law. A distinction is made between prohibited and conditionally admissible merchandise.

(a) *Prohibited merchandise.* District directors shall not admit prohibited merchandise. If there is a question as to whether the merchandise may be prohibited, district directors may permit the temporary deposit of the merchandise in a zone pending a final determination of its status. Any prohibited merchandise which is found within a zone will be disposed of in the manner provided for in the laws and regulations applicable to that merchandise.

(b) *Conditionally admissible merchandise.* The admission of this merchandise into a zone is subject to the regulations of the Federal agency concerned.

§ 146.32 Application and permit for admission of merchandise.

(a) *Application on Customs Form 214 and permit.* Merchandise may be admitted into a zone only upon application on a uniquely and sequentially numbered Customs Form 214 ("Application for Foreign Trade Zone Admission and/or Status Designation") and the issuance of a permit by the district director. Exceptions to the Customs Form 214 requirement are for merchandise temporarily deposited (§ 146.33), transiting merchandise (§ 146.34), or domestic merchandise admitted without permit (§ 146.43). The applicant for admission shall present the application to the district director and

shall include a statistical copy on Customs Form 214–A for transmittal to the Bureau of Census, unless the applicant has made arrangements for the direct transmittal of statistical information to that agency.

(b) *Supporting documents.*

(1) *Commercial documentation.* The applicant shall submit with the application two copies of an examination invoice meeting the requirements of Subpart F, Part 141, of this chapter, for any merchandise, other than that excepted in paragraph (a) of this section, to be admitted to a zone. The notation of tariff classification and value required by § 141.90 of this chapter need not be made, unless the merchandise is to be admitted in privileged status.

(2) *Evidence of right to make entry.* The applicant for admission shall submit with the application a document similar to that which would be required as evidence of the right to make entry for merchandise in Customs territory under § 141.11 or 141.12 of this chapter.

(3) *Release order.* Merchandise will not be authorized for delivery by Customs to a zone until a release order has been executed by the carrier which brought the merchandise to the port, unless the merchandise is released back to that same carrier for delivery to the zone (see § 141.11 of this chapter). When a release order is required, it will be made on any of the forms specified in § 141.111 of this chapter, or by the following statement attached to Customs Form 214:

Authority is hereby given to release the merchandise described in this application to _____

_____

Name of carrier _____

_____

Signature and title of carrier representative _____

_____

A blanket or qualified release order may be authorized for the transfer of merchandise to a zone as provided for in § 141.111 of this chapter.

(4) *Application to unlade.* For merchandise unladen in the zone directly from the importing carrier, the application on Customs Form 214 will be supported by an application to unlade on Customs Form 3171.

(5) *Other documentation.* The district director may require additional information or documentation as needed to conduct an examination of merchandise under Customs selective entry processing criteria, or to determine whether the merchandise is admissible to the zone.

(c) *Conditions for issuance of a permit.* The district director will issue a permit for admission of merchandise to a zone when:

(1) The application is properly executed and includes the zone status desired for the merchandise, as provided in Subpart D of this part;

(2) The operator's approval appears either on the application or in a separate specific or blanket approval;

(3) The merchandise is retained for examination at the place of unlading, the zone, or other location designated by the district director, except for merchandise for direct delivery to a zone under §§ 146.39 and 146.40. The merchandise may be examined as if it were to be entered for consumption or warehouse; and

(4) All requirements have been fulfilled.

(d) *Blanket application for admission of merchandise.* Merchandise may be admitted to a zone under blanket application upon presentation of a Customs Form 214 covering more than one shipment of merchandise. A blanket application for admission is for:

(1) Shipments which arrive under one transportation entry as described in § 141.55 of this chapter, or

(2) Shipments which are destined to the same zone applicant on a single business day, in which case the applicant shall:

(i) Present the examination invoices required by paragraph (b) of this section to the district director before the merchandise is admitted into the zone,

(ii) Have been approved for the direct transmittal of statistical trade information to the Bureau of Census under an agreement with that agency; and

(iii) Have examination invoices containing a unique identifier to trace the shipment to the manifest of the carrier that brought the merchandise to the port having jurisdiction over the zone, as well as to the inventory control and recordkeeping system of the operator as described in Subpart B.

§ 146.33 Temporary deposit for manipulation.

Imported merchandise for which an entry has been made and which has remained in continuous Customs custody may be brought temporarily to a zone for manipulation and return to Customs territory under Customs supervision, pursuant to § 562, Tariff Act of 1930, as amended (19 U.S.C. 1562), and § 19.11 of this chapter. That merchandise will not be considered within the purview of the Act but will be treated as though remaining in Customs territory. No zone form or procedure will be considered applicable, but the merchandise will remain subject to any requirements necessary for the enforcement of § 562 and other Customs laws while in the zone.

§ 146.34 Merchandise transiting a zone.

The following procedure is applicable when merchandise is to be unladen from any carrier in the zone for immediate transfer to

Customs territory, or if it is to be transferred from Customs territory through the zone for immediate lading on any carrier in the zone:

(a) *Application.* Application for permission to lade or unlade will be filed with the district director on Customs Form 3171 prior to transfer of the merchandise into the zone.

(b) *Permit.* The district director shall permit the transfer unless he has reason to believe that the merchandise will not be moved promptly from the zone or will be made the subject of an application for admission in accordance with § 146.32(a).

(c) *Treatment of merchandise.* Upon the issuance of a permit to lade, or unlade, the merchandise will be treated as though the lading or unlading were in the Customs territory.

(d) *Delay in zone transit.* Merchandise delayed while transiting a zone must be made the subject of an application for admission in accordance with § 146.32, or it must be removed from the zone.

§ 146.35 Temporary deposit in a zone; Incomplete documentation.

(a) *General.* Temporary deposit of merchandise in a zone is allowed in circumstances where the information or documentation necessary to complete the Customs Form 214 is not available at the time of arrival of merchandise within the jurisdiction of the port. The merchandise will be subject to examination as provided in § 146.36.

(b) *Application.* An application for temporary deposit will be made to the district director on a properly signed and uniquely numbered Customs Form 214, annotated clearly "Temporary Deposit in a Zone".

(c) *Conditions.* Merchandise temporarily deposited under the provisions of this section has no zone status and is considered to be in the Customs territory. It will:

(1) Be physically segregated from all other zone merchandise;

(2) Be held under the bond and at the risk of the operator; and

(3) Be manipulated only to the extent necessary to obtain sufficient information about the merchandise to file the appropriate admission or entry documentation.

(d) *Approval.* The district director shall approve the application for temporary deposit of merchandise in a zone if the provisions of paragraphs (b) and (c) are met.

(e) *Submission of Customs Form 214.* A complete and accurate Customs Form 214 will be submitted, as provided in § 146.32, within 5 working days plus any extension granted by the district director, or the merchandise shall be placed in general order.

§ 146.36 Examination of merchandise.

Except for direct delivery procedures provided for in § 146.39, all merchandise covered by a Customs Form 214 may be retained for Customs examination at the place of unlading, the zone, or another

location, as designated by the district director. The district director may authorize release of the merchandise without examination, as provided in § 151.2 of this chapter. If a physical examination is conducted, the Customs officer shall note the results of the examination on the examination invoices.

§ 146.37 Operator admission responsibilities.

(a) *Maintenance admission documentation.* The operator shall maintain either:

(1) *Lot file.* The operator shall open and maintain a lot file containing a copy of the Customs Form 214, the examination invoice, and all other documentation necessary to account for the merchandise covered by each Customs Form 214. The lot file will be maintained in sequential order by using the unique number assigned to each Customs Form 214 as the file reference number; or

(2) *Authorized inventory method.* Where a Customs authorized inventory method other than a lot system (specific identification of merchandise) is used, e.g., First-In-First-Out (FIFO), no lot file is required but the operator shall maintain a file of all Customs Form's 214 in sequential order.

(b) *Examination invoice.* The operator shall give a copy of the examination invoice to the person making entry to transfer the merchandise from the zone upon request of that person or the district director.

(c) *Liability for merchandise.* The operator will be held liable under its bond for the receipt of merchandise admitted in the quantity and condition as described on the Customs Form 214, except as modified by a discrepancy report:

(1) Signed jointly by the operator and carrier on the Customs Form 214 or other approved form within 15 days after admission of the merchandise, and reported to the district director within 2 working days thereafter; or

(2) Submitted on Customs Form 5931 under the provisions of Subpart A, Part 158, of this chapter within 20 days after admission of the merchandise. The operator may file a Customs Form 5931 on behalf of the person who applied for admission of merchandise to the zone.

(d) *Supervision of merchandise.* The district director may authorize the receipt of zone status merchandise at a zone without physical supervision by a Customs officer (see section 146.3). In that case, the operator shall supervise the receipt of merchandise into the zone, report the receipt and condition of the merchandise, and mark packages with the unique Customs Form 214 number so that the merchandise can be traced to a particular Customs Form 214. Packages that are accounted for under a Customs-authorized inventory method other than specific indentification, need not be marked with a unique Customs Form 214 number but must be adequately identified so Customs can conduct an inventory count. The

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operator shall submit the Customs Form 214 to Customs at the location specified by the district director.

§ 146.38 Certificate of arrival of merchandise.

When a certificate prepared by Customs as to the arrival of any merchandise in a zone is required by a Federal agency, the district director shall issue the document certifying only that authorization to deliver the merchandise to a zone has been made. The operator shall issue a certificate of arrival of merchandise at a zone.

§ 146.39 Direct delivery procedures.

(a) *General.* This procedure is for delivery of merchandise to a zone without prior application and approval on Customs Form 214.

(b) *Application.* An operator, meeting the criteria of paragraph (c) of this section, shall file a written application with the district director at least 30 days before the special procedure is to become effective. The application will describe the merchandise to be handled or processed, and the kind of operation which it will undergo in the zone.

(c) *Criteria.* the district director shall approve the application if the following criteria are met:

(1) The merchandise is not restricted or of a type which requires Customs examination or documentation review before or upon its arrival at the zone;

(2) The merchandise to be admitted to the zone, and the operations to be conducted therein, are known well in advance, are predictable and stable over the long term, and are relatively fixed in variety by the nature of the business conducted at the site; and

(3) The operator is the owner or purchaser of the goods.

(d) *Application decision.* The district director shall promptly notify the operator, in writing, of Customs decision on the application. If the application is denied, the district director shall specify the reason for denial in his reply. The district director's decision will constitute the final Customs administrative determination concerning the application.

(e) *Revocation of approval.* The district director may revoke the approval given under this section if it becomes necessary for Customs routinely to examine the merchandise or documentation before or upon admission to the zone.

§ 146.40 Operator responsibilities for direct delivery.

(a) *Arrival of conveyance.* Upon arrival at a subzone or zone site of a conveyance containing foreign merchandise, the operator shall:

(1) Collect in-bond or cartage documentation from the carrier;

(2) Check the condition of any seal affixed to the conveyance, and if broken, missing or improperly affixed, notify the district director and receive instructions before unloading the merchandise;

(3) Check each incoming in-bond and cartage shipment to determine if the manifested quantity or the quantity on the cartage document agrees with the quantity actually received;

(4) Sign and date the in-bond or cartage documentation to accept responsibility for the merchandise under the Foreign Trade Zone Operator' Bond and to relieve the carrier of responsibility.

(5) Forward the in-bond or cartage documentation so as to reach the district director within 2 working days after the date of arrival of the conveyance at the subzone or zone site;

(6) Maintain a file of open in-bond manifests in chronological order of date of conveyance arrival to identify shipments that have arrived but the entire contents of which have not been admitted to the subzone or zone site; and

(7) Notify the district director, by annotation on the Customs Form 214, when the entire contents of a shipment have been admitted.

(b) *Admission of merchandise: alternative procedures.*

(1) *Cumulative Customs Form 214.* If the operator has an agreement with the Bureau of Census for direct transmittal of statistical information, he shall submit to the district director each business day a properly signed and uniquely numbered Customs Form 214 listing all merchandise except for domestic status merchandise admitted under § 146.43 recorded into the inventory control and recordkeeping system during the previous business day. The Customs Form 214 must contain a list of all in-bond (I.T.) numbers or the unique number of any cartage document, as well as the number of invoices for each I.T. or cartage document, pertaining to merchandise which has been entered into the system.

(2) *Individual Customs Form 214.* If a cumulative Customs Form 214 is not submitted as provided in paragraph (b)(1) of this section, the operator shall file with the district director each business day an individual Customs Form 214 and 214–A covering each shipment recorded into the inventory control and recordkeeping system during the previous business day. The forms shall be submitted within 10 days after the end of the month in which the merchandise was received in the zone, and no extension beyond that time will be approved by the district director.

(3) *General order.* Merchandise which is not admitted into a subzone or zone site as provided in this section within 5 working days after its arrival there may be sent to general order unless:

(i) The district director grants the operator's request for an extension of the 5 working day period; or

(ii) The importer of record files an appropriate Customs entry for the merchandise and removes it from the zone premises.

(4) *inventory control and recordkeeping system.* The operator shall establish and maintain a continuing input quality control program to ensure that information concerning merchandise in admission documents, verified or corrected by counts and checks, is accurately recorded in the inventory control and recordkeeping system. Quantities recorded in the system, after allowance by the district director for any discrepancies, will be the quantities of merchan-

dise for which the operator shall be held liable under its bond for admission to the subzone or zone site. A discrepancy involving a within-case shortage (or overage) need not be reported on Customs Form 5931, if the operator is able to report that information in another manner so that the district director can determine whether there is liability for the discrepancy under the bond of any party to the importation.

Subpart D—Status of Merchandise in a Zone

§ 146.41 Privileged foreign status.

(a) *General.* Foreign merchandise which has not been manipulated or manufactured so as to effect a change in tariff classification will be given status as privileged foreign merchandise on proper application to the district director.

(b) *Application.* Each application for this status will be made on Customs Form 214 at the time of filing the application for admission of the merchandise into a zone or at any time thereafter before the merchandise has been manipulated or manufactured in the zone in a manner which has effected a change in tariff classification.

(c) *Supporting documentation.* Each applicant for this status shall submit to the district director, with the application, an invoice notated as provided for in § 141.90 of this chapter.

(d) *Determination of duties and taxes.* Upon receipt of the application and accompanying invoice, the district director may examine the merchandise to determine whether to approve the application. The merchandise will be subject to classification and valuation as provided in § 146.65.

(e) *Status as privileged foreign merchandise binding.* A status as privileged foreign merchandise cannot be abandoned and remains applicable to the merchandise even if changed in form by manipulation or manufacture, except in the case of recoverable waste (see § 146.42(b)), as long as the merchandise remains within the purview of the Act. However, privileged foreign merchandise may be exported or withdrawn for supplies, equipment, or repair material of vessels or aircraft without the payment of taxes and duties, in accordance with §§ 146.67 and 146.69.

§ 146.42 Nonprivileged foreign status.

All of the following will have the status of nonprivileged foreign merchandise:

(a) *Foreign merchandise.* Foreign merchandise properly in a zone which does not have the status of privileged foreign merchandise or of zone-restricted merchandise;

(b) *Waste.* Waste recovered from any manipulation or manufacture of privileged foreign merchandise in a zone; and

(c) *Certain domestic merchandise.* Domestic merchandise in a zone, which by reason of noncompliance with the regulations in

this part has lost its identity as domestic merchandise, will be treated as foreign merchandise. Any domestic merchandise will be considered to have lost its identity if the district director determines that it cannot be identified positively by a Customs officer as domestic merchandise on the basis of an examination of the articles or consideration of any proof that may be submitted promptly by a party-in-interest.

§ 146.43 Domestic status.

(a) *General.* Domestic status may be granted to merchandise:

(1) The growth, product, or manufacture of the U.S. on which all internal-revenue taxes, if applicable, have been paid;

(2) Previously imported and on which duty and tax has been paid; or

(3) Previously entered free of duty and tax.

(b) *Application.* No application or permit is required for the admission of domestic status merchandise, including domestic packing and repair material, to a zone, except upon order of the Commissioner of Customs. No application or permit is required for the manipulation, manufacture, exhibition, destruction, or transfer to Customs territory of domestic status merchandise, including packing and repair materials, except (1) when it is mixed or combined with merchandise in another zone status, or (2) upon order of the Commissioner of Customs. When the Commissioner orders a permit to be required for domestic status merchandise, he may also order the procedures, forms, and terms under which the permit will be received and processed.

(c) *Return of merchandise to Customs territory.* Upon compliance with the provisions of this section, any of the merchandise specified in paragraph (a) of this section, may subsequently be returned to Customs territory free of quotas, duty, or tax.

§ 146.44 Zone-restricted status.

(a) *General.* Merchandise taken into a zone for the sole purpose of exportation, destruction (except destruction of distilled spirits, wines, and fermented malt liquors), or storage will be given zone-restricted status on proper application. That status may be requested at any time the merchandise is located in a zone, but cannot be abandoned once granted. Merchandise in zone-restricted status may not be removed to Customs territory for domestic consumption except where the Board determines the return to be in the public interest.

(b) *Application.* Application for zone-restricted status will be made on Customs Form 214.

(c) *Merchandise considered exported.*

(1) *For Customs purposes.* If the applicant desires a zone-restricted status in order that the merchandise may be considered exported for the purpose of any Customs law, all pertinent Customs requirements relating to an actual exportation shall be complied

with as though the admission of the merchandise into the zone constituted a lading on an exporting carrier at a port of final exit from the U.S. Any declaration or form required for actual exportation will be modified to show the merchandise has been deposited in a zone in lieu of actual exportation, and a copy of the approved Customs Form 214 may be accepted in lieu of any proof of shipment required in cases of actual exportation.

(2) *For other purposes.* If the merchandise is to be considered exported for the purpose of any Federal law other than the Customs laws, the district director shall be satisifed that all pertinent laws, regulations, and rules administered by the Federal agency concerned have been complied with before the Customs Form 214 is approved.

(d) *Merchandise entered for warehousing transferred to a zone.* Merchandise entered for warehousing and transferred to a zone, other than temporarily for manipulation and return to Customs territory as provided for in § 146.33, will have the status of zone-restricted merchandise when admitted into the zone. The application on Customs Form 214 will state that zone-restricted status is desired for the merchandise.

Subpart E—Handling of Merchandise in a Zone

§ 146.51 Customs control of merchandise.

No merchandise, other than domestic status merchandise provided for in § 146.43, will be manipulated, manufactured, exhibited, destroyed, or transferred from a zone in any manner or for any purpose, except under Customs permit as provided for in this part. The district director may require segregation of any zone status merchandise whenever necessary to protect the revenue or properly administer U.S. laws or regulations.

§ 146.52 Manipulation, manufacture, exhibition or destruction; Customs Form 216.

(a) *Application.* Prior to any action, the operator shall file with the district director an application (or blanket application) on Customs Form 216 for permission to manipulate, manufacture, exhibit, or destroy merchandise in a zone. After Customs approves the application (or blanket application), the operator will retain in his recordkeeping system the approved application.

(b) *Approval.*

(1) The district director shall approve the application unless (i) the proposed operation would be in violation of law or regulation; (ii) the place designated for its performance is not suitable for preventing confusion of the identify or status of the merchandise, or for safeguarding the revenue; (iii) the district director is not satisfied that the destruction will be effective; or (iv) the Executive Secretary of the Board has not granted approval of a new manufacturing operation.

(2) The district director is authorized to approve a blanket application for a period of up to one year for a continuous or repetitive operation. The district director may disapprove or revoke approval of any application, or may require the operator to file an individual application.

(c) *Appeal of adverse ruling.* If an approved application is subsequently rescinded by the district director for any reason, the applicant or grantee may appeal the adverse ruling pursuant to the hearing provisions of § 146.82(b)(2). The rescission shall remain in effect pending the decision on the appeal.

(d) *Report results.*

(1) *Separate application.*—The operator shall report on Customs Form 216 the results of an approved manipulation, manufacture, exhibition, or certification of destruction (other than by a blanket application), unless the district director chooses physically to supervise the operation.

(2) *Blanket application.*—The operator shall maintain a record of an approved manipulation, manufacture, exhibition, or certification of destruction, in its inventory control and recordkeeping system so as to provide an accounting and audit trail of the merchandise through the approved operation.

(e) *Destruction.*

The district director may permit destruction to be done outside the zone, in whole or in part and at the risk and expense of the applicant, and under such conditions as are necessary to protect the revenue, if proper destruction cannot be accomplished within the zone. Any residue from the destruction within a zone, which is determined to be without commercial value, may be removed to Customs territory for disposal.

§ 146.53 Shortages and overages.

(a) *Report required.* The operator shall report, in writing, to the district director upon identification, as such, of any:

(1) Theft or suspected theft of merchandise;

(2) Merchandise not properly admitted to the zone; or

(3) Shortage of one percent (1%) or more of the quantity of merchandise in a lot or covered by a unique identifier, if the missing merchandise would have been subject to duties and taxes of $100 or more upon entry into the Customs territory. The operator shall record upon identification all shortages and overages, whether or not they are required to be reported to the district director at that time, in its inventory control and recordkeeping system. The operator shall record all shortages and overages as required in the annual reconciliation report under § 146.25.

(b) *Certain domestic merchandise.* Except in a case of theft or suspected theft, the operator need not file a report with the district director, or note in the annual reconciliation report, any shortage or overage concerning domestic status merchandise for which no permit is required.

(c) *Shortage.*

(1) *Operator responsibility.* The operator is responsible under its Foreign Trade Zone Operator's Bond for any loss of merchandise or for any merchandise which cannot be located or otherwise accounted for (except domestic status merchandise for which no permit is required), unless the district director is satisfied that the merchandise was:

(i) Never received in the zone;

(ii) Removed from the zone under proper permit;

(iii) Not removed from the zone; or

(iv) Lost or destroyed in the zone through fire or other casualty, evaporation, spillage, leakage, absorption, or similar cause, and did not enter the commerce of the U.S.

(2) *Liability for duty and taxes.* Upon demand of the district director, the operator shall make entry for and pay duties and taxes applicable to merchandise which is missing or otherwise not accounted for.

(d) *Overage.* The person with the right to make entry shall file, within 5 days after identification of an overage, an application for admission of the merchandise to the zone on Customs Form 214 or file a Customs entry for the merchandise. If a Customs Form 214 or a Customs entry is not timely filed, and the district director has not granted an extension of the time provided, the merchandise shall be sent to general order.

(e) *Damage.* The liability of the operator under its Foreign Trade Zone Operator's Bond may be adjusted for the loss of value resulting from damage to merchandise occurring in the zone. The operator shall segregate, mark, and otherwise secure damaged merchandise to preserve its identiy as damaged merchandise.

Subpart F—Transfer of Merchandise From a Zone

§ 146.61 Constructive transfer to Customs territory.

The district director shall accept receipt of any entry in proper form provided under this subpart, and the merchandise described therein will be considered to have been constructively transferred to Customs territory at that time, even though the merchandise remains physically in the zone. If the entry is thereafter rejected or cancelled, the merchandise will be considered at that time to be constructively transferred back into the zone in its previous zone status.

§ 146.62 Entry.

(a) *General.* Entry for foreign merchandise which is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse, will be made on Customs Form 7512, Customs Form 3461, Customs Form 7501, or other applicable Customs forms. If entry is made on Customs Form 3461, the person making entry shall file an entry

summary for all the merchandise covered by the Customs Form 3461 within 10 working days after the time of entry.

(b) *Documentation.* Customs Form 7501 or the entry summary will be accompanied by the entry documentation, including invoices, as provided in Parts 141 and 142 of this chapter. The person with the right to make entry shall submit any other supporting documents required by law or regulations that relate to the transferred merchandise and provide the information necessary to support the admissibility, the declared values, quantity, and classification of the merchandise. If the declared values are predicated on estimates or estimated costs, that information must be clearly stated in writing at the time an entry or entry summary is filed.

Customs Form 7512 for merchandise to be transferred to another port or zone or for exportation shall state that the merchandise covered is foreign trade zone merchandise; give the number of the zone from which the merchandise was transferred; state the status of the merchandise; and, if applicable, bear the notation or endorsement provided for in § 146.64(c), 146.66(b), or 146.70(c).

(c) *Waiver of supporting documents.* The district director may waive presentation of an invoice and supporting documentation required in paragraph (b) of this section with the entry or entry summary, if satisfied that presentation of those documents would be impractical, and the person making entry or the operator either files invoices and supporting documentation with the district director or maintains and makes those records available for examination by Customs.

§ 146.63 Entry for consumption.

(a) *Foreign merchandise.* Merchandise in foreign status or composed in part of merchandise in foreign status may be entered for consumption from a zone.

(b) *Zone-restricted merchandise.* Merchandise in a zone-restricted status may be entered for consumption only when the Board has ruled that merchandise can be entered for consumption.

(c) *Estimated production.*

(1) *Weekly entry.* When merchandise is manufactured or otherwise changed in a zone (exclusive of packing) to its physical condition as entered within 24 hours before physical transfer from the zone for consumption, the district director may allow the person making entry to file an entry on Customs Form 3461 for the estimated removals of merchandise during the calendar week. The Customs Form 3461 must be accompanied by a *pro forma* invoice or schedule showing the number of units of each type of merchandise to be removed during the week and their zone and dutiable values. Merchandise covered by an entry made under the provisions of this section will be considered to be entered and may be removed only when the district director has accepted the entry on Customs Form 3461. If the actual removals will exceed the estimate for the week, the person making entry shall file an additional Customs Form

3461 to cover the additional units before their removal from the zone. Notwithstanding that a weekly entry may be allowed, all merchandise will be dutiable as provided in § 146.65. When estimated removals exceed actual removals, the excess merchandise will not be considered to have been entered or constructively transferred to the Customs territory.

(2) *Individual transfers.* After acceptance of the weekly entry, individual transfers of merchandise covered by the entry may be made from the zone.

(d) *Textiles and textile products.* Subject to the existing statutory authority of the Board, textiles and textile products admitted into a zone, regardless of whether the merchandise has privileged or nonpriviledged foreign status, which would have been subject to quota or visa or export license requirements in their condition at the time of importation (if entered for consumption rather than admitted to a zone), may not be subsequently transferred into the Customs territory for consumption if, during the time the merchandise is in the zone, there has been a change by manipulation, manufacture, or other means:

(1) In the country of origin of the merchandise as defined by § 12.130 of this chapter;

(2) To exempt from quota or visa or export license requirements other than a change brought about by statute, treaty, executive order or Presidential proclamation; or

(3) From one textile category to another textile category.

§ 146.64 Entry for warehouse.

(a) *Foreign merchandise.* Merchandise in privileged foreign status or composed in part of merchandise in privileged foreign status may not be entered for warehouse from a zone. Merchandise in nonprivileged foreign status containing no components in privileged foreign status may be entered for warehouse in the same or at a different port.

(b) *Zone-restricted merchandise.* Foreign merchandise in zone-restricted status may be entered for warehouse in the same or at a different port only for storage pending exportation, unless the Board has approved another disposition.

(c) *Textiles and textile products.* Textiles and textile products which have been changed as provided for in § 146.63(d) may be entered for warehouse only if the entry is endorsed by the district director to show that the merchandise may not be withdrawn for consumption.

(d) *Time limit.* Merchandise may neither be placed nor remain in a Customs bonded warehouse after 5 years from the date of importation of the merchandise.

§ 146.65 Classified, valuation, and liquidation.

(a) *Classification.*

(1) *Privileged foreign merchandise.* Privileged foreign merchandise provided for in this section will be subject to tariff classification according to its character, condition and quantity, at the rate of duty and tax in force on the date of filing, in complete and proper form, the application for privileged status. Classification of merchandise subject to a tariff-rate import quota will be made only at the higher non-quota duty rate in effect on the date privileged foreign status was granted.

(2) *Nonprivileged foreign merchandise.* Nonprivileged foreign merchandise provided for in this section will be subject to tariff classification in accordance with its character, condition and quantity as constructively transferred to Customs territory at the time the entry or entry summary is filed with Customs.

(b) *Valuation.*

(1) *Total zone value.* The total zone value of merchandise provided for in this section will be determined in accordance with the principles of valuation contained in §§ 402 and 500 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1401a, 1500). The total zone value shall be that price actually paid or payable to the zone seller in the transaction that caused the merchandise to be transferred from the zone. Where there is no price paid or payable, the total zone value shall be the cost of all materials and zone processing costs related to the merchandise transferred from the zone.

(2) *Dutiable value.* The dutiable value of merchandise provided for in this section shall be the price actually paid or payable for the merchandise in the transaction that caused the merchandise to be admitted into the zone less, if included, international shipment and insurance costs and U.S. inland freight costs. If there is no such price actually paid or payable, or no reasonable representation of that cost, the dutiable value may be determined by excluding from the zone value any included zone costs of processing or fabrication, general expenses and profit and the international shipment and insurances costs and U.S. inland freight costs related to the merchandise transferred from the zone. The dutiable value of recoverable waste or scrap provided for in § 146.42(b) will be the price actually paid or payable to the zone seller in the transaction that caused the recoverable waste or scrap to be transferred from the zone.

(3) *Allowance.* An allowance in the dutiable value of zone merchandise may be made by the district director in accordance with the provisions of Subparts B and C of Part 158 of this chapter, for damage, deterioration, or casualty while the merchandise is in the zone.

(c) *Liquidation; extension to update cost data.* When the declared value of values of the merchandise are based on an estimate or estimates, the person making entry may request an extension of liquidation pending the presentation of updated or actual cost data. A

request for an extension may be granted at the discretion of the district director.

§ 146.66 Transfer of merchandise from one zone to another.

(a) *At the same port.* A transfer of merchandise to another zone with a different operator at the same port (including a consolidated port) will be by a licensed cartman under an entry for immediate transportation on Customs Form 7512 or other appropriate form with a Customs Form 214 filed at the destination zone. A transfer of merchandise between zone sites at the same port having the same operator may be made under a permit on CF 6043 or under a local control system approved by the district director wherein any loss of merchandise between sites will be treated as if the loss occured in the zone.

(b) *At a different port.* A transfer of merchandise from a zone at one port of entry to a zone at another port will be by bonded carrier under an entry for immediate transportation on Customs Form 7512. All copies of the entry must bear a notation that the merchandise is being transferred to another zone designated by its number.

(c) *Forwarding of merchandise history; documentation.* When merchandise is transferred under the provisions of this section, the operator of the transferring zone shall provide the operator of the destination zone with the documented history of the merchandise being transferred.

(1) The following documentation must accompany merchandise maintained under a lot inventory control system:

(i) A copy of the original Customs Form(s) 214 with accompanying invoices for admission of the merchandise and all components thereof;

(ii) A copy of any Customs Form 214 filed subsequent to admission to change the status of the merchandise or its components; and

(iii) A copy of any Customs Form 216 to manipulate or manufacture the merchandise.

(2) The following documentation must accompany merchandise not under a lot system, and not manufactured in a zone:

(i) A copy of the original Customs Form(s) 214 with accompanying invoices for admission of the merchandise as attributed under the particular zone inventory method;

(ii) A copy of any Customs Form 214 filed subsequent to admission to change the status of the merchandise as attributed under the particular zone inventory method; and

(iii) A copy of any Customs Form 216 to manipulate the merchandise as attributed under the particular zone inventory method.

(3) If the documents specified in paragraph (c)(2) of this section are not presented, the operator of the transferring zone shall submit the following:

(i) A statement of the zone value, dutiable value, quantity, description, unique identifier, and zone status (showing any changes of status after admission and whether the merchandise was manipulated so as to change its tariff classification) of all the merchandise in the shipment covered by the transportation entry; and

(ii) A certification that the statement in paragraph (c)(3)(i) of this section, is true and that the information contained therein is contained in the inventory control and recordkeeping system of the transferring zone.

(4) The following documentation must accompany merchandise not under a lot system, but manufactured in a zone:

(i) A statement by the transferring zone operator of the zone value, dutiable value, quantity, description, unique identifier, and zone status of all the merchandise (and components thereof, where applicable) covered by the transportation entry. The statement will also show any change in zone status in the transferring zone and whether the merchandise has been manufactured or manipulated in the zone so as to change its tariff classification; and

(ii) A certification by the operator of the transferring zone that the statement in paragraph (c)(4)(i) of this section is true and the information therein is contained in the inventory control and recordkeeping system of the zone.

(5) The operator of the transferring zone shall transmit the historical documentation of the merchandise to the receiving zone within 10 working days after it has been delivered to the bonded carrier for transportation. The documentation will be referenced to the I.T. number covering the merchandise.

(d) *Arrival at destination zone.* Upon arrival of the merchandise at the destination zone, it will be admitted under the procedure provided for in § 146.32, except that no invoice or Customs examination will be required. When the historical documentation is received, the operator of the destination zone shall associate it with the Customs Form 214 for admission of the merchandise and incorporate that information into the zone inventory control and recordkeeping system.

§ 146.67 Transfer of merchandise for exportation.

(a) *Direct exportation.* Any merchandise in a zone may be exported directly therefrom (without transfer into Customs territory) upon compliance with the procedures of paragraph (b) of this section.

(b) *Immediate exportation.* Each transfer of merchandise to the Customs territory for exportation at the port where the zone is located, will be made under an entry for immediate exportation on Customs Form 7512. The person making entry shall furnish an export bond on Customs Form 301 containing the bond conditions provided for in § 113.62 of this chapter.

(c) *Transporation and exportation.* Each transfer of merchandise to the Customs territory for transportation to and exportation from

a different port, will be made under an entry for transportation and exportation on Customs Form 7512. The bonded carrier will be responsible for exportation of the merchandise in accordance with § 18.26 of this chapter.

(d) *Textiles and textile products.* Textiles and textile products which have been changed as provided for in § 146.63(d) may be exported and returned to Customs territory for warehousing provided the entry for warehouse is endorsed by the district director to show that the merchandise may not be withdrawn for consumption.

(e) *Merchandise produced or manufactured in a zone and returned to Customs territory after exportation.* Merchandise produced or manufactured in a zone and exported without having been transferred to Customs territory other than for exportation or for transportation and exportation will be subject, on its return to Customs territory, to the duties and taxes applicable to like articles of wholly foreign origin, unless it is conclusively established that it was produced or manufactured exclusively with the use of domestic merchandise. The identity of the domestic merchandise must have been maintained in accordance with the provisions of this part, in which case that merchandise will be subject to the provisions of Schedule 8, Part 1, Tariff Schedules of the United States (19 U.S.C. 1202).

§ 146.68 Transfer for transportation or exportation; estimated production.

(a) *Weekly permit.* The district director may allow the person making entry for merchandise provided for in § 146.63(c) to file an application for a weekly permit to enter and release merchandise during a calendar week for exportation, transportation, or transportation and exportation. The application will be on Customs Form 7512 stating at the top the words "Application for Weekly Zone Permit," and will be filed with the district director. The application must be accompanied by a *pro forma* invoice or schedule like that required in § 146.63(c)(1). If actual transfers will exceed the estimate for the week, the person with the right to make entry shall file a supplemental Customs Form 7512 to cover the additional merchandise to be transferred from the subzone or zone site. No merchandise covered by the weekly permit may be transferred from the zone before approval of the application by the district director.

(b) *Individual entries.* After approval of the application for a weekly permit by the district director, the pereson making entry will be authorized to execute individual Customs Forms 7512 for exportation, transportation, or transportation and exportation of the merchandise covered by permit. Upon transfer of the merchandise, the operator shall obtain a receipt from the carrier on Customs Form 7512 to ensure its assumption of liability under the carrier's or cartman's bond. Customs will consider the time of entry to be when the removing carrier signs the receipt for the merchan-

dise. The operator shall give the bonded carrier a copy of the individual Customs Form 7512 and the destination copy (Customs Form 7512–C), as provided for in § 18.2(c) of this chapter. The operator also shall ensure that the district director receives a copy of the Customs Form 7512 and the origin copy (Customs Form 7512–C) by the end of the next working day after the carrier has receipted for the merchandise.

(c) *Statement of merchandise entered.* The person making entry for merchandise under an approved weekly permit shall file with the district director, by the close of business on the second working day of the week following the week designated on the permit, a statement of the merchandise entered under that permit. The statement must list each Customs Form 7512 by its unique I.T. number, and will provide a reconciliation of the quantities on the weekly permit with the manifested quantities on the individual Customs Forms 7512 submitted to Customs, as well as an explanation of any discrepancy.

§ 146.69 Supplies, equipment, and repair material for vessels or aircraft.

(a) *General.* Any merchandise which may be withdrawn duty and tax free in Customs territory under § 309 or § 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317), and under §§ 10.59 through 10.65 of this chapter, may similarly be transferred from a zone, regardless of its zone status, under those statutes and regulations. Each transfer from a zone for delivery to a qualified vessel or aircraft, will be made on Customs Form 7512 (see § 10.60 of this chapter). The person making entry shall furnish a bond on Customs Form 301 containing the bond conditions provided for in § 113.62 of this chapter.

(b) *Merchandise for delivery within zone.* Upon acceptance of the entry and bond, the district director shall release the merchandise to the operator for delivery to the qualified vessel or aircraft for lading in the zone.

(c) *Merchandise for delivery outside zone.* Upon acceptance of the entry and bond, the district director shall release the merchandise to the operator for delivery to the bonded cartmen, lighterman, or carrier, for transportation through the Customs territory to the qualified lading vessel or aircraft.

§ 146.70 Transfer of zone-restricted merchandise into Customs territory.

(a) *General.* Zone-restricted merchandise may be transferred to Customs territory only for entry for exportation, for entry for transportation and exportation, for warehousing pending exportation, for destruction (except destruction of distilled spirits, wines and fermented malt liquors), for transfer from one zone to another, or for delivery to a qualified vessel or aircraft or as ground equipment of a qualified aircraft under § 309 or 317, Tariff Act of 1930,

as amended (19 U.S.C. 1309, 1317), unless the Board has ruled that the return of the merchandise to Customs territory for domestic consumption is in the public interest. With Board approval (See 15 CFR Part 400), that merchandise may be entered for consumption, for warehousing, for immediate transportation without appraisement, or under any other provision of the Customs laws, unless the Board has specified the form of entry to be made.

(b) *For consumption.* If the return of zone-restricted merchandise to Customs territory for consumption has been ruled by the Board to be in the public interest, the entry shall be endorsed by the district director to show the authority under which it was made, and that the merchandise is subject to the provisions of Schedule 8, Part 1, Tariff Schedules of the United States (19 U.S.C. 1202).

(c) *For warehousing.* Zone-restricted merchandise may be transferred from a zone to a Customs bonded warehouse for storage pending exportation. The Customs Form 7501 shall be endorsed by the district director to show that the merchandise may not be withdrawn for consumption. In the case of zone-restricted merchandise transported in bond to another port for warehousing and exportation, Customs Form 7512 shall be endorsed by the district director to show that the merchandise in foreign trade zone merchandise in zone-restricted status, which shall be entered for warehouse with proper endorsement on Customs Form 7501, and which may not be withdrawn for consumption. Zone-restricted merchandise transferred from a zone to a Customs bonded warehouse may not be manipulated, except for packing or unpacking incidental to exportation.

(d) *For other purposes.* Upon acceptance of an entry or withdrawal for zone-restricted merchandise for any purpose other than that described in a Board order, the entry shall be endorsed by the person making entry to show that actual exportation of the merchandise is required by the fourth proviso to § 3 of the Act, as amended, or the entry endorsed to require delivery to a qualified vessel or aircraft, under § 309 or 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317).

§ 146.71 Release and removal of merchandise from zone.

(a) *General.* Except as provided for in § 146.43, no merchandise will be transferred from a zone without a Customs permit on the appropriate entry or withdrawal form or other document as required in this part. The district director may authorize transfer from a zone without physical supervision or examination by a Customs officer. Upon issuance of a permit, the district director will authorize delivery of the merchandise only to the operator, who then may release the merchandise to the importer or carrier.

(b) *Liability for discrepancy.* When a transfer is not physically supervised by a Customs officer, the operator will be relieved of responsibility only for the merchandise in a zone in the condition and quantity as shown on the entry, withdrawal, or other appropriate

form. The operator will be relieved of responsibility only if it receives the signed receipt on the document of the importer or the carrier named in that document. The responsibility of the operator may be adjusted by any discrepancy report made jointly by the operator and the bonded cartman, lighterman, or carrier, or the importer, and signed by the above or an authorized representative within 15 days after transfer of the merchandise from the zone. Any adjustment must be noted on the permit copy of the entry, withdrawal, or other appropriate form or document. A copy of any joint report of discrepancy must be submitted to the district director within 10 working days of signing by the parties.

(c) *Time limit.* Except in the case of articles for use in a zone, merchandise for which a Customs permit for transfer to Customs territory has been issued must be physically removed from the zone within 5 working days of issuance of that permit. The district director, upon request of the operator, may extend that period for good cause. Merchandise awaiting removal within the required time limit will not be further manipulated or manufactured in the zone, but will be segregated or otherwise identified by the operator as merchandise that has been constructively transferred to Customs territory.

(d) *Retention or return of merchandise to zone for consumption.*

(1) The district director shall cancel any entry for consumption where (i) the merchandise is not removed from the zone within the period specified in paragraph (c) of this section, or (ii) the merchandise was removed from the zone but did not enter the commerce of the U.S. in Customs territory and was subsequently readmitted to a zone in domestic status. If the district director has reason to believe any new entry would be cancelled under the provisions of this subparagraph, he may reject the entry or demand a written stipulation, as a condition of entry acceptance, that the merchandise will not be returned to a zone in domestic status. Merchandise covered by an entry which has been cancelled under this subparagraph shall be restored to its last foreign status.

(2) A component of merchandise which has been entered, but not physically removed from a zone, shall be restored to its last zone status, provided the district director determines that the component was included in the entry through clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of the law. Such an error, including that in appraisement of any entry or liquidation due to the above circumstances, may be corrected pursuant to § 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)), in accordance with the procedures described in Part 173 of this chapter. If the district director decides there has been no error, mistake, or inadvertence, or that the information was not timely provided, the component will be considered as an overage and subject to the provisions of § 146.53(d).

(3) When merchandise which has been entered for consumption is subsequently returned to a zone for a reason other than that specified in subparagraph (d)(1), it shall be admitted in domestic status.

SUBPART G—PENALTIES; SUSPENSION; REVOCATION

§ 146.81 Penalties.

(a) *Amount.* Upon violation of the Act, or any regulation issued under the Act, by the grantee, or any officer, agent, operator or employee thereof, the person responsible for or permitting the violation shall be subject to a fine of not more than $1,000. Each day during which a violation continues will constitute a separate offense. Liquidated damages, where applicable, will be imposed in addition to the fine (19 U.S.C. 81s).

(b) *Review.* All fines assessed by the district director under this section will be reviewed by the Director, Entry Procedures and Penalties Division, Headquarters, to determine whether further action against the grantee or operator, such as suspension or a recommendation for revocation of the grant, is warranted.

§ 146.82 Suspension.

(a) *For cause.* The district director may suspend for cause the activated status of a zone or zone site, or the privilege to admit, manufacture, manipulate, exhibit, destroy, transfer or remove merchandise at a zone or zone site for a period not to exceed 90 days. Upon order of the Board the suspension may be continued. If appropriate, the suspension may be limited to an individual user or users and not to the zone or zone site as a whole, or may be limited to a particular activity of an operator or user, such as suspension of the privilege to admit merchandise or the privilege to manufacture. An action to suspend will be taken in accordance with the procedure in paragraph (b) of this section if:

(1) The approval of the application to activate the zone was obtained through fraud or the misstatement of a material fact;

(2) The operator neglects or refuses to obey any proper order of a Customs officer or any Customs order, rule, or regulation relating to the operation or administration of a zone;

(3) The operator, or any officer of a corporation which has been granted the right to operate a zone, is convicted of or has committed an act that would constitute a felony, or would constitute a misdemeanor involving theft.

(4) The operator fails to furnish a current list of names, addresses, or other information as required by § 146.7;

(5) The operator does not provide a secure facility or properly safeguard merchandise within a zone;

(6) The operator fails to pay, within 30 days after the due date, all annual fees associated with the operation of a zone;

(7) The operator, or any officer, agent, or employee of the operator, discloses to an unauthorized person proprietary information contained on a Customs form or in the inventroy control and recordkeeping system; or

(8) The inventory control and recordkeeping system is impaired to the point where the identity of merchandise in zone status has been lost and cannot be reestablished without a suspension of zone operations.

(b) *Procedure.*

(1) *Notice.* The district director may, at any time, serve notice, writing, upon an operator to show cause why its right to continue operation of a zone should not be suspended or why an individual user or activities of an individual user should not be suspended, as provided for in paragraph (a) of this section. The notice will advise the operator of the grounds for the proposed action and will afford the operator an opportunity to respond, in writing, within 15 days after receipt of the notice. Thereafter, the district director shall consider the allegations and any response made by the operator and issue a decision, unless the operator requests a hearing in the matter.

(2) *Hearing.* If the operator requests a hearing, it will be held before a hearing officer designated by the Commissioner of Customs or his designee within 30 days following the operator's request. The operator may be represented by counsel at the hearing, and any evidence and testimony of witnesses in the proceeding, including substantiation of the allegations and the response thereto, will be presented. The right of cross-examination will be available to both parties. A stenographic record of the proceeding will be made and a copy will be delivered to the operator. At the conclusion of the hearing, the hearing officer shall transmit promptly all papers and the stenographic record of the hearing to the regional commissioner of the region in which the zone is located, together with a recommendation for final action.

(3) *Decision of regional commissioner.* Within 10 calendar days after delivery to the operator of a copy of the stenographic record of the hearing, the operator may submit to the regional commissioner in writing any additional views or arguments. The regional commissioner shall then render a written decision stating his reasons therefor. That decision will be served on the operator and will be considered the final Customs administrative action in the case.

(4) *Grantee.* If the grantee of the zone is not the operator, a copy of the notice to show cause will be served upon the grantee. The grantee, as a party-in-interest, may join the operator in any proceeding under this section.

§ 146.83 Revocation of zone grant.

(a) *Recommendation of district director.* The district director may at any time recommend to the Board that the privilege of establishing, operating, and maintaining a zone or subzone under Customs

jurisdiction be revoked for willful and repeated violations of the Act (19 U.S.C. 81r). If the district director believes that a substantial question of law exists as to whether willful and repeated violations of the Act have occurred, that officer may request internal advice under the provisions of Part 177 of this chapter from the Director, Carriers, Drawback and Bonds Division, Headquarters. A recommendation to the Board that a zone or subzone grant be revoked does not preclude, and may be in addition to, any liquidated damages, penalty, or suspension for cause.

(b) *Decision of the Board.* The procedure for revocation of a grant, the decision of the Board, and appeal is covered by the provisions of the Act and Title 15, Chapter IV, Part 400, Code of Federal Regulations.

CONFORMING AMENDMENTS

PARTS 18, 24, 112, 113, 141, 144, 178, AND 191

To conform the Customs Regulations to the changes made by the revision of Part 146, Customs Regulations (19 CFR Part 146), Parts 18, 24, 112, 113, 141, 144, 178, and 191, Customs Regulations (19 CFR Parts 18, 24, 112, 113, 141, 144, 178, and 191) are amended in the following manner:

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The authority citation for Part 18 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1551-1553, 1624.

2. Section 18.2 is amended in the following manner:

a. By revising the heading to paragraph (a)(1) to read "Merchandise other than from warehouse or foreign trade zone delivered to bonded carrier."

b. By removing the words "paragraph (a)(2)" in the first sentence of paragraph (a)(1) and inserting, in their place, the words "paragraphs (a)(2) and (a)(3) of this section."

c. By adding a new paragraph (a)(4) to read as follows:

§ 18.2 Receipt by carrier manifest.

(a) * * *

(4) *Merchandise delivered from foreign trade zone.* When merchandise is delivered from a foreign trade zone to a bonded carrier for transportation in bond, supervision of lading will be accomplished in accordance with the procedure set forth in § 146.71(a) of this chapter.

* * * * * * *

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624, 31 U.S.C. 9701.

2. Section 24.13 is amended by inserting in the first sentence of paragraphs (c) and (f), the words "a foreign trade zone operator," before the words "and bonded warehouse proprietor," respectively.

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. All other statutory authority cited at the end of various sections in Part 112 is removed.

3. The last sentence of § 112.12(b)(3), is revised to read as follows:

§ 112.12 Application for authorization.

* * * * * * *

(b) *Special requirements.*

* * * * * * *

(3) *Private carriers.* * * * If the private carrier is the proprietor of one or more Customs bonded warehouses or bonded container stations, or the operator of a foreign trade zone, to which imported merchandise will be transported, he shall accompany the bond and copies of the bond by a statement showing the location of each warehouse, container station, or zone.

* * * * * * *

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1623, 1624.

2. Section 113.73 is amended by revising paragraphs (a)(1) and (a)(2), and by adding paragraph (d), to read as follows:

§ 113.73 Foreign trade zone operator bond conditions.

* * * * * * *

(a) *Receipt, Handling, and Disposition of Merchandise.* The principal agrees to comply with:

(1) The law and Customs Regulations relating to the receipt, admission, status, handling, transfer, and removal of merchandise from the foreign trade zone or subzone, and

(2) The Customs Regulations concerning the maintenance of inventory control and recordkeeping systems covering merchandise

in the foreign trade zone or subzone. If the principal defaults and the default involves merchandise other than domestic merchandise for which no permit for admission is required, the obligors (principal and surety) agree to pay liquidated damages equal to the value of the merchandise involved in the default, or three times the value of the merchandise involved in the default if the merchandise is restricted merchandise or alcoholic beverages, or such other amount as may be authorized by law or regulation. It is understood and agreed that whether the default involves merchandise is a determination made by Customs, that the amount to be collected under this condition shall be based upon the quantity and value of the merchandise as determined by Customs, and that value as used in these provisions means value as determined under 19 U.S.C. 1401a. If the principal defaults and the default does not involve merchandise, the obligors agree to pay liquidated damages of $1000 for each default, or such other amount as may be authorized by law or regulations.

(b) * * *

(c) * * *

(d) *Payment of Annual Fee.* The principal agrees to pay timely any annual fee or fees as provided in the Customs Regulations. If the principal defaults, the obligors agree to pay liquidated damages equal to the amount of the annual fee due but not paid and an amount equal to one percent of the annual fee for each of the first seven days the annual fee is in arrears, two percent of the annual fee for each of the succeeding seven days the annual fee is in arrears, and three percent of the annual fee for each day thereafter in which the annual fee is in arrears.

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624.

2. Section 141.111(d) is revised to read as follows:

§ 141.111 Carrier's release order.

* * * * * * *

(d) *Qualified release order.* In the case of merchandise which is entered for warehousing, for transportation in bond, for exportation, or is to be admitted to a foreign trade zone, the release order may be qualified as follows:

(1) "For transfer to the bonded warehouse designated in the warehouse entry," if the merchandise is entered for warehousing;

(2) "For transfer to the bonded carrier designated in the transportation entry," if the merchandise is entered for transportation in bond;

(3) "For transfer to the carrier designated in the export entry," if the merchandise is entered for exportation; or

(4) "For transfer to the foreign trade zone designated in Customs Form 214," if the merchandise is to be admitted to a foreign trade zone.

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The authority citation for Part 144 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301, 7 U.S.C. 1854, 19 U.S.C. 66, 1311, 1312, 1484, 1552, 1553, 1555, 1556, 1557, 1559, 1562, 1563, 1623, 1624, 1646(a), 26 U.S.C. 5214; Pub. L. 95-410; Pub. L. 95-176; Pub. L. 96-511.

2. All other statutory authority cited at the end of various sections in Part 144 is removed.

3. Section 144.36(g) is revised to read as follows:

§ 144.36 Withdrawal for transportation.

* * * * * * *

(g) *Procedure at destination.* Upon arrival at destination, the merchandise may be:

(1) Entered for rewarehouse in accordance with § 144.41;

(2) Entered for combined rewarehouse and withdrawal for consumption in accordance with § 144.42;

(3) Exported in accordance with paragraph (h) of this section;

(4) Forwarded to another port or returned to the port of origin in accordance with § 18.5 (c) or (d) of this chapter; or

(5) Admitted to a foreign trade zone in zone-restricted status as provided in Part 146 of this chapter.

§ 144.37 Withdrawal for exportation.

* * * * * * *

4. Section 144.37 is amended by adding a new paragraph (g), to read as follows:

* * * * * * *

(g) *Exportation at a foreign trade zone.* Merchandise may be withdrawn for exportation at a foreign trade zone in the same or at a different port. The merchandise will be considered exported upon admission to a zone in zone-restricted status, as provided in § 146.44(c) of this chapter.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting the following in the appropriate numerical sequence according to the section number the colums indicated:

§ 178.2 Listing of OMB Control Numbers.

19 CFR Section	Description	OMB Control No.
146.6, 146.7	Procedures for activation of a foreign trade zone; procedures for zone changes, including alteration, deactivation and suspension.	1515-0151

PART 191—DRAWBACK

1. The authority citation for Part 191 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1313, 1624.

§§ 191.163-191.165 also issued under 19 U.S.C. 81c.

2. Section 191.162 is amended by removing reference to "§ 146.25," and inserting, in its place, reference to "§ 146.44."

3. Section 191.163 (c) and (d) are revised to read as follows:

§ 191.163 Articles manufactured or produced in the U.S.

* * * * * * *

(c) *Action of the district director on the notice of transfer.* The district director shall assign a number to each notice of transfer, return one copy to the transferor and forward another copy to the zone operator at the foreign trade zone.

(d) *Action of foreign trade zone operator.* After articles have been received in the zone, the zone operator at the zone shall certify on a copy of the notice of transfer the receipt of the articles (see § 191.164(d)(2)) and forward the notice to the transferor or the person designated by the transferor. The transferor shall verify that the notice has been certified before filing it with the drawback entry.

* * * * * * *

4. Paragraphs (b) and (c) of § 191.164 are revised to read as follows:

§ 191.164 Merchandise transferred from continuous Customs custody.

* * * * * * *

(b) *Drawback entry.* Before the transfer of merchandise from continuous Customs custody to a foreign trade zone, the importer or a person designated in writing by the importer for that purpose shall file with the district director a direct export entry on Customs Form 7512 in duplicate. The district director shall forward one copy of Customs Form 7512 to the zone operator at the zone.

(c) *Certification by zone operator.* After the merchandise has been received in the zone, the zone operator at the zone shall certify on the copy of Customs Form 7512 the receipt of the merchandise (see paragraph (d)(2) of this section) and forward the form to the transferor or the person designated by the transferor. After executing the certifications provided for in paragraph (d)(3) of this section, the transferor shall resubmit Customs Form 7512 to the district director in place of the bill of lading required by § 191.136.

* * * * * * *

5. Paragraphs (b) and (c) of § 191.165 are revised to read as follows:

§ 191.165 Same condition drawback merchandise and merchandise not conforming to sample or specifications or shipped without the consent of the consignee.

* * * * * * *

(d) *Drawback entry.* Before transfer of the merchandise to a foreign trade zone, the importer or a person designated in writing by the importer for that purpose shall file with the district director an entry on Customs Form 7539 in duplicate. The district director shall forward one copy of Customs Form 7539 to the zone operator at the zone.

(c) *Certification by zone operator.* After the merchandise has been received in the zone, the zone operator at the zone shall certify on the copy of Customs Form 7539 the receipt of the merchandise and forward the form to the transferor or the person designated by the transferor. After executing the certifications provided for in paragraph (d)(3) of this section, the transferor shall resubmit Customs Form 7539 to the district director in place of the bill of lading required by § 191.136.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: December 10, 1985.

DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, February 11, 1986 (51 FR 5040)]

PARALLEL REFERENCE TABLE

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Revised section	Superseded section
146.0	146.0.
146.1(a)	New.
146.1(b) (2), (3), (4), (6), (7), (8), (12), (13), (14), (15), (16), (17), (18), (19), (20), (21), (22), (23).	New.
146.1(b)(1)	146.1(a).
146.1(b)(5)	146.1(c).
146.1(b)(9)	146.1(e).
146.1(b)(10)	146.1(e)(1).
146.1(b)(11)	146.1(e)(2).
146.2	146.2.
146.3(a)	146.3.
146.3(b)	New.
146.4	New.
146.5	146.4.
146.6	New.
146.7	New.
146.8	New.
146.9	146.5.
146.10	146.6.
146.11 (a), (b), and (c)	146.7 (a), (b), and (c).
146.11(d)	New.
146.12	146.8.
146.13	New.
146.14	New.
146.21	New.
146.22	New.
146.23	New.
146.24	New.
146.25	New.
146.26	New.
146.31	146.11.
146.32(a)	146.12(a).
146.32(b)(1)	New.
146.32(b)(2)	146.12(b)(1)(ii).
146.32(b)(3)	146.12(b)(1)(i).
146.32(b)(4)	146.12(b)(2).

PARALLEL REFERENCE TABLE—Continued

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Revised section	Superseded section
146.32(b)(5)	New.
146.32(c) (1), (2), and (4)	146.12(c) (1), (2), and (3).
146.32(c)(3)	New.
146.32(d)	New.
146.33	146.13.
146.34	146.14.
146.35	New.
146.36	New.
146.37	New.
146.38	146.15.
146.39	New.
146.40	New.
146.41 (a), (b), and (c)	146.21 (a), (b), and (c) (1) and (2).
146.41(d)	146.21(c)(3) (i) and (v).
146.41(e)	146.21(d).
146.42	146.23.
146.43	146.22, 146.24.
146.44	146.25.
146.51	146.31 (a), (b).
146.52(a)	146.21(f), 146.32(a), 146.33(a).
146.52(b)	146.21(f), 146.32(b), 146.33(b).
146.52(c)	146.32(c).
146.52(d)(1)	New.
146.52(d)(2)	146.32(d).
146.52(e)	146.33(b).
146.53 (a), (b)	146.31(c).
146.53 (c), (d), and (e)	New.
146.61	146.47(c), 146.48(b).
146.62	New.
146.63(a)	146.45, 146.46, 146.48(c).
146.63(b)	146.47.
146.63(c)	New.
146.63(d)	146.49.
146.64(a)	146.48(c).
146.64(b)	146.47(e)(4).
146.64 (c), (d)	New.
146.65(a)(1)	146.21(c)(3)(iv).
146.65(a)(2)	146.48(e)(1).
146.65(b)	146.48(e)(2).
146.65(c)	New.
146.66(a)	146.43(b)(1).

PARALLEL REFERENCE TABLE—Continued

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Revised section	Superseded section
146.66(b)	146.43(b)(1).
146.66(c)	146.43(b)(2).
146.66(d)	New.
146.67(a)	146.41.
146.67 (b), (c)	146.45(d), 146.46(d).
146.67(d)	New.
146.67(e)	146.46(e).
146.68	New.
146.69	146.42.
146.70(a)	146.47(a).
146.70(b)	146.47(e)(3).
146.70(c)	146.47(e)(4).
146.70(d)	146.47(e)(3).
146.71	New.
146.81	New.
146.82	New.
146.83	New.

Old section	New section
146.0	146.0.
146.1(a)	146.1(b)(1).
146.1(b)	Removed.
146.1(c)	146.1(b)(5).
146.1(d)	Removed.
146.1(e)	146.1(b)(9).
146.1(e)(1)	146.1(b)(10).
146.1(e)(2)	146.1(b)(11).
146.1(f)	Removed.
146.2	146.2.
146.3	146.3(a).
146.4	146.5.
146.5	146.9.
146.6	146.10.
146.7 (a), (b), and (c)	146.11 (a), (b), and (c).
146.8	146.12.
146.11	146.31.
146.12(a)	146.32(a).
146.12(b)(1)(i)	146.32(b)(3).
146.12(b)(1)(ii)	146.32(b)(2).
146.12(b)(2)	146.32(b)(4).
146.12(c) (1), (2), and (3)	146.32(c) (1), (2), and (4).

PARALLEL REFERENCE TABLE—Continued

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Old section	New section
146.13	146.33.
146.14	146.34.
146.15	146.38.
146.21 (a), (b), and (c)(1)(2)	146.41 (a), (b), and (c).
146.21(c)(3) (i) and (v)	146.41(d); 146.65(a)(1).
146.21(c)(3)(iv)	146.65(a)(1).
146.21(c)(3) (ii) and (iii)	Removed.
146.21(d)	146.41(e).
146.21(e)	Removed.
146.21(f)	146.52 (a) and (b).
146.22	146.43.
146.23	146.42.
146.24	146.43.
146.25	146.44.
146.31 (a) and (b)	146.51.
146.31(c)	146.53 (a), (b).
146.32(a)	146.52(a).
146.32(b)	146.52(b).
146.32(c)	146.52(c).
146.32(d)	146.52(d)(2).
146.33(a)	146.52(a).
146.33(b)	146.52(b).
146.41	146.67(a).
146.42	146.69.
146.43(a)	Removed.
146.43(b)(1)	146.66(b).
146.43(b)(2)	146.66(c).
146.44	Removed.
146.45 (a), (b), and (c)	146.63.
146.45(d)	146.67 (b), (c).
146.46 (a), (b), and (c)	146.63.
146.46(d)	146.67 (b), (c).
146.46(e)	146.67(e).
146.47(a)	146.70(a).
146.47 (b), (d), and (e) (1) and (2)	Removed.
146.47(c)	146.61.
146.47(e)(3)	146.70 (b) and (d).
146.47(e)(4)	146.64, 146.70(c).
146.47(f)	Removed.
146.48(a)	Removed.
146.48(b)	146.61.
146.48(c)	146.63(a) and 146.64(a).

PARALLEL REFERENCE TABLE—Continued

[This table shows the relationship of sections in revised Part 146 to superseded Part 146]

Old section	New section
146.48(d)	Removed.
146.48(e)(1)	146.65(a)(2).
146.48(e)(2)	146.65(b).
146.48(f)	Removed.
146.49	146.63(d).

APPENDIX

FINAL REGULATORY FLEXIBILITY ANALYSIS ON PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO FOREIGN TRADE ZONES

INTRODUCTION

The economic impact review below constitutes the Customs Service final regulatory flexibility analysis in compliance with the requirements of Section 3 of the Regulatory Flexibility Act (5 U.S.C. 603). The Act requires that regulatory effects be analyzed so as to determine and quantify, if possible, the economic effects of proposals on small business operations. The Act's key concepts revolve around identifying "significant economic impacts on a substantial number of small entities." The initial analysis was modified as necessary into a final regulatory flexibility analysis upon receipt and review of public comments resulting from Federal Register publication of this rule as a notice of proposed rulemaking.

RATIONAL

The number of Foreign Trade Zones, complexity of operations and volume of trade passing through zones has increased significantly in recent years. From less than 20 zones in the early 1970's, activated zones and sub-zones reporting activity at the end of 1984 numbered 88 (57 general purpose zones and 31 subzones), with 83 other zones approved but not reporting activity (see table 1).

Meanwhile, Customs inspection and supervision of zone activity has changed little in practice. Secular reductions in agency resources have combined with unchanged practices to produce (1) operational hardships on zone grantees and users and (2) uncertain inspection and control of zone activity.

The proposed revisions to 19 CFR Parts 18, 24, 112, 141, 144, 146, and 191 (relating to Customs administration of foreign trade zones) is an administrative attempt to update zone supervision in accordance with current business practices.

Objectives

The proposal is intended to bring about three fundamental changes:

1. The method of accountability of merchandise admitted, stored, manipulated, exhibited, manufactured and removed from zones;
2. The method of enforcement of Customs laws through audits and spot checks instead of more costly physical presence of inspectional resources; and
3. The method of reimbursing Customs for its zone-related operational expenses.

Legal Basis for Proposal

This regulatory project is initiated under the authority of R.S. 251, as amended, Sections 1-21, 48 Stat. 998, 999, as amended, 1000, 1002, as amended, 1003, 77A Stat. 14, Section 624, 46 Stat. 759 (19 U.S.C. 66, 81a-81u, 1202 (General Headnote 11), 1924).

Estimated Number of Small Entities Affected

Tallies of zone activity in Customs regions indicated that approximately 1,500 users occupy space in zones and carry out the range of permitted manipulation manufacturing and storage activities. Of these, 600 operate on a full-time, year-round basis. The remaining 900 operate on a part-time basis. These estimates do not include users in foreign trade sub-zones. Sub-zone users tend to be large (oftentimes multinational) corporations and thus do not fit within the purview of the requirements of the Regulatory Flexibility Act which concentrate on small business concerns.

Economic Effects of Compliance With the Proposal

After review of the proposal's work plan, we have identified within the proposal the following seven procedural/administrative and fee-related changes likely to affect economic concerns of small business:

A. Procedural administrative changes:
   1. Inventory control and record keeping system;
   2. Operator's control over admission and removal of goods;
   3. Elimination of customs forms 7502/7505/215.

B. Fee changes:
   1. Elimination of present form of reimbursement to Customs;
   2. Implementation of an annual fee covering audits and spot checks;
   3. Zone activation an boundary alteration fee.

TABLE I.—NUMBER OF FOREIGN TRADE ZONES IN THE UNITED STATES [1]

	Approved	Reporting Activity	No Reported Activity
General Purpose Zones	111	57	54
Sub-zones	60	31	29
Total	171	88	83

[1] As of the end of FY 1984.

Source: Foreign Trades Zones Board, U.S. Department of Commerce and special reports from U.S. Customs Service Regions.

A. *Procedural/Administrative Changes*

—Inventory Control and Record Keeping System

An inventory control and record keeping system with Customs prescribed data will result from this proposal. A similar system (Alternative Inventory Control System) has been in effect since 1976 and currently operates at 7 general purpose zones. Data required for the new system will consist of standard business data currently collected and tabulated for small users by each zone's operator/grantee. We do not anticipate a significant net reporting burden on users or operators as a result of this segment of the proposal.

—Operators' Control Over Admission and Removal of Goods

Under present Customs supervision, a Customs officer must be present to clear admissions of merchandise to and removals of merchandise from a zone, thus limiting these transactions to the availability of a Customs officer. Under the present proposal, an operator will be able to admit and remove merchandise without a Customs officer being present, after receiving Customs approval. However, Customs approval for admission will require an invoice in support of the application for admission on CF 214 and that the merchandise be retained for Customs examination at the place of unlading, the zone, or other location designated by the district director. Upon admittance to a zone, textile goods subject to visa controls will require a CF 214 with an invoice annotated by a Customs officer. Withdrawal of those goods will require the visa, either the original if withdrawn in its original lot size or new visas if withdrawn in break bulk, partial quantities. Presentation of an invoice and merchandise examination prior to admission are not currently required and will represent an additional paperwork requirement and possible delay in the arrival of merchandise at the zone. Customs approval for removals will be simplified by a reduction in paperwork as outlined in the next section. In total, the additional admission requirements will be offset by the simplified removal procedure and the enhanced business flexibility derived from being

able to admit or remove merchandise freely into and out of the zone after Customs approval has been received.

—Forms Reduction—Customs Forms 7501/7505/215

Under present practice, Customs forms 7501 and 214 are required to obtain privileged foreign status. Removal of privileged foreign status merchandise from a zone requires filing CF 7505 for consumption. CF 215 is required to remove all zone status merchandise, except merchandise in privileged status or wholly composed of merchandise in privileged status. The estimated number of forms filed in FY 1984 appear in Table 2 below.

Table 2

Form		
*7501	.....	15,000
7505	.....	20,000
215	.....	45,000

* The present CF 7501 requires data previously requested on the CF 7502.

Under a provision of this proposal, a request for privileged foreign status would require a CF 214 and invoice (as before) but would eliminate the CF 7501. Upon removal of privileged foreign status goods from a zone, the applicable entry form would replace the 7505 (no net gain or loss). Further, the CF 215 will be eliminated under this proposal. Current clerical, data base management and brokerage costs for an estimated 60,000 forms 7501/215 would be eliminated, giving small businesses a net gain on the order of $650,000 yearly from this procedural change.

—Mandatory Bonding

One of the major proposed changes in zone administration is to involve the operator/grantee in data keeping and reporting. A new mandatory bond at a minimum level of $50,000 would be required in another provision of the proposal, with the goal of encouraging operator/grantee accuracy in compliance with his new responsibilities. The new bond would cover non-compliance with these proposed regulations as well as losses of merchandise. In terms of practical effects of this provision on small businesses, we anticipate no net appreciable added burden or cost. Most activated zones currently have bonds which meet or exceed the proposed minimum level.

B. *Fee Changes*

—Elimination of Present Forms of Customs Reimbursement

Under present practices, operators/grantees reimburse Customs for inspectional services rendered at zones. In fiscal year 1984, payments to Customs totaled an estimated $1.7 million, of which $1.3 million pertain to operations at general purpose zones. Assuming operators charge users flat fees to recover these payments, then

each small user pays an average of $870 per year for these present Customs services. The proposed revisons would *eliminate* this $1.3 million present fee, substituting in its place (see below) tiered fees which would cover Customs costs in carrying out audits and spot checks.

A particular concern is underscored at this point, concerning the distribution of this $1.3 million benefit (eliminated Customs reimbursement). The 57 general purpose zones at the end of FY 1984 are widely distributed around the country. A small business interested in participating in a foreign trade zone generally finds itself limited to one and only one zone provider in its operating area. The offering of foreign trade zone services could thus be regarded as a monopolistic market condition. Significant regulatory requirements and administrative and application costs in seeking approval and setting up a zone essentially prevents access by (especially small) businesses. In essence, then, they must generally contract with the sole established zone operator in the geographic area.

In economic theory, the pricing practices of a good/service provided under monopolistic conditions are oriented towards extracting a maximum profit for the unique provider, and, in practice, the level of fees charged by some zone operators/grantees is a known concern of the Commerce Department's Foreign Trade Zone Board.

As stated above, average savings per user from elimination of Customs reimbursement is expected to approximate $870 per year. Based on actual trade zone market conditions, however, real actual savings to users may total well below the average $870/year. We expect that zone operator/grantees will pass through to small users only a portion (quite possible small) of the total $1.3 estimated benefit of this provision of the proposed regulation. In the public comments, no commenters (largely major general purpose and sub-zone operators) addressed this issue. We expect that in most cases operators will neglect to pass on savings to small users. The Foreign Trade Zone Board has authority to review fees and charges to users if those fees are challenged as unreasonable.

The fiscal year 1984-based fee schedule is tiered. The purpose of the annual fee is to recover Customs costs incurred in carrying out the audit-inspection supervision program. The annual fee to be charged each zone is a function of the degree of complexity in Customs auditing and inspection of zones. In order to account for those distinct operating conditions, each zone with fall into a distinct size/complexity tier, with a specific fee for each tier. In this way, small, less operationally complex zones will not subsidize large zones. The tiers are based on operational complexity as measured by the number of admissions and removals of foreign and zone restricted merchandise.

A zone will be classified as to its fee tier according to the following simple criteria if admissions/transfers of foreign and zone restricted merchandise:

(i) Are less than 300 per year, then TIER I ($1,400 per year fee);
(ii) Fall between 300 and 3,000 per year, then TIER II ($15,500 per year fee);
(iii) Are greater than 3,000 per year, then TIER III ($33,800 per year fee).

We expect general purpose zones to be largely skewed towards the TIER I level (see Table 3).

The annual fee is due and payable on the effective date of final Rule and on January 1 of each subsequent year. For existing zones the tier will be based on the number of admissions and transfers of foreign and zone restricted merchandise made during fiscal year ending September 30, 1984. Zones currently under a voluntary audit-inspection agreement need not pay an additional annual fee for calendar year 1985, nor will there be any refunds of fees paid. For subsequent years the tier will be based on the number of admissions and transfers of foreign and zone restricted merchandise made during the previous fiscal year ending September 30. Each zone operator is responsible for determining the appropriate tier. The operator's determination is subject to Customs verification. Operators of zones activated during a calendar year will be responsible for paying an annual fee based on tier I.

TABLE 3.—DISTRIBUTION OF FOREIGN TRADE ZONES BY ANNUAL FEE TIERS

	Tier I [1]	Tier II [2]	Tier III [3]	Small Business Users
Total	44	33	11	1,500
General Purpose Zones	30	18	8	1,300
Sub-zones	14	15	3	200

[1] $1,400 fee per year.
[2] $15,500 fee per year.
[3] $33,800 fee per year.

Under the present inspectional system Customs bills general purpose zone operators approximately $1.3 million annually for inspectional services. Zone operators recover this expense in their fee and rental/lease billings to zone users. As above, we estimate that the Customs component of these fees paid by zone users average $870 per year per user.

Under the proposed audit-inspection system with different fee tiers, Customs billings to general purpose operators will amount to approximately $591,000 per year, versus the estimated $1.3 million at present. The Customs component of small business users' payments to operators will average $450 per year per user, versus the

$870 per year per user at present. Future increases in the annual fee will reflect cost increases incurred by Customs in delivering audit and inspection services. These increases will consist largely of annual rises in labor costs. It is expected that labor costs, and thus annual fees charged zone operators, will rise by a moderate 2-4% per year.

Since sub-zone users are generally large companies, the effects of fees on them do not fall within the purview of the RFA and this analysis and thus will not be considered in this economic review. The burden on small business from this fee schedule (yielding $591,000/yr.) would be an average $450 per small user. Elimination of the current reimbursement method ($870 per small user annually), even under the caveats noted above, would more than cover these new audit-inspection approach fees.

—New Zone Activation and Boundary Alteration Fees

Under present procedures, zone applicants are not billed for necessary Customs preparatory work prior to a zone's activation or alteration. The proposed revisions contain a provision allowing Customs to recover its costs for such tasks, among others, as site surveys, background investigations, zone approval processing, inventory systems review and associated clerical costs. These fees would be applicable to zones which are activated, relocated or altered on or after the effective date of final rulemaking.

Prospective fees are currently estimated at the following:

(a) $1,021 for zone activation;

(b) $442 for zone relocation; and

(c) $442 for zone alterations.

Concerning effects on small businesses, we expect average added cost pass-through from this source to be insignificant.

Overlapping Rules

None identifiable.

Alternative Rules

None feasible. The *Status Quo* becomes more untenable as complex zone manufacturing operations increase in number, while Customs resources diminish.

Summary of Economic Effects

Based on present available data, the proposed revisions would appear to provide net yearly benefits to zone operators and users of $1.3 million, as summarized below:

Quantified Cost (−)/Benefits (+)

[In dollars]

Document Reduction	+650,000
Current Reimbursement Eliminated	+1,300,000
New Annual Fees for Audit Approach	−591,000
Total	+1,359,000

Non-Quantified Factors

	Added Costs	New Benefits	Neutral Effect
Admission of goods	X		
Removal of goods		X	
Inventory control and record keeping system.			X
Mandatory bonding			X

(T.D. 86-17)

Leaded Naphtha; Change of Tariff Classification

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Change of practice.

SUMMARY: Customs has determined that a uniform and established practice exists to classify certain imported leaded naphtha for tariff purposes as motor fuel. Because this petroleum product, as imported, is not chiefly used as motor fuel, it cannot be classified as such, nor can it be classified as naphtha in view of the added lead content. Accordingly, Customs believes the classification practice is clearly wrong. The most appropriate tariff provision for the classification of leaded naphtha is for mixtures not specifically provided for, i.e., mixtures that are in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil, or natural gas.

EFFECTIVE DATE: This change of practice will be effective as to merchandise entered for consumption, or withdrawn from warehouse for consumption, on or after May 8, 1986.

FOR FURTHER INFORMATION CONTACT: John G. Hurley, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. (202-566-8181).

SUPPLEMENTARY INFORMATION:

U.S. Customs Service

General Notice

Solicitation of Public Comments Regarding Tariff Classification of Prefinished Hardboard Siding

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Solicitation of public comments.

SUMMARY: Customs is reviewing its position regarding the tariff classification of certain imported prefinished hardboard lap siding. The product in question is a plank of hardboard, 7/16-inch thick, and either 9 or 12 inches wide. Approximately 1-inch from the bottom, a hard plastic locking strip or "spline" is fixed into a groove in the back of each plank. The top edge of each plank is machined to form a groove or "rabbet", which fits the spline in the plank above. The planks are prefinished at the time of importation with acrylic latex paint. The current tariff classification was challenged administratively by the filing of a domestic interested party petition. That petition was denied by Customs. In the subsequent court proceeding contesting the denial by Customs, an alternative classification not previously considered was suggested. Customs has been directed by the court to consider the alternative classification, which we are publishing for public comments in order to make an administrative decision on the claim. The Court further directed Customs to communicate its administrative decision within 60 days from the date of the Court order, January 27, 1986.

DATE: Comments (preferably in triplicate) must be received on or before April 10, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Jeremy N. Baskin, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs is reviewing its position regarding the tariff classification of certain imported prefinished hardboard lap siding. The product in question is a plank of hardboard, 7/16-inch thick, and either 9 or 12 inches wide. Approximately 1 inch from the bottom, a hard plastic locking strip or "spline" is fixed into a groove in the back of each plank. The top edge of each plank is machined to form a groove or "rabbet", which fits the spline in the plank above. The planks are prefinished at the time of importation with acrylic latex paint. The current tariff classification is under the tariff provision for "Other boards, of vegetable fibers (including wood fibers) * * *", in item 245.90, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), a duty-free provision.

Customs published a notice in the FEDERAL REGISTER on March 22, 1982 (47 FR 12258), acknowledging receipt of a petition from a domestic interested party filed under section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516). The notice solicited public comments on the merits of the petition. The deadline for receipt of comments was subsequently extended by a FEDERAL REGISTER notice published on May 27, 1982 (47 FR 23249). The petitioner claimed that the proper classification of the siding should be under the tariff provision for other hardboard in item 245.30, TSUS. The current duty rate under item 245.30, TSUS, is 7.5 percent ad valorem.

In accord with proper administration practice, by a ruling dated October 29, 1982, Customs informed the petitioner that the comments solicited by the March 22, 1982, notice had been considered and, upon review of the matter, it was decided to deny the petition and to continue to classify the imported siding in item 245.90, TSUS.

In response to the October 29, 1982, ruling, by letter of November 29, 1982, the petitioner filed notice of its intention to contest the decision in accordance with § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.23, Customs Regulations (19 CFR 175.23).

By publication of T.D. 83-104 in the Federal Register on May 11, 1983 (48 FR 21231), Customs informed the public of the petitioner's desire to contest the decision, and gave a detailed account of the proceedings to that date together with a full explanation of the reasons for denying the petition.

In the subsequent proceeding contesting the classification before the Court of International Trade, *American Hardboard Association* v. *United States and MacMillan Blodel, Ltd.*, Party-in-Interest, Court No. 83-9-01301, a tariff classification not previously considered was suggested. On January 27, 1986, the Court remanded the case for ecision on the correctness of the current tariff classification as opposed to the newly suggested alternative classification under the provision for "Building boards * * * Laminated boards

* * *", in item 245.80, TSUS. Materials classified under item 248.80, TSUS, are currently subject to a compound rate of duty of 1.4 cents per pound, plus 2.6 percent ad valorem.

Accordingly, in order to properly consider the issue Customs is requesting the views of the public on classification of the imported prefinished hardboard lap siding in item 245.80, TSUS, as opposed to classification in item 245.90 TSUS. A comment period of 30 days is being allowed in view of the short deadline imposed upon Customs by the Court to report on our decision.

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 24, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 11, 1986 (51 FR 8338)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul R. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
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Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-21)

PABRINI, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-3-00372

Before: DICARLO, *Judge.*

Plaintiff challenges imposition of country of origin marking duties on umbrellas. *Held: Small labels sewn inside umbrellas were not "conspicuous" and racetrack patrons receiving the umbrellas after paying regular price of admission were "ultimate purchasers" of the umbrellas under section 304 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1304 (1982).*

[Summary judgment for defendant.]

(Decided February 25, 1986)

Leonard M. Fertman, P.C. (*Leonard M. Fertman*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Department of Justice (*Judith M. Barzilay*) for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Umbrellas from Taiwan entered at the Port of Los Angeles were assessed country of origin marking duties of ten percent *ad valorem* pursuant to section 304 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1304 (1982), when liquidated in April, 1982 by the United States Customs Service (Customs). Section 304 requires that all imported merchandise be marked in a manner "conspicuous" to the "ultimate purchaser."[1] Plaintiff protested assessment of the marking duties and filed this action following denial of the protest, pursuant to 19 U.S.C. § 1515 (1982) and 28 U.S.C. § 1581(a) (1982).

Before the Court are plaintiff's motion and defendant's cross-motion for summary judgment. Plaintiff contends that (1) the umbrellas need not be individually marked since they were distributed as gifts by a donor who was the "ultimate purchaser" and was

[1] Section 304 provides, in part:

Except as hereinafter provided, every article of foreign origin (or its container * * *) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article * * * will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

aware of the country of origin, and (2) a small label sewn to one of the seams inside the umbrellas sufficiently identifies the country of origin. The Court disagrees with both contentions. Summary judgment is granted for defendant.

"Ultimate Purchaser"

Plaintiff alleges that the umbrellas were distributed without further charge to patrons of the Hollywood Park Race Track paying the regular admission fee.[2] Plaintiff argues that the "ultimate purchaser" of the umbrellas within the meaning of section 304 was not the racetrack patron, but the racetrack, which was aware of the umbrellas' country of origin, and the umbrellas are therefore excepted from the marking requirement by 19 U.S.C. § 1304(a)(3)(H) and 19 C.F.R. § 134.32(h).[3] Plaintiff challenges as contrary to section 304 a regulation, 19 C.F.R. § 134.1(d)(4), that defines "ultimate purchaser" to include the recipients of gifts.[4]

The current language of the first paragraph of section 304 was enacted as part of the Customs Administrative Act of 1938, ch. 679, § 3, 52 Stat. 1077. Previously the marking statute did not mention an end user or "purchaser" of the article. The statute provided simply that "Every article imported into the United States * * * shall be marked * * *." Tariff Act of 1930, ch. 497, Title III, § 304, 46 Stat. 590, 687 (repealed 1938).[5] The principal purpose of the 1938 revision of section 304 was to eliminate the previous requirement that the article, its immediate container, and the outer package all be marked with the country of origin.[6]

"As in all cases involving statutory construction, 'our starting point must be the language employed by Congress.' " *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979)). *Webster's Second New International Dictionary* 2015 (1934), published four years before the enactment of the statute, defines "purchaser" as "one who purchases", and "purchase" as "to obtain (anything) by paying money or its

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[2] Defendant has denied for lack of information plaintiff's allegations concerning the distribution of the umbrellas. For purposes of deciding the motion, the Court assumes that plaintiff's allegations are true.

[3] 19 C.F.R. § 134.32(h) excepts from the marking requirements:

> Articles for which the ultimate purchaser must necessarily know the country of origin by reason of the circumstances of their importation or by reason of the character of the articles even though they are not marked to indicate their origin.

[4] 19 C.F.R. § 134.1(d)(4) provides:

> The "ultimate purchaser" is generally the last person in the United States who will receive the article in the form in which it was imported. It is not feasible to state who will be the "ultimate purchaser" in every circumstance. The following examples may be helpful * * *.
>
> 4. If the imported article is distributed as a gift, the recipient is the "ultimate purchaser."

Customs has applied section 304 to cover gifts at least since 1924. *See* C.S.D. 80-232 (1980) (digital pen watches to be distributed as gifts to business associates must be individually marked); C.S.D. 79-406 (1979) (plastic pencils to be distributed free as advertising must be individually marked); T.D. 40547 (1924) (clocks purchased as gifts to friends denied entry as improperly marked). 19 C.F.R. § 134.1(d)(4) was promulgated in current form to include the "example" covering gifts in 1972. 37 Fed. Reg. 20,318 (1972), T.D. 72-262.

[5] The requirement that all goods entering the United States must be marked with their country of origin dates to the Tariff Act of 1890, ch. 1244, § 6, 26 Stat. 567, 613.

[6] The legislative history of the 1938 act provides no evidence of congressional intent with respect to the meaning of "ultimate purchaser." In colloquy at hearings before the subcommittee considering the proposed legislation, Senator David I. Walsh, chairman of the subcommittee, did refer to the "consumer" of the merchandise. *Customs Administrative Act: Hearings on H.R. 8099 Before a Subcomm. of the Comm. on Finance United States Senate*, 75th Cong., 3d Sess. 57 (1938).

equivalent." Thus, the question before the Court is whether by paying admission to the racetrack the racetrack patrons obtained the umbrellas by paying "money or its equivalent."

Under federal common law at the time the statute was enacted, consideration was defined as "some * * * benefit or advantage conferred upon the promisor * * * or any detriment * * * suffered or undertaken by the promisee." *Cuneo Press* v. *Claybourn Corp.*, 90 F.2d 233, 236 (7th Cir. 1937). This definition is consistent with current law under the Uniform Commercial Code (UCC) and the common law of contracts under which a single consideration is sufficient to support two promises. R. Anderson, 1 *Uniform Commercial Code* § 2-106:6 (3rd ed. 1981). *See, e.g., Sheppard* v. *Revlon, Inc.*, 267 So. 2d 662, 664 (Fla. 1972) (transfer of "free" jar of facial cream with purchase of cosmetics a "sale" within UCC § 2-106). *See also* A. Corbin, *Contracts* § 125 (1950). By purchasing a ticket to the racetrack, the patrons paid one consideration for two promises by the racetrack: admission to the racetrack and transfer of an umbrella.

The Court holds that racetrack patrons receiving the umbrellas as a condition to payment of the regular price of admission were not donees of gifts[7] but "ultimate purchasers" of the imported merchandise within section 304. Since the Court holds that the racetrack patrons were the "ultimate purchasers" of the umbrellas within the meaning of section 304, the Court need not, and does not, consider the validity of any part of 19 C.F.R. § 134.1(d).

"Conspicuous Place"

Plaintiff also contends that a label sewn to one of the seams inside the umbrella measuring approximately 1⅜ inches by ⅜ inches printed with the words "100% NYLON MADE IN TAIWAN" is "conspicuous" within the meaning of the statute.

Section 304 provides that the Secretary of the Treasury "may by regulations * * * prescribe * * * a conspicuous place on the article * * * where the marking shall appear * * *." 19 C.F.R. § 134.41(b) provides that "the ultimate purchaser in the United States must be able to find the marking easily and without strain."

Whether the marking is conspicuous is a question of fact. *See Midwood Industries, Inc.* v. *United States*, 64 Cust. Ct. 499, 503, C.D. 4026 (1970); *cf. Uniroyal, Inc.* v. *United States*, 3 CIT 220, 224, 542 F. Supp. 1026, 1029 (substantial transformation for marking purposes a question of fact); *U.S. Wolfson Bros. Corp.* v. *United States*, 52 Cust. Ct. 86, C.D. 2442 (1964), *aff'd*, 52 CCPA 46, C.A.D. 856 (1965) (ultimate purchaser a question of fact). Nevertheless, the parties agree that this issue is appropriate for summary judgment.

[7] The Court notes that under federal common law at the time of the enactment of the statute, "gift" was defined as a gratuitous transfer of property to another without consideration. *See, e.g. Schumacher* v. *United States*, 55 F.2d 1007, 1011 (Ct. Cl. 1932). Plaintiff does not allege that the racetrack was motivated by generosity in distributing the umbrellas.

Plaintiff included a sample of the merchandise with its motion for summary judgment. Since the case would be tried to the Court and the Court's determination on this issue would not turn on an assessment of witness credibility or demeanor, disposition by summary judgment is appropriate. A trial would add little, if anything, to the Court's ability to decide the issue. *See Nunez* v. *Superior Oil Co.*, 572 F.2d 1119, 1123–24 (5th Cir. 1978); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 476–480 (1984). *Cf., United States* v. *Rockwell International Corp.*, 10 CIT , Slip Op. 86–11 (January 22, 1986), at 9–10 (summary judgment denied where defendant contested ultimate fact of negligence).

The Court finds as a matter of fact that the small label cannot be seen easily and without strain. The label cannot be seen unless the umbrella is opened, and even then it is difficult to find. The Court holds that the marking is not "conspicuous" within the meaning of section 304. *See J.B. Meltzer* v. *United States*, 2 Cust. Ct. 675, Abs. No. 41126 (1939).

Since the Court finds that the umbrellas were not marked in a manner conspicuous to the ultimate purchaser, summary judgment for defendant is granted. Judgment will be entered accordingly.

So ordered.

(Slip Op. 86–22)

DETERMINED PRODUCTIONS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–9–01527

Before DICARLO, *Judge.*

Two stuffed toy figures designed, packaged, sold, and purchased as a unit but which are intended to be disassembled and used separately and with other toys are not an entirety since neither figure is essential to the completeness of the other, and the identities of the individual figures are not subordinate to the identity of the unit.

[Judgment for defendant.]

(Decided February 26, 1986)

Stein Shostak Shostak & O'Hara (Joseph P. Cox), for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice (*Susan Handler-Menahem*), for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of merchandise invoiced as "Clinging Snoopy/Woodstock" imported from the Republic of Korea. The Snoopy figures were classified under item 737.30, Tariff Schedules of the United States (TSUS), as "toy figures of animate objects: not

having a spring mechanism: stuffed: valued over 10 cents per inch of height" at nine percent ad valorem and the Woodstock figures were classified under item 737.25, TSUS, as "toy figures of animate objects: not having a spring mechanism: stuffed: valued not over 10 cents per inch of height" at twenty-eight percent ad valorem.

Plaintiff argues the merchandise should be classified as an entirety, under item 737.30, TSUS.

Defendant moves and plaintiff cross-moves for summary judgment. In their statements of material issues of fact submitted pursuant to Rule 56(i) of the Rules of this Court the parties agree that the merchandise consists of two stuffed figures modeled after the *Peanuts* comic strip characters Snoopy and Woodstock; that in its imported condition, the Snoopy figure embraces the Woodstock figure by means of a velcro fastener on the ends of its front paws; that the merchandise was designed, packaged, sold, and purchased as a unit; and that plaintiff sells numerous different sizes and types of stuffed and other kinds of Snoopy and Woodstock figures as individual items, but does not individually sell Snoopy and Woodstock figures identical to those before the court.

The parties also agree that the two figures have an "individual identity and play value." They do not agree whether the two figures have an individual "commercial value." The parties have stipulated that the Court will make a finding of fact with respect to this issue.[1]

Plaintiff argues that since the merchandise is designed, packaged, sold, and purchased as a unit, it is properly classified as an entirety.

But these facts are not determinative of the entirety inquiry. *United States* v. *Altray*, 54 CCPA 107, 110, C.A.D. 919 (1967); *Lang Co.* v. *United States*, 15 CCPA 341, 342, T.D. 42495 (1927); *Mattel, Inc.* v. *United States*, 8 CIT 323, Slip Op. 84-133 (December 11, 1984). In *Mattel* doll stands designed, imported, and sold with "Pretty Changes Barbie" dolls which could be used with other dolls were held not to be an entirety with the Barbie dolls. Applying the "somewhat discordant principles" of entireties law, the Court said that the stands and the dolls were not entireties because: "When merged, they do not form a new and distinct article of commerce having a different character or use. Further, because neither is essential to the completeness of the other, and since neither bears a natural affinity or relation to the other, they must be classified and assessed duty separately." *Mattel*, Slip Op. at 4-6.

Plaintiff's catalog contains an illustration of nine stuffed Snoopy figures and three stuffed Woodstock figures of various sizes sold individually by plaintiff. The Snoopy and Woodstock figures before the Court appear substantially similar to several of these Snoopy

[1] Transcript of Telephone Conference, January 28, 1986, at 2-6.

and Woodstock figures.[2] The important physical distinction apparent to the Court between other figures sold by plaintiff and the merchandise before the Court is the velcro fastener on the end of Snoopy's paws. Both the figures before the Court can be used separately or with other toys, including other Snoopy and Woodstock figures sold by plaintiff.[3] Examining a sample of the merchandise, plaintiff's catalog, other exhibits before the Court, and the parties' statements of material issues of fact submitted pursuant to Rule 56(i), the Court finds as a matter of fact, on the basis of this record, that the Snoopy and Woodstock figures have an individual commercial value.[4]

In the opinion of the Court, the addition of the velcro fastener is insufficient to make either the Snoopy or the Woodstock figure essential to the completeness of the other or to give the figures a "natural affinity or relation" to each other, as those terms have been applied in entireties law. *See United States* v. *John Wanamaker, Philadelphia, Inc.*, 20 CCPA 367, 369 (1933); *Mattel, supra.*[5] *As the Court of Customs and Patent Appeals said in United States* v. *Altray Co.*, 54 CCPA 107, 110, C.A.D. 919 (1967):

> where the design of the combination in issue by its very nature contemplates its disassembly and the utilization of the constituents in the manner for which they are otherwise used and when articles very similar to those constituents are on sale as separate items, the combination is not, in the sense of the customs law, an entirety.

Cases cited by plaintiff are inapposite. Unlike the "two-piece shirt-short sets" or "cabana sets" at issue in *Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, C.A.D. 894 (1966), or the "cotton flannel shirts and corduroy longie sets" at issue in *Nissho American Corp.* v. *United States*, 64 Cust. Ct. 378, C.D. 4005 (1970), the Snoopy and Woodstock figures before the Court have an independent commercial value and the character and use of the figures are substantially the same whether the figures are used together, individually, or with other merchandise. Unlike the cotton pads impregnated with inhalant and their cylindrical holders at issue in *Donalds Ltd., Inc.* v. *United States*, 32 Cust. Ct. 310, 315, C.D. 1619

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[2] The Snoopy figure before the court is 11 inches tall, and the Woodstock figure is 7 inches tall. According to plaintiff's catalog, plaintiff also sells an 11 inch "Baby Plush Snoopy", an 18 inch "Medium Plush Snoopy", an 18 inch "Sleepy Snoopy", a 6 inch "Velveteen Woodstock", a 9 inch "Plush Swinging Woodstock", and a 9 inch "Plush Woodstock."

[3] An entire line of "Snoopy's Wardrobe" clothing available for the "Baby Plush Snoopy", may be used with the Snoopy figure before the Court. There is also a line of accessories, including a wardrobe trunk, chairs, sleeping bags, and tent, which could be used with the figures.

[4] Customs is presumed to have found every subsidiary fact necessary to suport its classification, *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, 57-59, C.A.D. 1004, 435 F.2d 1315, 1317-1319 (1970), and plaintiff has the burden to show by a preponderance of the evidence that the facts found by Customs in making its classification are incorrect. *See* 19 U.S.C. § 2639(a)(1) (1982); *Jarvis Clark Co.* v. *United States*, 733 F.2d 873, 876, *reh. denied*, 739 F.2d 628 (Fed. Cir. 1984). Customs must have found that the figures had an independent commercial value to classify them, and assess ad valorem duty, separately, and the Court finds that plaintiff has not overcome its burden to demonstrate the incorrectness of this finding.

[5] Plaintiff argues that the Snoopy and Woodstock figures together have an "enhanced play value." But plaintiff does not allege that the figures are, or are intended to be, used predominately in their "clinging" position, or that the figures have any special significance in that position.

(1954), the individual identities of the figures before the Court are not subordinate to the identity of the unit.

It is axiomatic that the entireties doctrine is merely an aid to ascertain the intent of Congress. *Miniature Fashions, Inc.* v. *United States,* 54 CCPA 11, 16, C.A.D. 894 (1966). Congress has determined that less expensive stuffed figures are dutiable at a substantially higher rate than more expensive figures. The Court would frustrate the intent of Congress if it considered the figures before the Court an entirety, and dutiable at the lower rate.

The Court holds that the merchandise is not an entirety. Judgment for the defendant will be entered accordingly. So ordered.

(Slip Op. 86-23)

DETROIT ZOOLOGICAL SOCIETY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-2-00275

OPINION AND ORDER

[Motion to dismiss granted in part. Decision on motion to amend complaint reserved.]

(Decided February 28, 1986)

Edmund Maciorowski for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, *Jerry P. Wiskin*, Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff, the Detroit Zoological Society, is the consignee of five entries made between November 21, 1983, and March 12, 1984.[1] Plaintiff sought to have the imported merchandise classified under a duty free item, TSUS 862.10: "Articles imported for exhibition by any institution or society established for the encouragement of * * * education or science * * *." The United States Customs Service (Customs), however, classified the entries under TSUS items 690.05, 690.15 and 806.20 and required the deposit of duties in accordance with the rates applicable to those items. *See* 19 U.S.C. § 1505(a) (1982 & West Supp. 1985) (requiring deposit of estimated duties at the time of entry). Plaintiff filed a protest concerning classification of the first entry on February 18, 1985,[2] and filed another protest on February 25, 1985, cov-

[1] The entries consisted of a locomotive and coaches for plaintiff's "zoo train." It is not disputed that the entry numbers and dates of entry are as follows:

Entry No.	*Date of Entry*
345803	10/21/83
336957	11/29/83
338023	01/06/84
339266	02/16/84
340029	03/12/84

[2] Protest No. 3801-5-000967.

ering the second through fourth entries.[3] The following day, plaintiff filed a complaint with this court, asserting jurisdiction under 28 U.S.C. §§ 1581(i), 1585 and 2202, seeking to have all five entries deemed liquidated by operation of law under 19 U.S.C. § 1504(a).[4] Subsequently, plaintiff filed a protest, dated May 14, 1985, covering the last of the five entries.[5] Plaintiff now seeks to amend its complaint to include an assertion of jurisdiction under 28 U.S.C. § 1581(a) (1982). This matter is before the court on plaintiff's motion to amend its complaint and on defendant's motion to dismiss for lack of subject matter jurisdiction.[6]

Section 1581(a) provides the Court of International Trade with "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930. [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a) (1982). The prerequisites of section 1581(a) jurisdiction are that a protest has been filed as to protestable subject matter; that the protest has been denied; and that the protest was timely filed. The court will examine each of these requirements in turn to determine whether section 1581(a) jurisdiction is appropriate in the case at bar. A protest may be filed to contest, among other things, "the classification and rate and amount of duties chargeable," 19 U.S.C. § 1514(a)(2) (1982), or "the liquidation * * * of an entry * * *." 19 U.S.C. § 1514(a)(5) (1982). Thus, it is evident that plaintiff's dispute as to the alleged deemed liquidation, classification and duties to be paid on its entries is protestable subject matter under section 1514(a).

The parties agree that plaintiff's first protest was denied on May 15, 1985, and there has been no allegation that either of plaintiff's other two protests were denied earlier than that date. Plaintiff, however, filed its complaint on February 26, 1985. Thus, plaintiff's complaint preceded the denial of any of its protests. This failure to

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[3] Protest No. 3801-5-001358.

[4] 19 U.S.C. § 1504(a) provides:

(a) Liquidation

Except as provided in subsection (b) of this section [applying to extension of liquidation,] an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

* * * * * * *

shall be deemed liquidated at the rate of duty, value, quantity, an amount of duties asserted at the time of entry by the importer, his consignee, or agent * * *.

19 U.S.C. § 1504(a) (1982).

The court notes that 19 U.S.C. § 1504 has been modified by Public Law 98-573, § 191(d)(1) (1984). The amendments only apply to entries made on or after the 15th day after October 30, 1984, Pub. L. No. 98-573, § 195(a) (1984), and thus they are not applicable to the case at bar. Citations to § 1504 will, therefore, unless otherwise indicated, refer to the 1982 Code.

[5] Protest No. 3801-5-001907.

[6] As a preliminary matter, the court observes that § 1581(i) is the residual jurisdiction of this court. *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 182-83, 687 F.2d 467, 471-72 (1982); *Ass'n of Food Indus., Inc.* v. *von Raab*, 9 CIT ——, Slip Op. 85-128 at 4 (Dec. 17, 1985); *Visitor Corp.* v. *United States*, 7 CIT 170, 585 F. Supp. 1419, 1424-25 (1984); *aff'd*, 761 F.2d 1552, 1559 (Fed. Cir. 1985). As such, it may only be invoked when other available avenues of jurisdiction are "manifestly inadequate or necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies." *Manufacture de Machines du Haut-Rhin* v. *von Raab*, 6 CIT 60, 569 F. Supp. 877, 882-83 (1983) (citing *Lowa, Ltd.* v. *United States*, 5 CIT 81, 561 F. Supp. 441 (1983), *aff'd* 724 F.2d 121 (Fed. Cir. 1984); *United States Cane Sugar Refiners' Ass'n* v. *Block*, 69 CCPA 172, 683 F.2d 399 (1982)). *Accord American Ass'n of Exporters and Importers—Textile and Apparel Group* v. *United States*, 751 F.2d 1239, 1246 (Fed. Cir. 1985); *Uniroyal*, 69 CCPA at 187, 687 F.2d at 475 (Nies, J., concurring); *Visitor*, 7 CIT at ——, 585 F. Supp. at 1425. Consequently, the potential jurisdiction of this court under § 1581(a) must be considered prior to addressing the claim of § 1581(i) jurisdiction, despite the fact that plaintiff raises these alternative jurisdictional bases in the reverse order.

exhaust the requisite administrative review process of protest *and* denial of protest before filing the complaint would have prevented this court from invoking section 1581(a) jurisdiction when the complaint was filed. *See Wear Me Apparel Corp.* v. *United States,* 1 CIT 194, 195, 511 F. Supp. 814, 816 (1981) (denial of protest as prerequisite to invoking section 1581(a) jurisdiction) (citing *United States* v. *Reliable Chemical Co.,* 66 CCPA 123, C.A.D. 1232, 605 F.2d 1179 (1979) (denial of protest as jurisdictional prerequisite under predecessor to section 1581(a)); H.R. Rep. No. 96–1235, 96th Cong., 2d Sess. 44, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3755 (indicating intent in enacting the Customs Courts Act of 1980 to preserve requirement of protest and denial as prerequisites to jurisdiction under section 1581(a)). Plaintiff claims in its motion for leave to file an amended complaint, however, that its protests covering each of the entries have been denied or will be denied during the course of this litigation, thus conferring section 1581(a) jurisdiction on this court.

A party may file a supplemental complaint to cure a jurisdictional defect of failure to exhaust administrative remedies if the requisite actions are taken after filing a complaint. *See Mathews* v. *Diaz,* 426 U.S. 67, 75 (1976) (jurisdiction prerequisite under Social Security Act of filing application for enrollment was satisfied by supplemental pleadings establishing that application was filed after plaintiff was joined in action); *Wear Me Apparel,* 1 CIT at 197, 511 F. Supp. at 817 (leave to file an amended complaint under section 1581(a) granted where protest denied after complaint was filed). Although plaintiff did file an amended complaint after two of the three protests were denied, leave to amend is appropriate here only if the amended complaint cures the jurisdictional defect. Thus, the court must determine whether the final jurisdictional requirement of section 1581(a), that the protests themselves be timely filed, has been satisfied.

The time frame for filing a protest under 19 U.S.C. § 1514(a) is specifically provided for by statute:

> (2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—
>
> (A) *notice of liquidation* or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, *the date of the decision as to which protest is made.*

19 U.S.C. § 1514(c)(2) (1982) (emphasis added).

Although 19 U.S.C. § 1504(a) (1982) specifically states that notice of a deemed liquidation need not be provided, the implementing regulations require that Customs provide such notice. 19 C.F.R. § 159.9(c)(2)(ii) (1984). Regardless of this apparent inconsistency, where Customs contends, as here, that entries are not deemed liquidated, notice obviously would not be provided. In this case it is appropriate to allow a protest as to the alleged deemed liquidation

to be filed within the time frame of section 1514(c)(2)(B) (above), prior to notice of liquidation.[7] The propriety of this ruling is made clear by the legislative history of liquidation by operation of law. Congress noted that "[u]nder the present law, [prior to enactment of the deemed liquidation provision,] an importer may learn years after goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess for years as he awaits liquidation." S. Rep. No. 95–778, 95th Cong., 2d Sess. 32, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2211, 2243. Congress sought to alleviate this problem by providing for liquidation by operation of law. To require a party to await notice of liquidation before filing a protest as to an alleged deemed liquidation would frustrate the legislative intent here, which was to prevent a party from bearing the burden of an inordinate delay in the liquidation of an entry. Thus the question is whether plaintiff's protests were timely filed in accordance with section 1514(c)(2)(B).[8]

Defendant argues that the liquidation of the entries in question was extended and that, as a result, plaintiff's protests were filed prior to liquidation of each respective entry. From this, defendant concludes that plaintiff's protests were not timely filed and, as such, the denial of those protests does not provide the basis for section 1518(a) jurisdiction.

Plaintiff filed each protest more than a year after each respective entry, after what if alleges was deemed liquidation of the entries.[9] Even so, only if the alleged extensions of liquidation were invalid could the protests have been filed within the requisite time frame of section 1514(c)(2)(B). *See supra* footnote 8. Whether the

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[7] This is not to say that a party would be time barred from filing a protest if it chose to file its protest after notice of liquidation. *See Pagoda*, 9 CIT ——, 617 F. Supp. 96, 97, *appeal docketed*, No. 86–750, (Fed. Cir. Dec. 18, 1985) (protest related to alleged deemed liquidation filed within 90 days after notice of liquidation); T.D. 79–221, 44 Fed. Reg., 46,794, 46,809, 13 Cust. Bull. 641, 684–85 (1979) (Customs' explanation that an importer has "two time frames" for protesting a deemed liquidation: 90 days after either deemed liquidation or notice of deemed liquidation).

[8] Here, "the decision as to which protest is made," 19 U.S.C. § 1514(c)(2)(B) (1982) (above), is the liquidation, allegedly by operation of law, of the entries in question. As noted, protest must be made "within ninety days after *but not before*" this decision. *Id.* (emphasis added). Thus, only if the entries were in fact deemed liquidated by operation of law could plaintiff's protests have been timely filed under § 1514(c)(2)(B).

[9] Although an entry liquidated by operation of law is "deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent * * *," 19 U.S.C. § 1504(a) (1982), this does not eliminate the possibility that this rate of duty and amount of duties will be contested through protest. For, as plaintiff seems to acknowledge, the rate of duty corresponding to the classification asserted "at the time of entry" is that which is on the entry summary accepted by Customs and contains *not* what the importer, his consignee, or agent necessarily desires but rather what Customs insists upon as a condition precedent to release of the merchandise. *See* T.D. 79–221, 44 Fed. Reg. 46,794, 46,829, 13 Cust. Bull. 641, 685 (1979). Thus, the importer, his consignee or other eligible person may wish to file a protest as to the rate of duty at which the entry is deemed liquidated. An alternative view would interpret § 1504(a) to effect deemed liquidation at that classification under which the importer, his consignee, or agent attempted to enter the merchandise. This would, in effect, operate as a substantive penalty on Customs for its failure to liquidate merchandise within a year of entry, rather than simply avoiding undue delays in a party's ability to challenge a liquidation. *See supra* discussion of 19 U.S.C. § 1514(c) (court's indication that deemed liquidation or notice of liquidation is prerequisite to filing protest of classification and rate and amount of duties chargeable or of liquidation of an entry); see discussion in Shayne, *Deemed Liquidated*, American Import-Export Bulletin, July 1979 at 37–40. As was discussed, *supra*, the legislative history of deemed liquidation clearly indicates that liquidation by operation of law is designed to expedite the process of liquidation. The court is not convinced, however, that Congress sought to impose a harsh penalty on Customs for a failure to timely liquidate an entry. Thus, in this opinion the court is not disposing of plaintiff's claim on the merits. Rather, the court is only addressing the time for filing a protest.

protests were timely filed, and thus whether this court has jurisdiction under 28 U.S.C. § 1581(a), therefore turns on the validity of the alleged extensions of liquidation. *See Computime* v. *United States,* 772 F.2d 874, 875 (Fed. Cir. 1985); *ITT Semiconductors* v. *United States,* 6 CIT 233, 576 F. Supp. 641, 643 (1983) (both indicating that denial of a timely filed protest is a prerequisite to section 1581(a) jurisdiction).

Plaintiff challenges the validity of the extensions of liquidation on two distinct grounds. First, plaintiff argues that the Customs Service had all the information required to complete the liquidations and therefore Customs was not justified in issuing extensions of liquidation under 19 U.S.C. § 1504(b) (1982). Second, plaintiff contends that notice of the extensions was not provided to plaintiff-consignee and therefore the extensions did not take effect. As to plaintiff's first contention, defendant responds that Customs required additional information to process the classifications. In addition, defendant claims that plaintiff's request that Customs seek internal advice on the classifications constituted an implicit request that liquidation be delayed pending receipt of the advice from Customs Headquarters.[10] Finally, defendant argues that its decision to extend liquidation is not reviewable by this court because there is allegedly no law to apply. At the outset, it must be noted that this court does in fact have limited authority to review Customs' decision to extend the period in which to liquidate entries. There are specific circumstances under which Customs may issue such extensions.[11] Customs must interpret the statutes which it administers reasonably, *Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978), and its decisions are "subject to judicial review for arbitrariness and abuse of discretion, even though the discretion may be broad." *Bar Bea Truck Leasing Co.* v. *United States,* 4 CIT 138, 140 (1982) (quoting *People* v. *United States Dept. of Agriculture,* 427 F.2d 561, 567 (D.C. Cir. 1970)); *see Pagoda,* 9 CIT at ——, 617 F. Supp. at 99-100 (finding no valid ground for extension or suspension). Both grounds asserted by defendant as justifying the extensions—the need to obtain information and a request by a party for an extension—are specifically provided for by statute. 19 U.S.C. § 1504(b)(1), (3) (1982). The notices of extension here, however, mentioned only the need to obtain information as justification for the extensions. Customs is required to specify its reasons for granting an extension in each notice of extension, 19 C.F.R. § 159.12(b)

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[10] The procedures for internal advice requests are set forth in 19 C.F.R. § 177.11.

[11] The circumstances justifying an extension of liquidation are set forth in 19 U.S.C. § 1504(b) (1982) which provides:

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if—

(1) *information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;*

(2) liquidation is suspended as required by statute or court order; or

(3) *the importer, consignee, or his agent requests such extension and shows good cause therefor.*

(emphasis added).

(1984), and the court will, therefore, analyze the alleged extensions solely in light of the reason stated in the notices.[12] The court does not doubt, as plaintiff claims, that plaintiff provided Customs with information regarding the classifications. The term "information," as it is used in the statute, 19 U.S.C. § 1504(b)(1) (1982), however, should be construed to include whatever is reasonably necessary for proper appraisement or classification of the merchandise involved. When a request for internal advice of a classification decision is granted, the "information" required to make the appropriate classification includes that advice. An extension of liquidation is thus justified in such a case if additional time is needed to obtain the internal advice and to consider it before making the classification decision.

The statute imposes a four year outside limit on extensions of liquidation, 19 U.S.C. § 1504(d) (1982), and the regulations state that each individual extension is not to exceed one year. 19 C.F.R. § 159.12(a)(1) (1984). Nonetheless, the court must conclude that it was intended that an extension be granted only for a reasonable period of time relative to the situation. The request for internal advice was made on May 21, 1984, providing Customs with between approximately five months and ten months before the anniversary dates of the various entries and between approximately eight months and twelve months before the respective protests were filed. These time periods in and of themselves cannot be said to be unreasonable. Ordinarily, the court should defer to Customs' determination that it needs additional information to liquidate an entry and therefore requires an extension of the statutory time period. As stated by the Temporary Emergency Court of Appeals, "deference to an agency's judgment is especially appropriate when the issue is the ability of that same agency to perform certain tasks." *Basin, Inc.* v. *Federal Energy Administration*, 552 F.2d 931, 937 (Temp. Emer. Ct. App. 1977) (review of Federal Energy Administration regulation freezing supplier-purchaser relations pursuant to the Emergency Petroleum Allocation Act.). Although it is unclear how long an extension would be reasonable, the court cannot conclude, based on the facts before it, that at the time the protests were filed the delay had been so great as to constitute an abuse of discretion, thereby invalidating the extensions.[13]

As noted, plaintiff also claims that even if extensions were justified, the failure to provide notice of any such extensions to plaintiff-consignee determines that the alleged extensions were invalid and, as a result, the entries were liquidated by operation of law.

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[12] Thus, the court need not determine whether a request for internal advice is tantamount to a request for an extension of liquidation.

[13] It appears that liquidation of the entries may not yet be completed. The legitimacy of the extensions must be judged as of the date the protests were filed, however, because the protests were timely filed only if the extensions were invalid as of the date of each respective filing. The court expresses no opinion as to the validity of any additional extensions that may have been granted beyond the initial one year period. Absent such additional valid extensions, deemed liquidation would appear to have occurred, a notice of liquidation should issue and protest would be appropriate.

The statute specifies that the period in which to liquidate an entry may be extended "*by providing notice* of such extension to the importer, his consignee, *or* agent in such form and manner as the Secretary shall prescribe in regulations * * *." 19 U.S.C. § 1504(b) (1982) (emphasis added). The implementing regulations state that "[i]f the district director extends the time for liquidation, * * * he promptly shall notify the importer *or* the consignee *and* his agent *and* surety * * *." 19 C.F.R. § 159.12(b) (1984) (emphasis added). Here, although notices were apparently provided to the importer of record and to the surety, no such notices were sent to plaintiff-consignee.[14]

Plaintiff claims that "importer of record" is a term of art in Customs usage and that an "importer of record" is not an "importer" within the meaning of the statute or regulations. Plaintiff further argues that Congress intended to have notice provided to the party incurring liability, whether it be the importer or consignee and that plaintiff-consignee was, therefore, entitled to notice of the alleged extensions. In support of the latter argument, plaintiff cites the legislative history to the deemed liquidation and notice provisions which states that these provisions "would increase certainty in the customs process for importers, surety companies, *and other third parties with a potential liability* relating to a customs transaction." S. Rep. No. 95-778 at 32, 1978 U.S. Code Cong. & Ad. News at 2243 (emphasis added). Thus, plaintiff concludes that even if notice was provided to the importer of record, this was insufficient to effect the alleged extensions.

Plaintiff's arguments here are unpersuasive. As noted, the statute requires that notice be provided to "the importer, his consignee, *or* agent * * *." 19 U.S.C. § 1504(b) (1982) (emphasis added). The listing of these parties in the alternative indicates that notice to any one will suffice.[15] Thus, under the literal words of the statute failure to give notice to plaintiff-consignee does not invalidate the extensions if one of the other two parties named in the statute is notified of the extensions. Plaintiff seems to acknowledge in its complaint that the importer of record here is an "agent" of plaintiff-consignee and in this case it appears that the importer of record was notified. Assuming that "agent" in the statute refers to "agent" of the "consignee," notice to the importer of record here meets the statutory requirement regardless of whether the importer of record is also the "importer."[16] On the other hand, even if

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[14] Plaintiff denied knowledge of whether any notices of extension were provided as to three of the entries. An affidavit subsequently provided by defendant, however, indicates that the required notices of extension apparently were provided to the importer of record and to the surety.

[15] Congress has amended § 1504(b) to specifically require that notice of extension be provided only to the importer of record. 19 U.S.C.A. § 1504(b) (West Supp. 1985).

[16] Although the parties have not provided any definitions of these terms, the implementing regulations indicate that an "importer of record" can be an "importer" within the meaning of the regulations. 19 C.F.R. § 101.1(k) defines "importer" as follows:

(k) *Importer.* "Importer" means the person primarily liable for the payment of any duties on the merchandise, *or an authorized agent acting on his behalf.* The importer may be:

(1) *The consignee,* or

Continued

"agent" means "agent" of the "importer" and not "agent" of the "consignee," the statute is satisfied. In the case at bar, "importer" can only mean "importer of record" or "consignee." Given the parties here, there are no other alternatives. By providing notice to the importer of record, either the "importer" was notified (if the importer of record is the "importer") or the "agent" of the "importer" was notified (if the consignee is the "importer"). Thus, under any construction of the statute, notice to the importer of record is sufficient to effect the extensions in this case.

Section 159.12(b) of the regulations (quoted above) would seem to require notices to the importer *or* consignee *and* to the agent *and* surety.[17] In this case, notification of the surety is not at issue. Therefore, the essential question is whether the regulation may properly require additional notice to the consignee as a condition precedent to a valid extension in a case where the importer of record/agent of the consignee is notified. The statute does provide that the Secretary of the Treasury shall specify the "form and manner" in which notice is to be given. 19 U.S.C. § 1504(b) (1982). That the Secretary is allowed to choose among various types of notice methods, however, does not mean that the Secretary may change the requirements for an extension from notice to *one* of three parties into notice to *each* of three parties. The Secretary may provide that notice is to be given to both the importer of record and the consignee, where these are two separate parties, as a matter of convenience to the parties. Such a provision, however, cannot alter the statutory requirements for effecting a valid extension.[18]

Furthermore, the court's decision is in accord with the legislative history of 19 U.S.C. § 1504 (quoted above). The deemed liquidation statute does indeed increase "certainty in the customs process" for parties with potential liability by limiting the time for liquidation. Of course, a specific notice requirement for all concerned parties would further increase certainty, but that is not necessarily required by the legislative history. The court also notes that a contractual agreement between the importer of record and the ultimate consignee would help to insure that whatever notices are required by statute or regulation would be passed on to the party not required to be notified. Based on the evidence produced to date, indicating that the proper parties were notified of the original exten-

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(2) *The importer of record*, or
(3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or
(4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with Subpart C of Part 144 of this chapter.

19 C.F.R. § 101.1(k) (1984) (emphasis added).

[17] *See*, C.S.D. 83-20, 17 Cust. Bull. 754 (1982) (liability of surety discharged due to failure to provide it with notice of extension), *rev'd in part*, 17 Cust. Bull. No. 19 at 8 (1983). The validity of Customs' reversal of C.S.D. 83-20 is currently being challenged in this court. *Old Republic Insurance Co. v. United States*, Court No. 83-10-01450. Because these decisions relate to surety liability only, they do not determine the outcome of this case.

[18] The court need not and does not reach the question of what the Secretary actually intended to require pursuant to 19 C.F.R. § 159.12(b). On its face section 159.12(b) does not mesh easily with the definitional regulation, 19 C.F.R. § 101.1(k) (1984), or with the statute.

sions, the court must conclude that the protests were not timely filed and that the denial of these protests does not, therefore, provide this court with the basis for section 1581(a) jurisdiction. *See Computime* v. *United States,* 772 F.2d 874, 875 (Fed. Cir. 1985); *ITT Semiconductors* v. *United States,* 6 CIT 233, 576 F. Supp. 641, 643 (1983).

As indicated, plaintiff also asserts jurisdiction under 28 U.S.C. § 1581(i) (1982). Although plaintiff contends that the Customs Service was not justified in granting extensions of liquidation, the delay in liquidation due to the extensions was not so great as to constitute the "special circumstances" necessary to invoke section 1581(i) jurisdiction in a case where section 1581(a) is available. *See supra* footnote 6. Plaintiff was required to deposit estimated duties and will not be able to obtain a refund, if at all, until it is determined that any such refund is appropriate, either through the administrative review process or through judicial review following liquidation, protest and denial of protest. This delay in obtaining a refund is a necessary consequence of the statutory scheme and any additional hardship imposed on plaintiff by the extensions is experienced by all importers or consignees required to deposit estimated duties for entries, the liquidation of which is extended. Thus, plaintiff here lacks justification to invoke section 1581(i) jurisdiction. *Compare United States Cane Sugar Refiners' Association* v. *Block,* 69 CCPA 172, 175 n.5, 683 F.2d 399, 402 n.5 (1982) (proceeding under section 1581(a) found "manifestly inadequate" where delay posed grave threat to the industry and the economy). To invoke section 1581(i) jurisdiction in the case at bar is inappropriate because to do so would "frustrate the orderly administration of the customs laws by permitting plaintiff to circumvent the usual and normal administrative review process." *Lowa Ltd.* v. *United States,* 5 CIT 81, 89, 561 F. Supp. 441, 447 (1983), *aff'd,* 724 F.2d 121 (Fed. Cir. 1984).

Finally, plaintiff also asserts jurisdiction under 28 U.S.C. §§ 1585 and 2201. It is clear, however, that neither of these provisions provides a basis of subject matter jurisdiction. *Manufacture De Machines Du Haut-Rhin* v. *von Raab,* 6 CIT 60, 569 F. Supp. 877, 881 (1983) (28 U.S.C. § 1585 does not grant jurisdiction to the Court of International Trade, rather confers ability to provide injunctive relief) (citing *Kidco, Inc.* v. *United States,* 4 CIT 103, 104 (1982)); *Smith* v. *Lehman,* 533 F. Supp. 1015, 1018 (E.D.N.Y.) (28 U.S.C. § 2202 is not jurisdictional but rather remedial), *aff'd,* 689 F.2d 342 (2d Cir. 1982), *cert. denied,* 459 U.S. 1173 (1983).

Thus far, plaintiff has failed to establish facts to support an appropriate basis of jurisdiction in either its original complaint or in the proposed amended complaint. As discussed, however, 28 U.S.C. § 1581(a), which is alleged in the proposed amended complaint, could provide a basis of jurisdiction if no extensions of liquidation had occurred when the protests were filed.

Because discovery was stayed pending consideration of this motion, plaintiff has not had an opportunity to discover facts relating to jurisdiction, which may be peculiarly within Customs' control. Nonetheless, some factual material has been turned over by the government. Furthermore, discovery related only to specific jurisdictional issues will be permitted at this time. The court is also aware that detailed examination of a Customs' extension decision based on the need for additional information could be useless and burdensome. (See previous discussion of agency's discretion in this area.) Of course, indications of bad faith on the part of Customs would be a reason to examine such a decision in some detail. Thus far, however, there are no such indications. Therefore, while to a limited degree the need for additional information may be an area of permissible discovery, this has not been shown to be a likely area of fruitful inquiry. The focus of plaintiff's discovery, if any questions remain unanswered, more likely should be whether or not the importer of record was sent the requisite notices.

Therefore, if plaintiff wishes to proceed with jurisdiction predicated on its original protests, and if it believes that discovery is necessary, it should advise the court of its specific and limited discovery plan within 10 days hereof. The government will have 5 days to respond to this plan, at which time the court will decide what discovery is appropriate. Failure to timely file a discovery plan will be deemed an admission that no jurisdictional facts remain to be discovered and this action will be dismissed for the reasons set forth above.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/21	Carman, J. February 24, 1986	Mattel, Inc.	84-4-00591	Item 737.22 17.5% for base stands and leg holders classified as an entirety with dolls with which they were imported	Item A774.60 Free of duty pursuant to GSP Item 774.60 8.5% for merchandise imported from the Republic of China	Mattel, Inc. v. United States, 8 CIT ——, Slip Op. 84-133 (1984)	New York Base stands and leg holders
C86/22	Carman, J. February 24, 1986	Topside International, Inc.	76-1-00178	Item 380.00 35%	Item 386.50 14%	Endicott Johnson, Corp. v. United States, C.D. 4787, *aff'd*, C.A.D. 1242	Miami Certain cotton canvas sneaker uppers
C86/23	DiCarlo, J. February 26, 1986	North American Foreign Trading Corp.	79-1-00018, etc.	Item 676.20 5%	Item A676.20 Free of duty	Agreed statement of facts	New York Calculators
C86/24	Carman, J. March 5, 1986	Mattel, Inc.	84-10-01450	Item 737.22 17.5% Item 737.24 5.4% or 14.8% Base stands and leg holders classified as an entirety with dolls	Item 774.60 8.5% Item A774.60 Free of duty when imported from the Republic of China (Taiwan) in 1979	Mattel, Inc. v. United States, 8 CIT ——, Slip Op. 84-133 (1984)	New York Base stands and leg holders

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/11	DiCarlo, J. February 21, 1986	Prefac Concrete Corp.	83-3-00378	Constructed value	At $7,535.46	Agreed statement of facts	Champlain/Rouses Point
V86/12	Restani, J. February 26, 1986	Jimlar Corp.	81-2-00177, etc.	American selling price	At values equal to the invoice unit values plus 75% of difference between invoice unit values and appraised values	Agreed statement of facts	New York; Baltimore; Los Angeles

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U.S. Customs Service

Treasury Decision

19 CFR Part 101

(T.D. 86-68)

Change in the Customs Field Organization; Pascagoula, MS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by extending the geographical limits of the port of entry of Pascagoula, Mississippi. The change extends the existing port limits to include all of Jackson County, Mississippi. These extended port limits coincide with the jurisdiction of the Jackson County Port Authority, and encompass areas undergoing industrial development and growth, thereby allowing them access to Customs services. Moreover, they will enable Customs to provide better service to carriers, importers and the public.

EFFECTIVE DATE: April 21, 1986.

FOR FURTHER INFORMATION CONTACT: Bernie Harris, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, DC 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs is amending § 101.3, Customs Regulations (19 CFR 101.3), by extending the geographical limits of the port of entry of Pascagoula, Mississippi.

Prior to this amendment, T.D. 56333, published in the Federal Register on January 12, 1965 (30 FR 344), extended the geographical limits of Pascagoula, Mississippi, to include the corporate limits of Pascagoula, and that area lying eastward of the city limits to 88° 28 minutes west longitude, and south of 30° 23 minutes north latitude to the existing shoreline.

The amendment extends the existing port limits to include all of Jackson County, Mississippi. These extended port limits coincide with the jurisdiction of the Jackson County Port Authority, and encompass area undergoing industrial development and growth, thereby allowing them access to Customs services. The list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations, is being amended accordingly.

The change set forth in this document was set forth in a notice published in the Federal Register on October 8, 1985 (50 FR 40982), and although public comments were invited, none were received. Accordingly, after further review of the matter, Customs has determined to make the change as proposed.

Change in the Customs Service Field Organization

Under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II), and pursuant to authority provided by Treasury Department Order No. 101-5 (47 FR 2449), the existing geographical limits of the port of Pascagoula, Mississippi, are extended to include all of Jackson County, Mississippi. Accordingly, the limits of the port of Pascagoula, Mississippi, include all of Jackson County, Mississippi.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Imports, Organization.

Amendment to the Regulations

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101, Customs Regulations (19 CFR Part 101), continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624, Reorganization Plan 1 of 1965; 3 CFR Part 1965 Supp.

2. To reflect the change, the list of Customs regions, districts, and ports of entry in § 101.3, Customs Regulations (19 CFR 101.3), is amended by removing "T.D. 56333" under the column headed "Ports of entry" after the phrase "Pascagoula, Miss., including territory described in" and inserting, in its place, "T.D. 86-68", in the Mobile, Alabama, Customs district in the South Central Region.

Executive Order 12291

Because the amendment relates to the organization of the Customs Service, pursuant to § 1(a)(3) of E.O. 12291, it is not subject to the Executive Order.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this amendment. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some small entities in the Pascagoula, Mississippi area, it is not expected to be significant because the extension of the limits of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisons of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service Headquarters. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: March 5, 1986.

Francis A. Keating II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 21, 1986 (51 FR 9780)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 86-24)

STAVELEY MACHINE TOOLS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-10-01384

Before DICARLO, *Judge.*

Plaintiff challenges the denial of a request for reliquidation to correct clerical error under section 520(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c) (1982), and moves for summary judgment. Defendant opposes plaintiff's motion and moves to dismiss for lack of jurisdiction on the ground that the protest was not timely.

Held: Plaintiff failed to file a protest within ninety days after the United States Customs Service (Customs) denied a request made by plaintiff's broker under section 520(c). Customs denial of plaintiff's subsequent request for the same relief was not protestable.

[Defendant's motion to dismiss is granted.]

(Decided March 12, 1986)

Sullivan & Lynch, P.C. (Herbert J. Lynch) for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Judith M. Barzilay)* for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* This action is before the Court on plaintiff's motion for summary judgment and defendant's cross-motion to dismiss for lack of jurisdiction. The Court holds that plaintiff's protest was not timely filed, denying the Court jurisdiction in this action. Defendant's motion is granted.

Merchandise manufactured in England and invoiced as a "horizontal boring machine" was imported by plaintiff, Staveley Machine Tools, Inc. (Staveley) in August, 1979.[1] According to Staveley, the machine was originally exported from England for temporary exhibition in Vera Cruz, Mexico. It was then sent to the United States for temporary exhibition in Dallas, Texas.

[1] The facts in this opinion reflect those set forth in the complaint. For purposes of deciding the motion, the Court assumes that plaintiff's allegations are true. Plaintiff and its London affiliate, the Kearns-Richards Division of Staveley Machine Tools, Ltd., are both referred to as "Staveley" throughout this opinion.

The machine entered under a consumption entry bond and duties of $18,859.56 were paid. No attempt was made to enter the machine under a temporary import bond, which, if applicable, would have permitted duty free entry.[2] The machine, which had a list value of 124,377 pounds sterling, was erroneously entered at a declared value of 143,626 pounds sterling. The United States Customs Service (Customs) was not informed that the machine arrived at the port of Houston in damaged condition and that marine surveyors estimated its value at only 55,352 pounds sterling. On October 12, 1979 duties were liquidated in the amount paid on entry. The machine could not be exhibited due to its damaged condition and was returned to England on or about October 15, 1979.

On July 15, 1980, Staveley's customs broker requested reliquidation and a refund of duties based on clerical error, pursuant to section 520(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c) (1976 & Supp. IV 1980).[3] The broker said duties should not have been paid since the machine was entitled to enter under a temporary import bond, and alternatively that the duties paid were too high since the machine was damaged and overvalued.

On July 18, 1980, Customs denied the request for reliquidation under section 520(c) stating (1) the request was not timely for the purposes of the voluntary reliquidation provisions of 19 U.S.C. § 1501, and (2) the request did not present a clerical error correctable under section 520(c)(1). No protest was filed within ninety days although Customs informed the broker that a protest contesting its decision must be filed within that time.[4]

On August 22, 1980 the broker again wrote Customs requesting a refund of duties. This request was denied by telephone on September 5, 1980.

On September 22, 1980 Staveley's London office wrote Customs requesting a refund of duties on grounds substantially similar to those raised by Staveley's broker on July 15, 1980. On December 3, 1980, Customs refused to grant the requested relief, noting that similar request by Staveley's broker previously had been denied.

[2] Plaintiff contends that the machine was entitled to enter free of duty under a temporary import bond under item 864.20 or 864.30 of the Tariff Schedules of the United States.

[3] Section 520(c) states in pertinent part:

> Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction; * * *

[4] Section 514(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514(a) (1976 & Supp. IV 1980) states in part: decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

> (7) the refusal to reliquidate an entry under section 1520(c) of this title, shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section * * *

Section 1514(c)(2) states in part:

> A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

On March 2, 1981, Staveley filed a protest contesting the denial of the September 22, 1980 request, and Customs denied the protest as untimely on April 29, 1982.

Staveley contends that the protest is timely since it was filed within ninety days after December 3, 1980, the date on which Customs refused to grant the relief requested by Staveley. It argues (1) that the period for filing a protest did not elapse ninety days after the denial of its broker's request of July 15, 1980 because the broker did not have authority to file a petition for reliquidation pursuant to section 520(c); (2) Staveley's request contained new grounds for reliquidation; and (3) whether or not its broker had authority, the request by Staveley dated September 22, 1980 is timely since it was filed within one year after liquidation.

The first issue is whether Staveley's broker had authority to file a request for reliquidation and refund of duties under section 520(c) on behalf of Staveley.

Staveley executed a "Corporation Power of Attorney," Customs Form 5293, on July 14, 1969, giving its broker broad authority to transact all customs business on its behalf, "except making, signing and filing of protest."[5] Staveley acknowledges that the power of attorney was neither revoked nor limited prior to July 15, 1980, but argues that a request for reliquidation under section 520(c) is similar to a protest and therefore the broker's actions were not authorized. Since the July 15, 1980 request was not authorized, Staveley contends that the first protestable denial of relief under section 520(c) did not occur until December 3, 1980.

The Court disagrees. Protests and requests under section 520(c) serve different functions. *See* 19 U.S.C. §§ 1514(a); 1520(c). The Customs Regulations contain special provisions applicable to the filing of protests by agents which are not applicable to the filing of requests under section 520(c). *See* 19 C.F.R. §§ 111.40, 174.3(2) (1980), 19 C.F.R. §§ 8.19, 17.2 (1969). The exception in the power of attorney relates solely to the making, signing and filing of protests. The Court holds that the exception does not implicity deny the broker authority to request reliquidation under section 520(c). The broker properly exercised its authority when it made such a request on July 15, 1980.

Staveley next claims that the passage of ninety days after the denial of its broker's request under section 520(c) does not preclude its filing a protest upon the denial of its subsequent section 520(c) request since the latter request contained new grounds for reliqui-

[5] The power of attorney, attached as exhibit F to defendant's brief, permits the broker:

> generally to transact at the Customhouses in said district any and all customs business, except making, signing, and filing of protests under section 514 of the Tariff Act of 1930, in which said grantor is or may be concerned or interested and which may properly be transacted or performed by an agent and attorney, giving to said agent and attorney full power and authority to do anything whatever requisite and necessary to be done in the premises as fully as said grantor could do if present and acting, hereby ratifying and confirming all that the said agent and attorney shall lawfully do by virtue of these presents; the foregoing power of attorney to remain in full force and effect until notice of revocation in writing is duly given to and received by the District Director of Customs of the district aforesaid.

(emphasis omitted).

dation and refund of duties. At oral argument, however, Staveley admitted that the September 22, 1980 request differs from the July 15, 1980 request only insofar as it is lengthier and was written by Staveley's London office rather than by the broker.

The Court holds that the length and authorship of the September 22, 1980 letter are of no importance. Comparison of the contents of the two letters reveals that the requests were in substance identical. Since the grounds alleged in the requests of Staveley and its broker are the same, the Court need not decide whether an importer may protest a denial of a request under section 520(c) after the expiration of the time available for the protest of a denial of a 520(c) request premised on separate grounds.

The final issue is whether, within one year after liquidation but more than ninety days after denial of an authorized request under section 520(c), an importer may protest the denial of a later request under section 520(c) containing the same grounds for relief as the first request. The Court holds that it may not. Section 514 expressly provides that a refusal to reliquidate under section 520(c) becomes final and conclusive unless a protest is filed within ninety days. *See* 19 U.S.C. §1514(a)–(c); *supra* note 4. Since Staveley failed to file a protest within ninety days after July 18, 1980, Customs refusal to grant relief under section 520(c) became unassailable. *Cf. Hambro Automotive Corp.* v. *United States*, 81 Cust. Ct. 29, 30, 458 F.Supp. 1220, 1221, C.D. 4761 (1978), aff'd, 66 CCPA 113, C.A.D. 1231, 603 F.2d 850 (1979). Customs denial of Staveley's September 22, 1980 request for reliquidation and refund was not protestable. *See James Loudon & Co.* v. *United States*, 79 Cust. Ct. 149, 158–61, C.D. 4727 (1977). Since the protest was not filed in accordance with section 514, the Court does not have jurisdiction under 28 U.S.C. § 1581(a) to consider its denial by Customs. *See Computime Inc.* v. *United States*, 8 CIT 259, 601 F.Supp. 1029 (1984), *aff'd.* 772 F.2d 874 (Fed. Cir. 1985).

Defendant's motion to dismiss for lack of subject matter jurisdiction is granted. So ordered.

(Slip Op. 86-25)

THE WEST BEND CO., DIV. OF DART INDUSTRIES, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80-10-01774

Before WATSON, *Judge.*

MEMORANDUM AND ORDER

[Motion for summary judgment granted]

(Decided March 12, 1986)

Barnes, Richardson & Colburn (Andrew P. Vance and *Michael A. Johnson)* for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* International Trade Field Office (*Barbara M. Epstein,* Attorney) for defendant.

WATSON, *Judge:* This matter is before the court on defendant's motion for summary judgment. This follows a determination by the President, pursuant to the court's remand in Slip Op. 84-85 (July 13, 1984) that, in terms of 19 U.S.C. § 2464(d)(1), (1975), hot air popcorn poppers are directly competitive with hot oil popcorn poppers produced in the United States on January 3, 1975 (50 Fed. Reg. 47198-9, November 14, 1985.)

By the terms of the limitations on the preferential treatment available under the Generalized System of Preferences (19 U.S.C. § 2464(c)(1)(B) this determination made plaintiff's popcorn poppers ineligible for a waiver of the 50% competitive need limit and justified the loss of duty-free treatment which led to this action.

Plaintiff has cross-moved for the filing of the administrative record of the remand determination in the hope of demonstrating that there were further procedural irregularities. However, the court is not persuaded that any further judicial inquiry is justified in this matter.

The President has made the determination called for by the court. That determination now conclusively supports the government's classification and the assessment of duties on this merchandise. It is therefore

ORDERED, ADJUDGED AND DECREED that the plaintiff's motion for the filing of the administrative record is denied and it is further

ORDERED that the government's motion for summary judgment is granted; and it is hereby

ORDERED, ADJUDGED AND DECREED that the government's classification of this merchandise and assessment of duties under Item 684.20, TSUS is affirmed and the action is dismissed.

ERRATA

(Slip Op. 86–5)

NEC CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

The above-noted slip opinion was originally published in CUSTOMS BULLETIN, Vol. 20, No. 6, dated February 12, 1986, starting on page 33. Delete second paragraph in its entirety (page 33, line 7 through page 34, line 14. Replace with the following:

"The Court initially notes that on December 4, 1985, prior to the filing of this motion, plaintiff filed a notice of appeal to the Federal Circuit of the November 19, 1985 judgment. Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as amended in 1979, the timely filing of a motion for new trial or to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure nullifies a previously filed notice of appeal, and the time for appeal runs from the district court's disposition of the motion. *See* Advisory Committee Note to 1979 Amendment to Fed. R. App. P. 4(a)(4); *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 59–61 (1982). Since Rule 59 of this court is patterned after Rule 59 of the Federal Rules of Civil Procedure, the court concludes that it has jurisdiction to dispose of the instant motion, the filing of which nullified the previously filed notice of appeal."

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THE DEPARTMENT OF THE TREASURY
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19 CFR Part 4

(T.D. 86-69)

Amendment to the Customs Regulations Concerning the Coastwise Transportation of Certain Articles by Vessels of the Netherlands Antilles

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to add the Netherlands Antilles to the lists of nations which permit vessels of the U.S. to transport certain articles specified in § 27, Merchant Marine Act of 1920, as amended, between their ports.

Customs has been furnished satisfactory evidence that the Netherlands Antilles places no restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country. This amendment provides reciprocal privileges for vessels registered in the Netherlands Antilles.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in the Netherlands Antilles became effective on October 22, 1984.

FOR FURTHER INFORMATION CONTACT: Donald Reusch, Carriers, Drawback & Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. 883) (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the U.S. except in vessels built in and documented under the laws of the U.S. and owned by U.S. citizens. However, the 6th proviso of the Act, as amended, by Pub. L. 89-194 (79 Stat. 823, T.D. 66-176) and Pub. L. 90-474 (82 Stat. 700, T.D. 68-227), provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign

nation does not restrict the transportation of certain articles between its ports by vessels of the U.S., reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the U.S. will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Section 4.93(b)(2), Customs Regulations (19 CFR 4.93(b)(2)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of equipment for use with cargo vans, lift vans, or shipping tanks; empty barges specifically designed for carriage aboard a vessel and certain equipment for use with these barges; certain empty instruments of international traffic; and certain stevedoring equipment and material.

On October 18, 1984, the Department of State advised the Director, Carriers, Drawback and Bonds Division, of the Customs Service Headquarters that the Netherlands Antilles places no restrictions on the transportation of the articles listed in the Act by vessels of the U.S. between ports in the Netherlands Antilles. The effective date of such notification was October 22, 1984.

The Carriers, Drawback and Bonds Division is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.93(b). Therefore, the Director of the Division has determined that, effective retroactively to October 22, 1984, the Netherlands Antilles should be added to the lists of nations set forth in § 4.93(b)(1) and (2).

By Treasury Department Order 165–25 the Secretary of the Treasury has delegated authority to the Commissioner of Customs to prescribe regulations relating to §§ 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f), Customs Regulations (19 CFR 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f)). These sections relate to lists of nations entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated this authority to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then re-delegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Secretary of State, as described above, it is determined that the Netherlands Antilles places no restrictions on the transportation of the articles specified in the 6th proviso of § 27 of the Merchant Marine Act of 1920, as amended, by vessels of the U.S. between ports in the Neth-

erlands Antilles. Therefore, reciprocal privileges are accorded as of October 22, 1984, to vessels registered in the Netherlands Antilles.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, cargo vessels, maritime carriers, vessels.

Regulations Amendments

To reflect the reciprocal privileges granted to vessels registered in the Netherlands Antilles, Part 4, Customs Regulations (19 CFR Part 4), is amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4, continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103; § 4.93 also issued under 19 U.S.C. 1322(a); 46 U.S.C. 883.

2. Sections 4.93(b)(1) and (b)(2), Customs Regulations (19 CFR 4.93(b)(1), (b)(2)), are amended by adding "Netherlands Antilles", in appropriate alphabetical order to the lists of nations entitled to reciprocal privileges.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this is a minor amendment in which the public is not particularly interested and there is a statutory basis for the described extension of reciprocal privileges, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d)(1), a delayed effective date is not required because this amendment grants an exemption.

Inapplicability of Regulatory Flexibility Act

This document is not subject to the provisions of 5 U.S.C. 603, 604, as added by § 3 of Pub. L. 96-354, the "Regulatory Flexibility Act." That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

Executive Order 12291

This amendment does not meet the criteria for major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S.

Customs Service. However, personnel from other Customs offices participated in its development.

Dated: March 19, 1986.

B. JAMES FRITZ,
Director, Regulations Control and Disclosure Law Division.

[Published in the Federal Register, March 25, 1986 (51 FR 10189)]

(T.D. 86-70)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued November 12, 1985, to December 30, 1985, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: March 17, 1986.

File: 218649.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback, and Bonds Division.

(A) Company: American Chrome and Chemicals Inc.
Articles: Sodium dichromate in liquid form
Merchandise: Sodium dichromate (anhydrous)
Factory: Corpus Christi, TX
Statement signed: October 11, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 6, 1985

(B) Company: Atlantic Industries, Inc.
Articles: Coal tar dyestuffs; pigments and intermediates; blends of dyestuffs; and dyestuffs reduced in strength
Merchandise: Various chemicals
Factory: Nutley, NJ
Statement signed: October 15, 1985
Basis of claim: Used in

Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 3, 1985
Revokes: T.D. 55423–C and T.D. 52718–B, to cover name change from Atlantic Chemical Corporation

(C) Company: Bristol De Puerto Rico
Articles: Sodium ampicillin sterile; ampicillin trihydrate sterile; sodium cephapirin sterile; potassium hetacillin sterile
Merchandise: Sodium ethyl hexanoate salt; ampicillin trihydrate; cephapirin acid; hetacillin
Factory: Barceloneta, PR
Statement signed: December 20, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 20, 1985

(D) Company: Carlton Forge Works
Articles: Titanium alloy billets (forged)
Merchandise: Titanium alloy ingots
Factory: Paramount, CA
Statement signed: July 31, 1985
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, November 14, 1985

(E) Company: Carlton Forge Works
Articles: Titanium alloy rough forgings
Merchandise: Titanium alloy billets
Factory: Paramount, CA
Statement signed: July 31, 1985
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, November 14, 1985

(F) Company: City Auto Stamping Co., Inc.
Articles: Automotive, agricultural, and industrial stampings
Merchandise: Hot rolled steel sheet, cold rolled steel sheet, galvanized steel sheet and zincrometal
Factory: Toledo, OH
Statement signed: October 15, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 81–190–D

(G) Company: Collins & Aikman Corporation
Articles: Dyed and/or texturized acrylic, polyester and nylon yarn

Merchandise: Undyed acrylic filament, texturized acrylic; polyester filament, texturized polyester; nylon filament and texturized nylon yarn
Factories: Graham and Hickory, NC
Statement signed: August 19, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, December 20, 1985

(H) Company: Cressona Aluminum Company
Articles: Extruded shapes, rod, bar, seamless tube and pipe
Merchandise: Aluminum and aluminum alloy ingots
Factories: Cressona, PA; Farmersville, TX
Statement signed: August 8, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, November 29, 1985

(I) Company: Galaxy Carpet Mills, Inc.
Articles: Tufted nylon carpet
Merchandise: Nylon yarn
Factories: Chatsworth, Dalton, and Ft. Oglethorpe, GA; South Pittsburg, TN
Statement signed: August 29, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami and Chicago, November 14, 1985

(J) Company: Great Lakes Chemical Corporation
Articles: Calcium bromide
Merchandise: Formic acid
Factory: West Lafayette, IN
Statement signed: May 6, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, December 10, 1985

(K) Company: Hell Graphics Systems, Inc.
Articles: Laser light device, scanners and scanner/lasers
Merchandise: Various components
Factory: Hauppauge, NY
Statement signed: October 14, 1985
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 84-123-H, to cover name change from HCM Graphic Systems, Inc.

(L) Company: Hoover Universal, Inc.
Articles: Motor vehicle seats and manufactured parts thereof
Merchandise: Motor vehicle seat parts
Factories: Athens, TN; Vincennes, IN; Georgetown and Cadiz, KY
Statement signed: October 4, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 78-268-B, T.D. 75-245-Q, T.D. 75-12-J, and T.D. 73-164-M

(M) Company: Hoover Universal, Inc.
Articles: Motor vehicle seats and manufactured parts thereof; other steel stampings and/or assemblies
Merchandise: Hot and cold rolled steel sheet, strip and blanks; high strength low alloy steel sheet, round steel wire, and welded steel tubing
Factories: Athens, TN; Vincennes, IN; Georgetown and Cadiz, KY
Statement signed: October 4, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 78-268-B, T.D. 75-245-Q, T.D. 75-12-J, and T.D. 73-164-M

(N) Company: ICI Americas, Inc.
Articles: Paraquat concentrate
Merchandise: PP796 and sulfacide brilliant blue dye
Factory: Pasadena, TX
Statement signed: December 21, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), November 12, 1985

(O) Company: Merck & Co., Inc.
Articles: Cilastatin sodium sterile, SP 2116
Merchandise: N,N-dibenzylethylenediamine diacetate; L-cysteine hydrochloride monohydrate; d-carboxamide; 1-bromo-5-chloropenate
Factories: Danville, PA; Elkton, VA
Statement signed: August 27, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 15, 1985

(P) Company: Merck & Co., Inc.
Articles: Imipenem sodium sterile

Merchandise: Carbonyldiimidazole; magnesium-p-nitrobenzyl malonate dihydrate; triphenylphosphine; pentanedioic acid derivative-ADC-6; benzothiazyl disulfide; diisopropylethylamine
Factories: Danville, PA; Elkton, VA; Rahway, NJ
Statement signed: August 27, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 21, 1985

(Q) Company: Meredith/Burda Company, Limited Partnership
Articles: Complete magazines
Merchandise: Machine-coated gravure paper; magazine sections
Factory: Des Moines, IA
Statement signed: November 1, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 16, 1985
Revokes: T.D. 80-245-P and T.D. 83-259-O, to cover successorship from Meredith Corporation

(R) Company: Michelin Tire Corporation
Articles: Rubberized tire fabric
Merchandise: 2-ply polyester cord
Factory: Sandy Springs, SC
Statement signed: October 15, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Miami, December 9, 1985

(S) Company: Mobil Chemical Company of Mobil Oil Corp.
Articles: Synthetic lubricant jet oil II
Merchandise: Heptanoic acid
Factory: Edison, NJ
Statement signed: June 14, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, November 29, 1985

(T) Company: Mobil Chemical Company of Mobil Oil Corp.
Articles: Lubricant ester 90 (MCP-133)
Merchandise: Heptanoic acid
Factory: Edison, NJ
Statement signed: October 8, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, November 29, 1985

(U) Company: Thomson Components—Mostek Corporation
Articles: Partially and fully fabricated semiconductor wafers and finished semiconductor devices
Merchandise: Raw silicon wafers
Factory: Carrollton, TX
Statement signed: December 3, 1985
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: Los Angeles (San Francisco Liquidation), December 30, 1985
Revokes: T.D. 84-169-Q, to cover successorship from Mostek Corporation

(V) Company: Thomson Components—Mostek Corporation
Articles: Finished semiconductor devices
Merchandise: Semiconductor assemblies
Factory: Carrollton, TX
Statement signed: December 3, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: Los Angeles (San Francisco Liquidation), December 30, 1985
Revokes: T.D. 84-1-P, to cover successorship from Mostek Corporation

(W) Company: Trico Products Corporation
Articles: Windshield wiper parts
Merchandise: Stainless steel wire, music spring wire, and zinc bars and slab
Factories: Buffalo, NY (3)
Statement signed: October 2, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, December 9, 1985

(X) Company: Union Carbide Corporation
Articles: UDELR polysulfone; Mindel engineering resins; Radel® polyarylsulfone; Kadel polyketone; Ardel® polyarylate
Merchandise: Monochlorobenzene; bisphenol A; bisphenol S; dimethyl sulfoxide; thionyl chloride; 4', 4'-difluorobenzophenone; hydroquinone
Factory: Marietta, OH
Statement signed: July 1, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 13, 1985

(Y) Company: Van De Mark Chemical Co., Inc.
Articles: Ethyl centralite
Merchandise: N-ethyl aniline

Factory: Lockport, NY
Statement signed: June 25, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 10, 1985

(Z) Company: Warner-Lambert Company
Articles: Prazepam steps IX and X
Merchandise: 2-amino-5-chlorobenzophenone
Factory: Holland, MI
Statement signed: June 21, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 20, 1985

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19 CFR Part 4

(T.D. 85-191)

Liquidated Damages Claims Against Bonded Carriers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In FR Doc. 85-25007, published as T.D. 85-180, in the Federal Register on October 21, 1985 (50 FR 42516), § 18.8(e)(1), Customs Regulations (19 CFR 18.8(e)(1)), was extensively revised to reflect the terms of the 1975 Convention on International Road Transport (TIR) Carnets.

Subsequently, § 18.8(e)(1) was further amended in FR Doc. 85-28433, published as T.D. 85-191, in the Federal Register on November 29, 1985 (50 FR 49037). This document made minor changes to the third sentence of § 18.8(e)(1). However, it erroneously referred to the second sentence. Accordingly, on page 49039, in the second column, in the third numbered paragraph, the word "second" should be changed to "third".

Dated: March 25, 1986.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, March 31, 1986 (51 FR 10825)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-2107)

WARNER BROTHERS, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

J. Joseph Bainton, of New York, New York, argued for appellant. With him on the brief were *Steven H. Reisberg* and *Joseph J. Iarocci*, Reboul, MacMurray, Hewitt, Maynard & Kristol, of counsel.

William E. Perry, Office of the General Counsel, of Washington, D.C., argued for appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

Richard M. Cooper and *Mary G. Clark*, Williams & Connolly, of Washington, D.C., were on the brief for Amicus Curiae, Motion Picture Association of America, Inc.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85-2107)

WARNER BROTHERS, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

(Decided March 20, 1986)

Before MARKEY, *Chief Judge*, SMITH and NIES, *Circuit Judges*.

NIES, *Circuit Judge*.

Warner Brothers, Inc. appeals from the final decision of the International Trade Commission (ITC) in investigation No. 337-TA-201, which declined to grant Warner's request for a temporary exclusion order (TEO) because Warner failed to prove that the domestic industry would suffer immediate and substantial harm in the absence of such relief. Because the ITC applied the correct legal standard, and its finding of no immediate and substantial harm is supported by substantial evidence, the decision of the ITC is affirmed.*

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* This appeal was originally decided in an unpublished opinion released January 10, 1986, and has now been reissued in published form.

OPINION

As a threshold matter in this appeal, the ITC argues that Warner has waived its right to challenge the immediate and substantial harm standard because it failed to file a petition for review of the ALJ's initial decision by the Commission. We do not agree. The government's argument on waiver hopelessly confuses the precedent dealing with requirements that a private litigant must first exhaust administrative remedies with the Commission's *sua sponte* right to restrict the disposition of a case to a single dispositive issue.

With respect to the latter, this court held in *Beloit Corp.* v. *Valmet Oy*, 742 F.2d 1421, 1423, 223 USPQ 193, 194 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2706 (1985):

> The Commission, on the other hand, is at perfect liberty to reach a "no violation" determination on a single dispositive issue. That approach may often save the Commission, the parties, and this court substantial unnecessary effort. Like many good things, that approach carries with it a risk—here the risk of a reversal, and a consequent need for the Commission to revisit one or more portions of the initial determination on which it had taken no position.

Whether or not a petition for review is filed, the ITC may limit resolution of a case to a single dispositive issue. It may not, however, parse that issue so finely that meaningful judicial review is precluded. In this case, the ITC in its notice of "nonreview" of the initial decision (ID) specifically adopted "that portion of the administrative law judge's ID finding that there is no immediate and substantial harm to the domestic industry." Although the ITC's statement appears to be directed to the factual finding of no immediate and substantial harm, it would make no sense for the ITC to treat that finding as dispositive were it not in agreement with the legal standard. Thus, a challenge to the legal propriety of the standard as well as to the factual satisfaction of that standard may be raised at this time.

With respect to a party's *waiver* of an issue, the precedent cited by the government has no applicability here. *Tong Seae Industries Co., Ltd.* v. *USITC*, 67 C.C.P.A. 160, 164 (1980) repeated the hornbook rule that a party may not raise issues on appeal "that were *never* raised below." *Astra-Sjuco A.B.* v. *USITC*, 629 F.2d 682 (CCPA 1980) was decided under the prior rules where the ALJ decision did not automatically become the decision of the Commission.

As we read the current regulations, 19 C.F.R. § 210.55(a)(2), if a party does file a petition for review of the ID, any issue not raised therein "will be deemed to have been abandoned." That rule obviously applies where a party files such a petition. However, there is no requirement that a party file a petition for review or risk

waiver of all adversely decided issues. On the contrary, as indicated in *Beloit, supra* at 1424, where Valmet filed no petition:

> Valmet obviously desires to argue before us the validity and injury issues as insurance against the possibility of our reversing the "no-infringement" finding adopted by the Commission. That desire, and the back-door appeal it would create, are premature. If this court affirms on "no-infringement", the litigation ends (absent grant of certiorari) favorably to Valmet. If this court reverses on that issue, and if on remand the Commission adopts the portions of the Initial Determination relating to the validity and injury issues, Valmet may appeal that decision to this court at that time.

Beloit clearly did not sanction a rule that a party waives appeal rights by failure to file a petition for review. Where the Commission limits the issues, *sua sponte,* a reversal on those issues will result in a remand. *Id.*

Regarding Warner's challenges to the ALJ's refusal to invoke a presumption of irreparable injury in copyright cases, this court has already spoken:

> [S]ection 337 does not function merely as the international extension of our patent, trademark and copyright laws * * *. Instead, section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof.

Textron, Inc. v. *U.S. International Trade Commission,* 753 F.2d 1019, 1028, 224 USPQ 625, 631 (Fed. Cir. 1985) (citation omitted). This is particularly important where, as here, temporary relief is sought. The ALJ properly declined to adopt a relaxed proof requirement as might exist when seeking injunctive relief under the copyright statute. The two statutes protect different rights, and similarity of two statutory schemes in one respect does not warrant eradication of purposefully designed differences in another. Finally, the Commission's finding of no immediate and substantial harm to Warner is reasonable on the evidentiary record. Thus, we hold that the finding is supported by substantial evidence. *See SSIH Equipment S.A.* v. *USITC,* 718 F.2d 365, 381-83, 218 USPQ 678, 692-93 (Fed. Cir. 1983) (Nies, J., supplemental opinion).

For the foregoing reasons, the ITC's refusal to issue a temporary exclusion order is affirmed.

AFFIRMED

(Appeal No. 85-2282)

VISCOFAN, S.A., PETITIONER *v.* U.S. INTERNATIONAL TRADE COMMISSION, UNION CARBIDE CORP., AND TEEPAK, INC., RESPONDENTS

Thomas V. Heyman, Dewey, Ballantine, Bushby, Palmer & Wood, of New York, New York, argued for appellant. With him on the brief were *Saul P. Morgenstern*

and *Claire Ann Koegler*. *Steven H. Bazerman* and *Julius Rabinowitz*, Kuhn, Muller & Bazerman, of New York, New York, of counsel.

Judith M. Czako, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee International Trade Commission. With her on the brief were *Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

H. Blair White, P.C., Sidley & Austin, of Chicago, Illinois, argued for appellee Union Carbide. With him on the brief were *David T. Pritikin*, *Rex E. Lee*, *Richard E. Young*, Sidley & Austin, of Washington, D.C., *C. Frederick Leydig*, *Homer J. Schneider*, *Charles S. Oslakovic*, *Mark E. Phelps*, Leydig, Voit & Mayer, Ltd., of Chicago, Illinois and *Thomas I. O'Brien*, *Clyde V. Erwin*, Union Carbide Corp., Danbury, Connecticut.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85-2282)

VISCOFAN, S.A., PETITIONER *v.* U.S. INTERNATIONAL TRADE COMMISSION, UNION CARBIDE CORP., AND TEEPAK, INC., RESPONDENTS

(Decided March 18, 1986)

Before FRIEDMAN, *Circuit Judge*, NICHOLS, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

FRIEDMAN, *Circuit Judge*.

This petition to review challenges (1) aspects of a remedial order the United States International Trade Commission (Commission) entered in a proceeding under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1982), and 19 U.S.C. §1337a (1982), and (2) the Commission's refusal to declassify confidential information that had been submitted during the Commission proceedings pursuant to a protective order. We affirm the challenged portions of the remedial order and dismiss the challenge to the refusal to declassify as an issue over which we have no jurisdiction.

I

A. In response to a complaint filed by respondent, Union Carbide Corporation (Carbide), the Commission in October 1983 initiated an investigation to determine whether the petitioner, Viscofan, S.A. (Viscofan), had committed unfair methods of competition and unfair acts in violation of section 337. The alleged unfair practices consisted of the importation and selling by Viscofan, a Spanish corporation, of certain skinless sausage casings. Carbide's complaint to the Commission alleged that Viscofan had manufactured the casings by processes that (1) violated two of Carbide's patents, and (2) involved trade secrets of Carbide that Viscofan had misappropriated. Carbide is one of the two major American manufacturers and sellers of skinless sausage casings.

The Commission consolidated this investigation with another investigation it previously had instituted, involving similar claims of patent infringement (but no claim of misappropriation of trade se-

crets) made by the other major American manufacturer and seller of skinless sausage casings, Teepak, Inc. (Teepak). No issues relating to the Teepak investigation are involved in the case before us.

In its opinion, the Commission stated that the

> general manufacturing process for skinless sausage casings as practiced by each of the parties to these investigations involves three distinct manufacturing operations: (1) chemical preparation, which involves the manufacture of viscose from natural cellulose fibers; (2) simultaneous regeneration of the cellulose and continuous formation of accurately-sized cellulose tubes in extrusion machines, including drying the extruded casing under carefully controlled conditions and winding it onto reels of semi-finished material called "flat stock;" and (3) shirring, which is a finishing operation during which lengths of flat stock are finely pleated and compressed into short, self-supporting, tubular sticks. [Footnote omitted.]

The Commission further stated:

> Meatpackers use skinless sausage casings to make sausage products by sliding a stick of shirred casing over the stuffing tube or horn of a sausage stuffing machine and pumping a meat emulsion into the stick as it de-shirrs, or extends. The meat-filled casing is twisted at intervals to define individual sausages or links. The long chain of links produced is cooked, after which the casing is normally removed, and the resulting product is sold as "skinless" sausages or frankfurters. [Footnote omitted.]

Following a hearing, the administrative law judge in July 1984 rendered a 363-page initial decision holding that Viscofan had violated section 337 and 19 U.S.C. § 1337a by (1) infringing a valid patent owned by Teepak, and (2) misappropriating Carbide's trade secrets. He determined that Viscofan had misappropriated six of those trade secrets.

The Commission stated:

> The ALJ found all the other elements of a violation of section 337 to exist in each investigation. The ALJ also determined that respondent Viscofan had failed to prove its affirmative defenses of patent misuse and unclean hands, wherein it alleged that complainants Teepak and Union Carbide had conspired to monopolize the manufacture of skinless sausage casings in the United States by means of illegal patent pooling, cross-licensing, price-fixing, and predatory behavior.

The Commission declined to review the initial decision, which thereby became the agency's final decision. The Commission then considered the relief stage of the proceedings and received submissions on the relief and public interest aspects of the case from the parties and others.

The Commission's final order, which became effective in January 1985, excluded "from entry into the United States for the remain-

ing term of the patent" "[s]mall caliber sausage casings manufactured abroad in accordance with the process disclosed" in the Teepak patent. It provided that persons desiring to import such casings "may petition the Commission to institute" further proceedings to determine whether the casings sought to be imported fell within the bar of the preceding paragraph.

Paragraph 3 of the Commission's order, the validity of which is a major issue before us, "excluded from entry into the United States for * * * ten (10) years from the date of this order" "[s]mall caliber cellulose sausage casings manufactured by Viscofan" or any affiliated company or related business entity.

The Commission explained at considerable length the reasons that led it to adopt paragraph 3, which we discuss in some detail in part II, *infra*. Here we merely summarize the Commission's reasoning.

The Commission rejected Viscofan's contention that "a cease and desist order is the only appropriate remedy in a trade secrets investigation * * *." It stated that because there was no way in which it could determine from the finished casings whether they had been manufactured by processes using the misappropriated trade secrets, and because it could not police Viscofan's manufacturing operations in Spain to determine whether the misappropriated secrets were being used, an exclusion order was "the only remedy that promises to be reasonably effective."

In setting the period of exclusion at 10 years, the Commission stated that the normal period of relief in a trade secrets misappropriation case is the time it would take the misappropriator "independently to develop the technology using lawful means." It rejected Viscofan's contention that the proper basis for ascertaining that period was the time it would have taken Viscofan to discover each trade secret separately, because "this approach ignores the interrelationships between and among the trade secrets and technology involved" and the fact that Viscofan had misappropriated six such interrelated trade secrets. The Commission concluded that it should "consider a single independent development time" for the six misappropriated trade secrets together. On the basis of the evidence Carbide submitted and Carbide's arguments regarding the time necessary independently to develop an integrated manufacturing process without the benefit of the six misappropriated trade secrets, the Commission concluded that its "remedial order should apply for a period of ten years."

Finally, the Commission concluded that the 10-year period of exclusion should run from the date of its order rather than, as Viscofan argued, from the date of the misappropriation of the trade secrets. It stated: "The facts of this investigation, particularly the fact that the misappropriation involved an actual theft of trade secrets, support the conclusion that Viscofan should not be credited

with the time between the misappropriation and the entry of the Commission's remedial order."

B. During the Commission proceedings, Carbide submitted to the Commission certain material relating to the circumstances surrounding the misappropriation of its trade secrets. This material was submitted as "confidential business information" pursuant to a protective order of the administrative law judge that provided for confidential treatment of such information.

Later in the proceedings Viscofan moved to redesignate this material as nonconfidential and thus make it a part of the public record in the case. Viscofan stated that it wanted to use this information in connection with a foreign court proceeding. The administrative law judge denied the motion.

Although the Commission denied review of the administrative law judge's initial decision, it granted review of his denial of Viscofan's motion to redesignate the material as nonconfidential. The Commission affirmed the administrative law judge's ruling. It stated that "[t]he proper standard of review on this issue is whether the ALJ abused his discretion in denying respondent Viscofan's motion" and concluded that "[t]he ALJ's decision was reasonable and not an abuse of discretion * * *."

The Commission stated: "Evidence in a section 337 investigation is gathered solely for the purposes of that proceeding. The statute and rules do not provide any support for the notion that information should be declassified because it is sought for use in a foreign court proceeding." It pointed out that the material involved " 'expenditures' of Union Carbide, and thus qualify as confidential business information within the literal terms of the rules and ALJ's protective order. Nothing in rule 201.6 as it existed when the protective order in this investigation issued, and the subject information was produced, limited the type of 'expenditure' which would qualify as confidential."

II

Section 337 requires the Commission, upon determining a violation of the section, either to "direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States" (subsection (d)) or to direct any person violating the section "to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued." (Subsection (f)(1)).

Under this provision the Commission has broad discretion in selecting the form, scope and extent of the remedy, and judicial review of its choice of remedy necessarily is limited. *See Canadian*

Tarpoly Co. v. *United States International Trade Commission,* 640 F.2d 1322, 1326, 209 USPQ 33, 35–36 (CCPA 1981); *Sealed Air Corp.* v. *United States International Trade Commission,* 645 F.2d 976, 989, 209 USPQ 469, 480–81 (CCPA 1981). As the Supreme Court stated in the leading case of *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608 (1946), in words that are equally applicable to this case:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Id. at 611–13 (footnote omitted). *See also Sealed Air Corp., supra,* ("it is not the function of a court to substitute a different remedy of its own design for that chosen by the ITC, or to substitute its view of the public interest for that of the ITC"). 645 F.2d at 989 (footnote omitted).

We evaluate Viscofan's challenges to paragraph 3 of the Commission's order, in the light of these principles.

As noted, paragraph 3 excluded from entry into the United States for 10 years from the date of the order skinless sausage casings manufactured by Viscofan or an affiliated company. Viscofan contends that this provision is (A) overly broad because it is not limited to sausage casings manufactured by use of the specific trade secrets found to have been misappropriated, and (B) excessively long in duration because the 10-year period of exclusion (1) improperly was based upon the time it would have taken Viscofan independently to develop the entire sausage casing manufacturing process rather than the time it would have taken Viscofan independently to discover separately each of the misappropriated trade secrets, and (2) should have run not from the date of the Commission's order but from the date of the misappropriation.

A. 1. In rejecting Viscofan's contention that the only appropriate remedy against the misappropriation of trade secrets would be a cease and desist order barring Viscofan from importing sausage casings made by a process that utilized the particular trade secrets Viscofan had misappropriated, the Commission justifiably concluded that such an order would not effectively correct the violations found.

The Commission pointed out that "there is no means by which we can determine from the casings whether they were manufac-

tured by a process which incorporates the misappropriated trade secrets." It noted that "Viscofan has represented that it can put into operation a separate production line, which does not incorporate the misappropriated trade secrets, use only that line for U.S. production, certify each shipment, and open its plant to inspection by Commission-appointed experts to ensure that it is not using the misappropriated trade secrets." The Commission concluded, however, that this would be an unsatisfactory and impossible method for insuring compliance with a cease and desist order because

> on the record in this investigation the Commission cannot confidently base the remedy on Viscofan's assurances, and the Commission has neither the jurisdiction nor means to conduct plant inspections in Spain. Therefore, exclusion is the only remedy which promises to be reasonably effective.

Moreover, as the Commission also pointed out, Viscofan's position not only would not provide a practical, effective method for insuring that the sausage casings Viscofan imported would not be made by processes utilizing the misappropriated trade secrets, but also "ignores the interrelationships between and among the trade secrets and technology involved, as well as the ALJ's conclusion that six specific trade secrets were found to have been misappropriated * * *. The trade secret aspects are not independent of the non-trade-secret aspects of the technology involved."

Considering all the circumstances, we cannot say that the Commission had not "made an allowable judgment in its choice of the remedy" in adopting a 10-year exclusion order rather than a cease and desist order, or that "the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel, supra*, 32 U.S. at 612-13.

Viscofan argues that in trade secret litigation, a normal remedial order bars the misappropriator from using only the particular secrets he has taken. The cases upon which it relies, however, all involved private litigation and did not implicate the important public interest considerations implicated in a Commission proceeding under section 337. In the language of the statute, that proceeding is designed to protect American industry from "[u]nfair methods of competition and unfair acts in the importation of articles into [or their sale in] the United States * * * the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such in industry, or to restrain or monopolize trade and commerce in the United States * * *.

2. Viscofan further argues that it is entitled to petition the Commission to show that sausage casings it wants to import have been made by processes that do not utilize misappropriated trade secrets. Pointing to the provision in the portion of the order excluding goods made by processes that infringe the Teepak patent that permits Viscofan to demonstrate to the Commission that particular

processes do not infringe, Viscofan apparently believes that the lack of a similar provison in the trade secrets portion of the order bars it from seeking such relief from the Commission with respect to trade secrets.

At oral agrument, however, Commission counsel stated that Viscofan could seek such relief pursuant to section 211.57 of the Commission's rule. That section provides that "[w]henever any person believes that changed conditions of fact * * * require that a final Commission action be modified or set aside, in whole or in part, such person may file with the Commission a motion requesting such relief." 19 C.F.R. § 211.57(a) (1985). Moreover, paragraph 6 of the order provides: "The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 211.57)."

There is nothing in the Commission's order that precludes Viscofan from filing with the Commission a petition for an exception to paragraph 3 of the order to permit Viscofan to import sausage casings manufactured by processes that do not involve or depend upon the trade secrets Viscofan misappropriated. If Viscofan can demonstrate to the Commission's satisfaction that it has developed and will continue to use manufacturing processes totally untainted by the trade secrets it misappropriated, there is no reason to think that the Commission would not permit Viscofan to import the product.

B. 1. In setting the length of the order at 10 years, the Commission correctly recognized that "the duration of relief in a case of misappropriation of trade secrets should be the period of time it would have taken respondent independently to develop the technology using lawful means." The Commission concluded that in the circumstances of this case the basis for determining the development time was the time it would have taken Viscofan to create the manufacturing processes involving the misappropriated trade secrets and not, as Viscofan urged, the time it would have required Viscofan to discover each particular trade secret independently and without regard to the total process. Here, as in the case of the Commission's decision to adopt an exclusion rather than a cease and desist order, we cannot say the Commission abused its discretion or that this aspect of the order is not supported by substantial evidence.

Viscofan misappropriated six specific trade secrets of Carbide. The Commission stated that "to issue a remedial order based on the time necessary to develop each such aspect would ignore the fact that Viscofan had the benefit of the entire machine, system, or set of standards, including non-trade-secret elements, which it had misappropriated, from which to work in developing its 'new technology.' The trade secret aspects are not independent of the non-trade-secret aspects of the technology involved." The agency justifiably concluded "to consider a single independent development time

for the six trade secrets found by the ALJ to have been misappropriated."

There was conflicting evidence regarding the time it would have required Viscofan independently to develop its own technology without the benefit of the misappropriated trade secrets. Viscofan's witnesses viewed the independent development of each of the six misappropriated trade secrets as relatively simple tasks that could have been done in a short period. Carbide, on the other hand, based upon its witnesses' testimony, suggested that "a shirring technology could be developed in between nine to twelve years, and an extrusion technology could be developed in between twelve to fifteen years."

The Commission's conclusion that it would have taken Viscofan 10 years independently to develop the technology is supported by the evidence in the record, and we have no basis for rejecting the Commission's determination that that period is the appropriate duration of the order. As the Commission explained: "To now conclude that Viscofan could have developed alternative technology for the misappropriated trade secrets in a relatively short time would be to give it the benefit of having had the misappropriated trade secrets for a period of years as a basis from which to work. We believe that this would be a wholly inequitable result."

Viscofan argues, however, that *Syntex Ophthalmics, Inc.* v. *Novicky,* 745 F.2d 1423, 223 USPQ 695 (Fed. Cir. 1984), *vacated,* 105 S.Ct. 1740 (1985), *reinstated on remand,* No. 84-838 (Fed. Cir. July 18, 1985), compels a different conclusion. In *Syntex,* this court stated that under governing Illinois law, "an injunction in a trade secret case must be limited to the appropriate length of time necessary for the defendant to duplicate the trade secret by lawful means." 745 F.2d at 1435, 223 USPQ at 704 (citations omitted). That is substantially the same standard the Commission applied here. *Syntex* was a private suit, and the opinion there did not address the question here, which is whether the necessary development time was that required to develop the complete processes in which the misappropriated trade secrets were used rather than the time necessary to discover each trade secret independently.

In *Syntex,* the court significantly reduced the duration of the 20-year injunction the district court entered. It did so, however, because it concluded that the only evidence upon which the district court based that injunction—testimony that more than 20 man-years were spent developing the misappropriated trade secret—was insufficient to support the injunction, primarily because the 20 man-years actually had been expended by several people during only two years. *Syntex* does not support Viscofan's position that the duration of the exclusion order should be based upon the time required to develop each trade secret separately.

2. Viscofan further contends that even if a 10-year order is appropriate, its starting date should have been the date of the misap-

propriation, which Viscofan contends was not later than January 1979, rather than the date on which the Commission's order became final in January 1985. Viscofan relies again on *Syntex*, this time on the holding there that the maximum permissible duration of the injunction was eight years from the misappropriation or four years from the preliminary injunction.

In determining that the 10-year exclusion should run from the date of the Commission's order, the Commission pointed out that in its only previous ruling on this issue, the period of exclusion had so run. *In re Certain Apparatus for the Continuous Production of Copper Rod*, 206 USPQ 138 (U.S.I.T.C. 1979). The Commission concluded: "The facts of this investigation, particularly the fact that the misappropriation involved an actual theft of trade secrets, support the conclusion that Viscofan should not be credited with the time between the misappropriation and the entry of the Commission's remedial order."

The appropriate starting date for an exclusion order based upon misappropriation of trade secrets necessarily depends on the facts of the particular case. In *Syntex* the district court's injunction ran for 20 years from the date of misappropriation. The fact that this court, in reducing the length of the injunction in *Syntex*, indicated that the maximum permissible injunction would be eight years from misappropriation (or four years from the date of the preliminary injunction), does not establish that the Commission abused its discretion in this case in making the effective date of its 10-year exclusion the date of its order.

III

Viscofan challenges the Commission's affirmance of the administrative law judge's refusal to declassify certain material relating to the misappropriation of the trade secrets that had been submitted to the Commission as confidential business records pursuant to a protective order of the administrative law judge. We do not reach the merits of that issue, since we agree with the Commission that we have no jurisdiction to review the refusal to declassify as part of this review proceeding.

Under 28 U.S.C. § 1295(a)(6) (1982), this court has exclusive jurisdiction

> to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 * * *.

Congress has specifically defined the "final determinations * * * under section 337 * * *" which this court may review:

> Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination to the United States Court of Appeals for the Federal Circuit * * *

19 U.S.C. § 1337(c) (1982). Commission determinations under subsections (d), (e), and (f) are those excluding articles from entry, excluding articles from entry during an investigation except under bond, and cease and desist orders, respectively. The Commission's refusal to declassify the confidential material, however, was not "a determination" under any of those subsections.

The refusal to declassify was unrelated to the propriety of the exclusion order, which we have jurisdiction to review under subsection (d). An affirmance or reversal of the refusal to declassify would not and could not in any way affect the validity of the exclusion order. Viscofan does not contend to the contrary. It sought to make the confidential information public only because it wanted to use it in a foreign court proceeding, and not because a favorable ruling on that issue would aid its challenge to the exclusion order. The Commission's refusal to declassify the confidential business information is not ancillary to our review of Viscofan's challenges to paragraph 3 of the Commission's order. *Cf. Refractarios Monterrey, S.A.* v. *Ferro Corp.*, 606 F.2d 966, 203 USPQ 568 (CCPA 1979), *cert. denied*, 445 U.S. 943, 205 USPQ 488 (1980. *Duracell, Inc.* v. *United States International Trade Commission*, —— F.2d ——, 228 USPQ 187 (Fed. Cir. 1985).

We express no view on what court, if any, would have jurisdiction to review the Commission's refusal to declassify. We hold only that under our narrow jurisdiction to review Commission determinations, we do not have that authority.

Conclusion

Paragraph 3 of the Commission's order is affirmed. Insofar as the petition to review challenges the Commission's refusal to declassify confidential material, it is dismissed.

AFFIRMED IN PART AND DISMISSED IN PART

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul R. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-26)

UNITED STEELWORKERS OF AMERICA AND ITS LOCALS 68, 7508, AND 196, PLAINTIFFS *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, DEFENDANT

Court No. 83-7-00944

Before RE, *Chief Judge.*

ON PLAINTIFFS' MOTION FOR REVIEW OF ADMINISTRATIVE DETERMINATION UPON AGENCY RECORD

Plaintiffs, on behalf of former employees of Duval Corporation, challenge the Secretary of Labor's denial of certification of eligibility for benefits under the trade adjustment assistance program.

Held: The Secretary's determination that increases of imports did not contribute importantly to the workers' separation from employment is not supported by substantial evidence contained in the record, and is not in accordance with law. Hence, the determination of the Secretary is vacated, and the case is remanded.

[Administrative determination of the Secretary of Labor denying certification of worker adjustment assistance benefits vacated; case remanded.]

(Dated March 12, 1986)

Bredhoff & Kaiser (*James D. Holzhauer,* on the motion), for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff,* on the motion), for the defendant.

RE, *Chief Judge:* In this action, plaintiffs, on behalf of former employees of the Duval Corporation, seek review of a final determination by the Secretary of Labor which denied certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974, tit. II, §§ 221-249, 284, 19 U.S.C. §§ 2271-2321, 2395 (1982 & Supp. I 1983). Specifically, the Secretary found that the workers were not eligible for assistance because increases of imports did not contribute importantly to their separation from employment.

After reviewing the administrative record and the arguments of the parties, the Court holds that the determination of the Secretary is not supported by substantial evidence, and is not in accord-

ance with law. Therefore, the case is remanded to the Secretary for further consideration not inconsistent with this opinion.

On July 6, 1982, July 28, 1982, and August 5, 1982, plaintiffs, on behalf of employees at three mining operations of Duval Corporation, filed petitions for certification of eligibility to apply for trade adjustment assistance benefits. Pursuant to section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a), the Office of Trade Adjustment Assistance (OTAA) of the Department of Labor [1] published notices in the Federal Register stating that it had received the petitions and had instituted an investigation into their validity. 47 Fed. Reg. 31,450, 36,484 (1982).

Section 222 of the Trade Act requires the Secretary to certify a group of workers as eligible to apply for trade adjustment assistance benefits if it is determined:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Trade Act of 1974 § 222, 19 U.S.C. § 2272 (Supp. I 1983).

Plaintiffs contend that increased imports of copper contributed importantly to the decline of sales and production by Duval Corporation, and to the workers' separation from employment. The Secretary denied plaintiffs' petition on the grounds that it failed to satisfy the increased imports requirement of section 222. 19 U.S.C. § 2272(c).

The Secretary of Labor's Determination

The OTAA's investigation disclosed that Duval Corporation, a wholly owned subsidiary of Pennzoil Company, owns three mines in Arizona, which are known as Mineral Park, Sierrita, and Esperanza. On December 15, 1981, all three operations ceased production, and approximately 2,000 workers were separated from employment. Some workers were retained at each site and, on April 1, 1982, the Sierrita Mine resumed production at 40 percent of capacity.

The workers at all three mines were found to be engaged in both the mining of copper ore and the production of copper concentrate. Copper ore, concentrate, precipitate, and matte, are types of copper

[1] The Director of the Office of Trade Adjustment Assistance has been delegated the responsibility for investigating adjustment assistance eligibility. 29 CFR § 90.2 (1985).

which are smelted or converted into blister copper. The record shows that statistics for the domestic production of copper ore, concentrate, precipitate, and matte are grouped under the heading "copper ore." Statistics are also provided for the later stages of processing, under the headings blister copper and refined copper. Most blister copper is cast into copper anodes for electrolytic refining. Refined copper is cast into wirebar, ingot, or other shapes for later fabrication. Duval processed between 20 and 25 percent of its copper concentrate into blister copper. All of the blister copper and the remainder of the copper concentrate produced by Duval was refined by outside companies on a toll basis.

The OTAA performed a trade and industry analysis to ascertain the effect of imports on the domestic copper industry. The investigation disclosed that imports of copper ore in 1980 increased 70.6 percent over 1979. In 1981, imports of copper ore decreased 20.6 percent to a level representing 2.7 percent of domestic production. During the first three quarters of 1982, imports of copper ore increased 338.5 percent. Imports of blister copper decreased 70.3 percent in 1979, from a 5-year high attained in 1978. In 1980, however, imports rose 88.8 percent. Imports of blister copper decreased in 1981 by 35.5 percent, and increased by 229.2 percent in 1982. The investigation also disclosed that imports of refined copper increased 107 percent in 1980 from 1979. Imports of refined copper declined by 21.8 percent in 1981 and 23.7 percent in 1982. The Secretary noted that an industry-wide strike of mine workers affected the total level of copper imports in 1980.

Based on these findings, the Secretary concluded that the workers should be denied certification because, "U.S. imports of refined copper declined both absolutely and relative to domestic production in 1981 compared to 1980 and in the January through September 1982 period compared to the same period in 1981." *See* 48 Fed. Reg. 12,006 (1983).

Thereafter, plaintiffs applied for reconsideration of the administrative determination. On April 25, 1983, the Secretary issued a notice of negative determination in response to plaintiffs' application. 48 Fed. Reg. 28,524 (1983). Subsequently, plaintiffs commenced this action seeking judicial review of the Secretary's final negative determination.

On April 30, 1984, the Court granted the Secretary's motion for a voluntary remand in order to allow the Secretary to supplement the record with a survey of Duval's customers. After reconsideration, on June 29, 1984, the Secretary issued a "further determination," which stated that the "[r]esults of the customer survey [confirmed] the Department's original determination that imports did not contribute importantly to * * * worker separations at the Duval Corporation in 1982." Plaintiffs then requested this Court to set aside the Secretary's determination.

Discussion

Section 284 of the Trade Act of 1974 empowers the Court of International Trade to review a determination by the Secretary of Labor that denies certification of eligibility for adjustment assistance to assure that the determination is supported by substantial evidence and is in accordance with law. 19 U.S.C. § 2395(c); *see Woodrum* v. *Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984). The findings of fact by the Secretary are conclusive if supported by substantial evidence. Trade Act of 1974, § 284(b), 19 U.S.C. § 2395(b) (1982). Moreover, "the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary or capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union* v. *Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978), *quoted in ILWU Local 142* v. *Donovan*, 9 CIT ——, Slip Op. 85–127, at 9 (Dec. 11, 1985); *see* 19 U.S.C. § 2273(c).

The plaintiffs urge that the Secretary's negative determination of eligibility should be set aside. First, they contend that the Secretary improperly used 1982 as a comparison year, because the workers were separated from employment in 1981, not 1982. Second, plaintiffs allege that it was improper for the Secretary to consider import statistics for the third quarter of 1982, a time period subsequent to the separation of the workers. Third, they maintain that the Secretary "erred as a matter of law in limiting his focus to refined copper," and that the Secretary should also have considered imports of copper ore and blister copper. The plaintiffs also contend, for the same reasons, that the consumer survey conducted by the Secretary did not accurately reflect the effect of imports on Duval's sales.

It is well established that, in the absence of a valid reason to consider a different time period, the Secretary determines whether there has been an increase of imports by a comparison of the year of separation with the immediate preceding year. *See, e.g., Paden* v. *United States Dep't of Labor*, 562 F.2d 470, 473 (7th Cir. 1977); *Katunich* v. *Donovan*, 8 CIT 157, 594 F. Supp. 744, 752 (1984). In this case, the Secretary found that there were "major layoffs" in both 1981 and 1982, and, therefore, 1982 was a base year for comparison. Plaintiffs contend that, since a significant number of workers were separated from employment in 1981, by using 1982 as a base year, the Secretary has considered an irrelevant and erroneous time period. Thus, the question presented in this case is whether the Secretary's finding that 1982, in addition to 1981, is a year of separation is supported by substantial evidence in the record, and is in accordance with law.

The Secretary found that, at all three mines, major layoffs occurred in December 1981 and March, May, June, and July 1982. Duval separated approximately 2,000 workers, over 68 percent of its total work force, when the mines ceased production in Decem-

ber 1981. This represented an 88 percent decline in the average number of workers employed at the Mineral Park mines, a 54 percent decline at the Sierrita mine, and an 83 percent decline at the Esperanza mine. Although additional separations occurred in 1982, the number of workers affected was significantly less than in 1981. Plaintiffs contend that since the significant majority of workers were separated from employment in 1981, the Secretary should not have considered whether imports increased in 1982.

The Secretary has promulgated regulations which provide definitions relating to trade adjustments petitions. These regulations provide, in part:

> "Layoff" means a suspension from pay status for lack of work initiated by the employer and expected to last for no less than seven (7) consecutive calendar days * * *.
>
> "Significant number or proportion of the workers" means that:
>
> (a) In most cases the total or partial separations, or both, in a firm . . . are the equivalent to a total unemployment of five percent (5 percent) of the workers or 50 workers, whichever is less * * *.

29 C.F.R. § 90.2 (1985).

Surely, the 2,000 workers who were separated in December 1981 and who filed for adjustment assistance constitute a "significant number or proportion of the workers," as that phrase is defined by the Secretary. *See* 29 C.F.R. § 90.2 (1985). However, the record shows that the workers separated in 1982 also constitute a significant number of workers. From the record, the Court can reasonably discern that the Secretary's determination was based on an analysis of both 1981 and 1982. The workers were denied certification because the Secretary found that imports declined in both 1981 and 1982. On these facts the Court cannot say that the Secretary's choice "is not the product of a reasoned analysis evident in the administrative record." *See International Union* v. *Marshall,* 584 F.2d 390, 396 (D.C. Cir. 1978). Hence, in view of the regulations promulgated by the Secretary, and the evidence contained in the record, the Court holds that the Secretary's decision to use 1982 as a base year is supported by substantial evidence in the record, and is in accordance with law.

Plaintiffs also contend that the Secretary should not have considered import statistics for the third quarter of 1982. Plaintiffs claim that this data is irrelevant to their petition because it relates to a time period subsequent to the workers' separation from employment. In addition, plaintiffs contend that the Secretary's reliance on these statistics is inconsistent with his certification of similarly situated mine workers at Kennecott Minerals Company, who were also represented by the United Steelworkers Union. The Secretary explained that the Duval workers were denied certification because data for the third quarter of 1982 became available, and the Ken-

necott investigation was based on data for the first 6 months of 1982. *See* 48 Fed. Reg. at 28,524. The Secretary did not explain, however, how the decline in imports *subsequent* to the Duval workers' separation was "likely to affect employment in the year of separation." *Paden,* 562 F.2d at 473. Hence, the Court holds that the case must be remanded so that the Secretary may articulate with reasonable clarity his reasons for considering imports after the separation of the workers. *See UAW* v. *Marshall,* 584 F.2d 390, 397 (D.C. Cir. 1978); *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971); *see also Camp* v. *Pitts,* 411 U.S. 138, 143 (1973) (court may require additional explanation of reasons for agency decision).

Plaintiffs also contend that the Secretary improperly restricted his focus to imports of refined copper. The Secretary, however, determined that "the proper focus of competitive impact" should be on refined copper, since that was the product most "like or directly competitive with" the articles produced by Duval.

In *United Shoe Workers* v. *Bedell,* 506 F.2d 174 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia Circuit held that component parts of an article are not "like" the imported articles which incorporate them. *Id.* at 177-78. The court also noted that the parties did not contend that the term "directly competitive" applied to the domestic manufacturer of component parts. *Id.* at 178 n.13. Moreover, the *United Shoe Workers* court recognized that the terms "like" and "directly competitive" are not synonymous or explanatory of one another. *Id.* at 186 n.77; *see* S. Rep. No. 1298, 93d Cong., 2d Sess. 121, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7265. The court distinguished the term "like" from the term "directly competitive" by noting that "many products can be directly competitive without having identical or nearly identical physical characteristics." 506 F.2d at 185.

In the *United Shoe Workers* case, the court stated that Congress had "expressly redefined 'directly competitive' in the Trade Expansion Act to cover items that were in different stages of processing." 506 F.2d at 186; *see* Trade Expansion Act of 1962 § 405(4), 19 U.S.C. § 1806(4) (1970) (current version at 19 U.S.C. § 2481(5)). The legislative history of the Trade Act of 1974 indicates that the term "like or directly competitive" was used in the same context as in the Trade Expansion Act of 1962. S. Rep. No. 1298, 93d Cong., 2d Sess. 121, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7265; *see Morristown Magnavox Former Employees* v. *Marshall,* 671 F.2d 194, 198 (6th Cir.), *cert. denied sub nom.* 459 U.S. 1041 (1982). The statutory definition of "directly competive' provides:

> (5) An imported article is "directly competitive with" a domestic article at an earlier or later stage of processing, and a domestic article is "directly competitive with" an imported article at an earlier or later stage of processing, if the importation of the article has an economic effect on producers of the

> domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article. For purposes of this paragraph, the unprocessed article is at an earlier stage of processing.

19 U.S.C. § 2481(5) (1982); *see* 29 C.F.R. § 90.2 (1985).

The legislative history to the Trade Expansion Act provides examples of the expanded definition of directly competitive:

> Under this provision, an imported article may be considered "directly competitive with" a domestic article * * * if the one is at an earlier or later stage of processing than the other, or if one is a processed and the other an unprocessed form of the same article, and if the economic effect of importation of articles is in the same stage of processing as the domestic article.
>
> The term "earlier or later stage of processing" contemplates that the article remains substantially the same during such stages of processing, and is not wholly transformed into a different article. Thus, for example, zinc oxide would be zinc ore in a later stage of processing since it can be processed directly from zinc ore. For the same reason, a raw cherry would be a glace cherry in an earlier stage of processing, and the same is true of a live lamb and dressed lamb meat * * *.

H.R. Rep. No. 1818, 87th Cong., 2d Sess. 24 (1962); *see United Shoe Workers*, 506 F.2d at 186 n.80.

Thus, in the context of petitions filed by workers who mine ore, it is appropriate for the Secretary to consider the effects of imported ore or "the more refined imported product." *See* Bratt, *Issues in Worker Certification and Questions of Future Direction in the Trade Adjustment Assistance Program*, 14 Law & Pol'y Int'l Bus. 819, 848 (1982). The cases cited by the defendant in support of the Secretary's determination are inapposite because they all involve component parts rather than articles in earlier or later stages of processing.

In this case, the Secretary limited his focus to imports of refined copper because "neither copper ore nor copper concentrate was marketed to outside customers." 48 Fed. Reg. 28,524 (1983). The statute, however, contemplates that imported articles which are not "like" the product produced by the domestic firm may nevertheless be "directly competitive with" domestic articles. Indeed, plaintiffs contend that there is "considerable cross-elasticity of demand between refined copper and other forms of copper." By focusing only on the product ultimately marketed by the workers' firm, the Secretary has, in effect, limited the scope of the statutorily defined words "directly competitive." Hence, the Court holds that the Secretary has improperly restricted his focus to articles marketed by Duval, rather than articles like or directly competitive with articles produced by Duval. Therefore, the Secretary's determination is not in accordance with law, and is vacated.

Conclusion

In light of the facts contained in the administrative record, the statute, and relevant case law, it is the holding of the Court that the Secretary of Labor's denial of certification is not supported by substantial evidence, and is not in accordance with law.

Accordingly, the determination of the Secretary of Labor is vacated, and the case is remanded to the Secretary for a redetermination of the certification of eligibility for adjustment assistance. Since the Secretary may wish to take additional evidence on matters which relate to the workers' petition, the Court notes that "the Secretary's latitude on remand extends to the full scope of his function under the Act. It is within his discretion to make a new determination, with new findings and reasons." *International Union* v. *Marshall,* 584 F.2d 390, 396 (D.C. Cir. 1978). Finally, it is ordered that the Secretary shall certify the record and report to the Court the results of the further proceedings within 60 days from the date of the entry of this opinion and order.

(Slip Op. 86–27)

NISSHO-IWAI AMERICAN CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–4–00637

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Bridge Sections

[Judgment for the defendant.]

(Decided March 12, 1986)

Stein Shostak Shostak & O'Hara (James F. O'Hara), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commerical Litigation Branch *(Barbara M. Epstein),* for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain parts and accessories of unassembled bridges or bridge sections imported from Japan.

The merchandise was entered at the port of Anchorage, Alaska, and was classified by the Customs Service under item 652.98 of the Tariff Schedules of the United States (TSUS), a "basket" provision for bridges, bridge sections, and other structures and parts of structures of base metal. Hence, the merchandise was assessed with duty of 9.5 per centum ad valorem.

Plaintiff protests this classification, and contends that the merchandise is properly classifiable under item 652.96, TSUS, as "columns, pillars, posts, beams, girders and similar structural units," made in part of alloy iron or steel, dutiable at 5.5 per centum ad valorem.

Since resolution of the classification issue requires analysis of the tariff items relating to the superior heading, it is helpful to set forth the tariff provisions relating to these base metal structures as of the date of importation:

Schedule 6, Part 3, Subpart F:

Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts, and other structures and parts of structures, all the foregoing of base metal:

	Of iron or steel:	
	Door and window frames:	
* * * * * * *		
	Columns, pillars, posts, beams, girders, and similar structural units:	
	Not in part of alloy iron or steel:	
* * * * * * *		
	In part of alloy iron or steel:	
652.95	In part of stainless steel.....	6% ad val.
652.96	Other	5.5% ad val.
652.98	Other	9.5% ad val.

As noted, plaintiff contends that the imported merchandise is classifiable under item 652.96, with duty at 5.5% ad valorem, whereas Customs has classified the merchandise under item 652.98, with duty at 9.5% ad valorem.

The question presented, therefore, is whether, within the meaning of the competing tariff provisions, the imported merchandise is classifiable under item 652.98, the provision covering bridges, bridge sections, structures and parts of structures of base metal, as classified by Customs, or under item 652.96, the provision encompassing "Columns, pillars, posts, beams, girders, and similar structural units," in part of alloy iron or steel, as claimed by plaintiff. In order to decide this question, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984); *E.R. Hawthorne & Co.* v. *United States*, 730 F.2d 1490, 1490 (Fed Cir. 1984).

The parties have agreed to a stipulation of the facts, and each has moved for summary judgment pursuant to Rule 56 of the Rules

of the Court. Since there is no issue as to any material fact, the case may properly be decided on the parties' cross-motions for summary judgement. *See B&E Sales Co.* v. *United States,* 9 CIT ——, Slip Op. 85–22, at 5 (Feb. 28, 1985); *C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 68 Cust. Ct. 17, 22, C.D. 4327, 336 F. Supp. 1395, 1399 (1972), *aff'd,* 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974).

After a careful examination of the stipulated facts, the pleadings and supporting papers, the pertinent tariff provisions, and the relevant case law, it is the determination of the Court that Customs has correctly classified the imported merchandise under item 652.98, TSUS.

The imported merchandise consists of the necessary parts and accessories of unassembled bridges or bridge sections, including columns, beams, girders, bolts, nuts, brackets, plates, hinges, drain boxes, railing, bridge shoes, and railing anchors. All parts and accessories are made of steel, in part of alloy. The merchandise, as imported, was ready for erection into bridge sections, and was later assembled into specific bridge sections of the Anchorage Port Access Bridge project in Anchorage, Alaska.

Plaintiff contends that the imported parts of bridge sections are "similar structural units" to "[c]olumns, pillars, posts, beams, [and] girders," within the ambit of the superior heading to item 652.96. In support of its position, plaintiff cites the canon of construction, *ejusdem generis*. The Court, however, has concluded that, since the imported merchandise is in fact more than these structural units, this guide to statutory interpretation provides no support for the plaintiff's contention that the imported merchandise is classifiable under item 652.96.

Ejusdem generis, which means literally, of the same class or kind, teaches that "where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described." *United States* v. *Damrak Trading Co.,* 43 CCPA 77, 79, C.A.D. 611 (1956). The doctrine of *ejusdem generis* is "a specific application or illustration of the broader maxim *noscitur a sociis,* i.e., known by its associates." *Economy Cover Corp.* v. *United States,* 76, Cust. Ct. 130, 132, C.D. 4645, 411 F. Supp. 783, 784 (1976). In *Economy Cover Corp.*, the court explained:

> In essence, *ejusdem generis* means that when general words in a statute follow a specific enumeration of persons or things, the general words are not to be construed in their widest sense of meaning, but rather are to be limited, or held to apply, only to persons or things of the same kind or class as those specifically enumerated.

Id.; see Oxford Int'l Corp. v. *United States,* 75 Cust. Ct. 58, 68, C.D. 4608 (1975); *Nomura (America) Corp.* v. *United States,* 62 Cust. Ct.

524, 530, C.D. 3820, 299 F. Supp. 535, 540 (1969), *aff'd*, 58 CCPA 82, C.A.D. 1007, 435 F.2d 1319 (1971).

As applicable to customs classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms. *See Economy Cover Corp., supra*, 76 Cust. Ct. at 132, 411 F. Supp. at 784-85; *Stylo Matchmakers Int'l* v. *United States*, 73 Cust. Ct. 78, 83, C.D. 4556 (1974). In order for plaintiff's classification to prevail, therefore, it must be established that the imported parts of bridge sections are structural units similar to columns, pillars, posts, beams and girders. *See United States* v. *Bruckmann*, 65 CCPA 90, 93, C.A.D. 1211, 582 F.2d 622, 625 (1978); *J. Ray McDermott & Co.* v. *United States*, 69 Cust. Ct. 197, 205, C.D. 4394, 354 F. Supp. 280, 286 (1972); *Laurence Myers Scaffolding Co.* v. *United States*, 57 Cust. Ct. 333, 339, C.D. 2809, 259 F. Supp. 874, 878 (1966).

In *Laurence Myers Scaffolding Co.* v. *United States*, 57 Cust. Ct. 333, C.D. 2809, 259 F. Supp. 874 (1966), certain bridge overhang shores, highway shores, and building shores, used to support concrete form work, were classified under item 657.20, TSUS, as other "[a]rticles of iron or steel," not specifically provided for elsewhere in the tariff schedules. The plaintiff argued that the merchandise was properly classifiable under item 652.94 as "columns, pillars, posts, beams, girders and similar structural units," not in part of alloy iron or steel. In analyzing the common meaning of columns, pillars and posts, the court noted that the one common characteristic of these terms was that they offered firm upright support to a building or structure. *Id.* at 340, 259 F. Supp. at 879. In addition, the court found that the structural members were of unitary construction. Since the building shores at issue comprised tubular uprights, fastened together by coupling pins, braced by cross bars and adjusted by stopper pins and an incorporated jack, the court found the shores were composite articles. Thus, the court held that the shores were "not similar structures to columns, pillars and posts within the common meaning of those terms but were in fact more than said designated structural units * * *." *Id.*

The decision in *J. Ray McDermott & Co.* v. *United States*, 69 Cust. Ct. 197, C.D. 4394 (1972), is in accord with this holding. At issue in *McDermott* were two steel components for an offshore oil drilling platform which were described as a "jacket section" and a "box girder." Both units were classified under item 652.98 as "[o]ther" structures or parts of structures of base metal. The plaintiff claimed that both units were properly classifiable under item 652.94 as "[c]olumns, pillars, posts, beams, girders, and similar structural units," not in part of alloy iron or steel. Analyzing each imported component separately, the court held that the "box girder" should have been classified as a "girder" under item 652.94 because it served the single function of providing vertical support

for the rig above it. The court found, however, that the platform jacket's primary function was not to provide upright support, but to protect the pipe piles from the elements. Since the unit's function was not primarily support, the court held that the imported "jacket section" could not be considered a similar structural unit to columns, pillars, and posts. 69 Cust. Ct. at 205. It is significant to note that the imported jacket, although comprised of steel, was classified under item 652.98.

Thse decisions make it clear that the terms columns, pillars, posts, beams, and girders refer to units that offer either vertical or horizontal support to a structure. Lexicographic authorities are in accord with this interpretation. For example, the Random House Dictionary of the English Language (unabr. ed. 1973) provides the following definitions:

> Column: a rigid, relatively slender, upright support, composed of relatively few pieces.

Id. at 292.

> Pillar: an upright shaft or structure * * * relatively slender in proportion to its height * * *.

Id. at 1092.

> Post: a strong piece of timber, metal, or the like, set upright as a support * * *.

Id. at 1122.

> Beam: any of various relatively long pieces of metal, wood, stone, etc., manufactured or shaped esp. for use as rigid members or parts of structures or machines
> * * * *Engineering.* A rigid member or structure supported at each end, subject to bending stresses from a direction perpendicular to its length.

Id. at 129.

> Girder: a large beam * * * for supporting masonry, joists, purlins, etc.

Id. at 598.

Pertinent definitions indicate that columns, pillars and posts provide upright support, while beams and girders provide support against stresses or forces from a direction perpendicular to their lengths. All of these units are described as relatively slender in relation to their lengths or heights.

In this case, neither party contends that the different types of units comprising the bridge sections should be classified separately. Indeed, under the doctrine of entireties, when an importer imports a set of components designed to form a saleable unit, the merchandise is classifiable as that unit. *See, e.g., Lafayette Radio Elec. Corp.* v. *United States,* 57 CCPA 62, 66, C.A.D. 977, 421 F.2d 751, 754 (1970); *United States* v. *Mannesmann Meer, Inc.,* 54 CCPA 24, 26–27,

C.A.D. 897 (1966). Since the parties have stipulated that the imported merchandise consists of all the parts necessary to construct complete bridge sections, the merchandise was properly classified together.

There is no question that some of the imported units are columns, beams, and girders. Many other components of the imported merchandise, however, such as bolts, nuts, brackets, plates, hinges, drain boxes, railing, bridge shoes, and railing anchors, cannot be considered similar structural units to columns, beams, or girders. Clearly, these other parts are different or more than the enumerated units because they serve different functions than providing support. Since they are not of the same class or kind as columns, pillars, posts, beams and girders, plaintiff is not aided by the canon of *ejusdem generis*. Moreover, a bridge or bridge section is more than a column, beam or girder. In short, although the imported parts of bridges and bridge sections may be structural units, these units, classified as an entirety, cannot be considered "similar structural units" to columns, pillars, posts, beams and girders. Hence, they were not classifiable under item 652.96, and were properly classified by Customs under item 652.98.

Plaintiff argues that the imported merchandise cannot be classified under item 652.98 because that item only covers products made of base metals other than iron or steel. This contention, however, is without merit.

The superior headings to items 652.96 and 652.98, TSUS, can best be reviewed by examining each heading individually. Since the broadest superior heading enumerates or lists "bridges," "bridge sections," and "parts" *eo nomine*, it is clear that the imported bridge sections are specifically described under this heading. This superior heading is then subdivided or broken down by the subheading "[o]f iron or steel," Under the heading, "[o]f iron or steel." are only two subordinate headings: "[d]oor and window frames," and "[c]olumns, pillars, posts, beams, girders, and similar structural units."

General Interpretive Rule 10(c)(i) of the Tariff Schedules of the United States provides: "a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby." As a matter of statutory interpretation, the Court finds that the heading "[o]f iron or steel" is limited by its two inferior headings. Therefore, the coordinate heading for "[o]ther" may include structures of iron or steel that are not covered by the inferior headings.

In its brief, plaintiff argues that these two headings, "[d]oor and window frames" and "[c]olumns * * * and similar structural units," which encompass items 652.90 through 652.96, "cover all structures and parts of structures enumerated in the superior heading which are of iron or steel, without exception." Plaintiff's Brief, at 7. Thus, according to plaintiff's reading of the statute, all of the items listed in the primary heading, such as "hangars and

other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, shutters [and] balustrades," if made of iron or steel, must be classified either as door and window frames, or as columns, pillars, posts, beams, girders, and similar structural units. Clearly, this result is untenable.

In order to avoid this anomalous or absurd result, and to effectuate the legislative intent, the two subordinate headings, "door and window frames" and "columns * * *" must be read to limit the superior heading "[o]f iron or steel." *See* General Interpretive Rule 10(c)(i). Thus, the coordinate basket provision, item 652.98, must be read to include not only structures and parts of base metal other than iron or steel, but also structures and parts of iron or steel that are not included in items 652.90 through 652.96. Since the imported bridge parts cannot be classified under item 652.96, they are properly classifiable under the basket provision, item 652.98.

It may be noted that the subsequent legislative history of these provisions of the TSUS sheds light on the question presented in this case. In July 1979, Schedule 6, Part 3, was amended by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1107(d), 93 Stat. 313. The statute now provides, in pertinent part:

	Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts, and other structures and parts of structures, all the foregoing of base metal:	
	Of iron or steel:	
* * * * * * *		
	Columns, pillars, posts, beams, girders, and similar structural units:	
* * * * * * *		
	In part of alloy iron or steel:	
652.95	In part of stainless steel	4.2%
652.96	Other	3.9%
652.97	Offshore oil and natural gas drilling and production platforms	9.7%
653.00	Other	9.7%
653.01	Other	9.7%

The effect of this change was to add a basket provision for "other" under the subheading "of iron or steel." Thus, iron and steel structures not specially provided for under the other subheadings will now fall under item 653.00. The stated intent of Congress in amending the statute was to "reduce ambiguity and confusion in the use of the TSUS" without changing the rates of duty or classification of merchandise. *See* S. Rep. No. 249, 96 Cong., 1st Sess. 266, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 652. The

Report of the House Ways & Means Committee states that the "[r]earrangement of the provisions is intended to clarify and ease the classification of these articles without effecting any changes in the rates of duty." H.R. Rep. No. 317, 96th Cong., 1st Sess. 194 (1979). The Senate Finance Committee agreed that no substantive change was intended. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 266, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 652.

In comparing the TSUS provisions under consideration with the current sections as amended, it is clear that the legislature intended to apply the same tariff to all bridges, bridge sections, and other structures of base metal not set forth in the subordinate headings, without regard to their steel and iron content. Under the 1979 amendment, bridge sections, in part of alloy steel, are classified under item 653.00, TSUS, and are assessed the same duty as structures of base metal other than iron and steel. This result is in accord with the Court's holding in this case.

Based upon an examination of the stipulated facts and other submissions of the parties, applicable statutory and judicial legal authority, it is the determination of the Court that the imported merchandise in issue was properly classified by Customs under item 652.98, TSUS.

Since the imported merchandise was properly classified under item 652.98 of the tariff schedules, plaintiff's protest is denied and the action is dismissed. Judgment will issue accordingly.

(Slip Op. 86-28)

ILWU LOCAL 142, PLAINTIFF *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES, DEFENDANT

Court No. 83-5-00779

Before RE, *Chief Judge.*

ON DEFENDANT'S MOTION FOR REHEARING

[Motion denied.]

(Dated March 13, 1986)

King, Nakamura & Chun-Hoon (*James A. King*), for the plaintiff.
Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff*), for the defendant.

RE, *Chief Judge:* Pursuant to Rule 59(a) of the rules of this Court, defendant has moved for a rehearing of the decision in *ILWU Local 142* v. *Donovan,* Slip Op. 85-127 (Dec. 11, 1985).

In the *ILWU Local 142* case, plaintiff, on behalf of former employees of the Puna Sugar Company, challenged the Secretary of Labor's denial of certification of eligibility for benefits under the trade adjustment assistance program, 19 U.S.C. §§ 2271-2321, 2395

(1982 & Supp. I 1983). The court held that the Secretary's determination that increases of imports did not contribute importantly to the workers' separation from employment was not supported by substantial evidence contained in the record, and was not in accordance with law. Hence, on plaintiff's motion, the court vacated the Secretary's determination, and remanded the case to the Secretary for a redetermination of eligibility for trade adjustment assistance benefits. Slip Op. 85-127, at 14.

In the present motion, defendant contends that the court failed to address several issues raised in defendant's opposition to plaintiff's motion. First, defendant contends that Puna produced refined sugar, and that under 19 U.S.C. § 2272(3) "the import-impacted article must be the commodity that is *marketed,* not the article at an intermediate processing stage prior to marketing." Second, defendant contends that increased imports of raw sugar could not have contributed to the workers' separation from employment because those imports were destined for the export market under the drawback provision of 19 U.S.C. § 1313. Defendant also contends that "the fact that *other* workers producing raw sugar at *other* companies in Hawaii were certified in 1977 is irrelevant to the pending case and cannot 'provide a precedent' for certifying the workers at Puna."

After careful review of defendant's motion, the Court holds that defendant has not satisfied the requirements for the granting of a rehearing, and the motion is denied.

The cases make clear that whether a motion for rehearing shall be granted or denied lies within the sound discretion of the court. *Oak Laminates* v. *United States,* 8 CIT 300, 601 F. Supp. 1031, *denying reh'g to* 8 CIT 176 (1984), *aff'd,* No. 85-1873, slip op. (Fed. Cir. Feb. 11, 1986); *see also Reynolds Trading Corp.* v. *United States,* 61 CCPA 57, 59, C.A.D. 1120, 496 F.2d 1228, 1230 (1974). In addition, Rule 59(a) of the rules of this Court provides that a rehearing may be granted "for any of the reasons for which rehearings have heretofore been granted in suits of equity in the courts of the United States * * *."

In *W.J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358, C.R.D. 72-5 (1972), the appropriate grounds for the granting of a rehearing were set out as follows:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

Id. at 358.

Defendant has failed to demonstrate any grounds that would justify the granting of its motion. Moreover, the defendant's allegations of error, in addition to being insufficient as a basis for the granting of a rehearing, are without merit.

In this case, the record disclosed that Puna Sugar Company produced raw sugar. This raw sugar was "processed into refined sugar by C & H Sugar Company, a cooperative owned by the 15 Hawaiian sugar companies." Slip Op. 85–127, at 5. C & H then marketed the refined sugar for all of the sugar companies. In its original motion for review, plaintiff argued that the "increased imports of raw short and sugar contributed importantly to the workers' separation, and that it never contended * * * that imports of refined sugar impacted adversely on the Puna workers or their employer." In opposition to plaintiff's motion, and again in this motion for rehearing, defendant contends that Puna produced refined sugar. It also contends that under the adjustment assistance program "the import-impacted article must be the commodity that is *marketed*, not an article at an intermediate processing stage prior to marketing." These contentions are without merit.

The Court of International Trade reviews a determination by the Secretary of Labor that denies certification of eligibility for adjustment assistance to assure that the determination is supported by substantial evidence and is in accordance with law. 19 U.S.C. § 2395(c); *see Woodrum* v. *Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984). The findings of fact by the Secretary are conclusive if supported by substantial evidence contained in the record. 19 U.S.C. § 2395(b).

In this motion, and in its memorandum in support of the Secretary's determination, counsel for the defendant contends that Puna did not produce refined sugar. Plaintiff's petition for adjustment assistance which was filed with the Department of Labor states that Puna produced raw sugar. In the negative determination on reconsideration of the workers' petition, the Secretary stated that "[r]aw sugar production coming from [Puna] is refined by the California and Hawaii Sugar Company (C & H) in San Francisco for consumption on the U.S. mainland." 48 Fed. Reg. 14,073 (1983). In addition, in the agency's notice which stated that it had instituted an investigation into the workers' petition, under the heading "articles produced," Puna is stated to produce "sugar cane—grow sugar—raw & molasses." 47 Fed. Reg. 12,402 (1982). Hence, it is clear that the Secretary found that Puna produced raw sugar and sent it to C & H for refining. The contention that Puna did not produce raw sugar was advanced for the first time by defendant's counsel in its memorandum in opposition to plaintiff's motion for review of the record.

Previous decisions of this court make clear that "the governing statutes contemplate a scheme of judicial review which is based on the record before the decision maker." *Sugar Workers Union* v.

Donovan, 8 CIT 350, Slip Op. 84-138, at 4-5 (Dec. 28, 1984) (construing 28 U.S.C. § 2640(c) & 19 U.S.C. § 2395); *see also Abbott* v. *Donovan*, 3 CIT 54, 55 (1982). Furthermore, it is a fundamental principle of administrative law that agency action must be upheld on the basis articulated by the agency, and not by *post hoc* rationalizations of counsel. *See, e.g., Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This "simple but fundamental rule" has been stated as follows:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.

SEC v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

In this case, the court reviewed the Secretary's determination on the basis of the record and the Secretary's summary of decision. 19 U.S.C. § 2395(c). It cannot be doubted that the Secretary found that Puna produced raw sugar. Accordingly, in light of the facts contained in the administrative record, and the findings and reasons articulated by the Secretary, the Court must reject defendant counsel's contention that Puna produced refined sugar.

The Court also rejects defendant's contention that the Secretary may not consider articles at intermediate processing stages. Section 222 of the Trade Act requires that the Secretary determine whether "increases of imports of articles *like or directly competitive with* articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof * * *." 19 U.S.C. § 2272 (Supp. I 1983) (emphasis added).

The Act defines the words "directly competitive with" as follows:

> (5) An imported article is "directly competitive with" a domestic article at an earlier or later stage of processing, and a domestic article is "directly competitive with" an imported article at an earlier or later stage of processing, if the importation of the article has an economic effect on producers of the domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article. For purposes of this paragraph, the unprocessed article is at an earlier stage of processing.

Trade Act of 1974 § 601(5), 19 U.S.C. § 2481(5) (1982); *see also* 29 C.F.R. § 90.2 (1985).

The defendant's interpretation of the "like or directly competitive with" requirement of the Act would exclude consideration of the effect of an article at an intermediate processing stage. The Court cannot accept that interpretation because it would contradict the statutory definition of the phrase "directly competitive with," as set forth in 19 U.S.C. § 2481(5). *See United States* v. *Bedell*, 506 F.2d 174, 186 n.80 (D.C. Cir. 1974); *United Steelworkers* v. *Donovan*, 10 CIT ——, Slip Op. 86-26, at 14-16 (Mar. 12, 1986).

Defendant also contends that the increased imports or raw sugar could not have contributed to the Puna workers' separation because "most of these imports were not used for domestic consumption." The record shows that the Secretary stated that "[i]n 1981, the refined sugar equivalent of more than 25 percent of total [raw sugar] imports was exported subject to drawback procedures which allowed exporters to be refunded duties and fees paid to the government on previously imported raw sugar." 48 Fed. Reg. 14,072 (1983). The Secretary, however, did not evaluate this data, nor was its relevance explained in the notice of determination.

The only apparent reason for the inclusion of the drawback data is to explain fully the domestic export market. At no point in the record does the Secretary state or imply, as counsel contends, that this data should be evaluated under the "contributed importantly" provision of the statute. 19 U.S.C. § 2272(3).

Moreover, nothing in the record, makes clear that "increased imports did not affect the domestic price of raw sugar" because the "entire increase in exports of refined sugar absorbed almost the entire increase in imports of raw cane sugar in 1981." Indeed, the record indicates that the imports of cheap raw sugar caused the price of both raw and refined sugar to decline. The United States imported 51 percent of its sugar needs in 1981, and the import-to-production ratio for raw cane and beet sugar increased from 76 to 82.1 percent in the same year. Finally, in 1982, the President proclaimed an emergency quota program which limited the amount of raw sugar that could be imported. *See* Slip Op. 85–127, at 6.

The Secretary is directed by the statute to determine whether increases in imports "contributed importantly" to the workers' separation from employment. The record clearly reveals that imports of raw sugar increased significantly in the period prior to separation. The fact that some of these imports were later exported does not relieve the Secretary of the responsibility for assessing their original impact upon importation.

There is nothing in the record, and it seems contrary to logic, to suggest that, because these sugar products were exported after processing, the original influx of these products into the United States had no effect on the market. Indeed, it seems reasonable to suggest that, because of the drop in domestic sugar prices caused by the increase in imports, importers decided to take advantage of the drawback provisions and export their refined sugar rather than sell at the low domestic price.

Hence, since the Secretary chose not to evaluate the drawback data under the contributed importantly test of the Act, or explain the data's relevance to the workers' petition, the Court must reject counsel's explanation of the agency determination.

Defendant's final contention is that the certification of sugar workers at other plantations in Hawaii is irrelevant to the Puna workers' petition. In its judicial opinion in this case, the Court

found that "the Secretary did not sufficiently explain why the earlier 1977 certification of workers producing raw cane sugar in Hawaii did not 'provide a precedent.'" Slip Op. 85–127, at 13. Hence, the court ordered the Secretary to explain his reasons for decision. This order comports with the requirement of fairness that an agency explain the disparate treatment of similarly situated applicants. *See, e.g., ACTWU Local 1627* v. *Donovan,* 7 CIT 212, 587 F. Supp. 74, 78 (1984); *Contractors Transport Corp.* v. *United States,* 537 F.2d 1160 (4th Cir. 1976). Hence, if the agency "does not alter its decision, it should explicitly state its reasons for the apparently inconsistent treatment" of the workers. 537 F.2d at 1162; *see International Union* v. *Marshall,* 584 F.2d, 390, 397 (D.C. Cir 1978).

Therefore, after careful consideration of the arguments of the parties, the facts contained in the administrative record, and the statement of reasons provided by the Secretary, the Court holds that defendant has not demonstrated a "significant flaw" in the original proceeding, and its motion for rehearing is denied. The case is remanded to the Secretary for redetermination of the certification of eligibility. Of course, it is "within his discretion to make a new determination, with new findings and reasons." *International Union,* 584 F.2d at 398. It is ordered that the Secretary shall certify the record on remand, and report to the Court the results of the further proceedings within 30 days of the date of this opinion and order.

(Slip Op. 86–29)

KOKUSAI ELECTRIC CO. LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, E.F. JOHNSON CO., DEFENDANT-INTERVENOR

Court Nos. 85–02–00185 and 85–02–00187

Before CARMAN, *Judge.*

[Judgment for defendant.]

(Decided March 14, 1986)

Arent, Fox, Kitner, Plotkin & Kahn (*Margaret Roggensach, Esq.,* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Wayne W. Herrington, Esq.,* on the motion), for the defendant.

Robbins, Zelle, Larson & Kaplan (*Jann L. Olsten, Esq.,* on the motion) for the defendant-intervenor.

CARMAN, *Judge:* Plantiff challenges in two separate law suits the determination of the United States Department of Commerce (Commerce), Court No. 85–02–00185, and the determination of the International Trade Commission (Commission), Court No. 85–02–00187. Since both cases arose out of the same facts and the same investi-

gation they have been combined for the purposes of discussion in this opinion.

In Court No. 85-02-00185, the Commerce case, plaintiff moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record, contending the determination of Commerce pursuant to an antidumping petition that cell site transceivers imported from Japan were being sold or were likely to be sold at less than fair value (LTFV), extended to dedicated subassemblies, was not supported by substantial evidence and was otherwise not in accord with the law.[1] In Court No. 85-02-00187, the Commission case, plaintiff makes a similar motion challenging the Commission's determination in the same investigation that the LTFV imports are materially injuring an industry in the United States. Defendant United States and defendant-intervenor oppose the motions in each case. The Information and Telecommunications Technologies Group of the Electronic Industries Association appeared as *amicus*. For the reasons stated below, the determinations of both Commerce and the Commission are sustained.

FACTS

Defendant-intervenor filed on December 28, 1983 with Commerce and the Commission an antidumping petition captioned "In the Matter of Cell Site Transceivers and Subassemblies Thereof From Japan." The allegations in the petition and the Request for Relief complained of dumping of cell site transceivers from Japan. The petition contained no allegations with respect to related subassemblies as such. Court Nos. 85-02-00185 and 85-02-00187 Records at Doc. 1 (hereinafter Petition). On January 25, 1984 Commerce published notice of the initiation of its investigation. The notice was styled "Cell Site Transceivers and Related Subassemblies From Japan" and indicated the investigation was to determine whether cell site transceivers and related subassemblies from Japan were being or likely to be sold in the United States at less than fair value. 49 Fed. Reg. 3100 (1984). The preliminary determination of Commerce published on June 12, 1984, captioned "Cell Site Transceivers From Japan," indicated the investigation covered cell site transceivers and related subassemblies. 49 Fed. Reg. 24,155 (1984). The notice made an affirmative preliminary determination of sales at less than fair value as to cell site transceivers and ordered suspension of their liquidation. The final determination of Commerce published October 26, 1984, again captioned "Cell Site Transceivers From Japan," reiterated that the scope of the investigation included cell site transceivers and related subassemblies. 49 Fed. Reg.

[1] Cell site transceivers and related subassemblies are part of radio frequency (RF) equipment in the base station (cell site) of a cellular radio communication system. Apparently the RF equipment functions as a locating receiver and provides simultaneous two way voice and data communication between the base station and the subscriber's mobile phone by using different frequencies to transmit and receive. Subassemblies are an assemblage of components dedicated for use in the cell-site transceivers which were the subject of the investigation. 49 Fed. Reg. 3100, 3101 (1984).

43,080 (1984). The final determination found cell site transceivers from Japan were being sold in the United States at less than fair value. The overall weighted average margin on all sales compared was 59.94 percent. There was no separate determination pertaining to related subassemblies as such.

Subsequent to the publication of the preliminary determination of Commerce, the Commission commenced its final injury investigation by notice on July 5, 1984. 49 Fed. Reg. 27,641 (1984). In its final investigation the Commission issued questionnaires that separately identified cell site transceivers and subassemblies. Plaintiffs argued before the Commission that subassemblies should be excluded from its investigation or alternatively the Commission should make a negative injury determination in regard to importation of subassemblies, contending Commerce made no determination that subassemblies were being sold at less than fair value. Court No. 85-02-00185, Plaintiff's brief 9.

On November 27, 1984 staff members of the Commission questioned by phone the staff of Commerce to ascertain whether or not "related assemblies" of cell site transceivers were included within the investigation and final determination of Commerce. Commerce advised that the omission of subassemblies from the suspension of liquidation section of each of the notices in the Federal Register was in error and further indicated that import administration had contacted Customs to clarify that liquidation of entries from Japan of any subassemblies in question should be suspended and the duty for cell site transceivers should apply to subassemblies as well. Letter from Deputy Assistant Secretary for Import Administration, Commerce to Chairwoman Paula Stern, International Trade Commission, Pub. Doc. 143. (Exhibit 13, chronology of documents requested by Court at Oral Argument.)

In December 1984 the Commission published its determination in a report entitled "Cell-Site Transceivers and Subassemblies Thereof From Japan." U.S.I.T.C. Public. 1618, Investigation No. 731-TA-163 (Final) (1984). On January 3, 1985 Commerce published an antidumping duty order covering both cell site transceivers and related subassemblies. 50 Fed. Reg. 307 (1985).

As to Commerce's determination, plaintiff maintains that Commerce should not have included subassemblies in its final antidumping order on the following grounds:

1. The petition contained no allegations with respect to subassemblies and failed to request relief from subassembly imports, and Commerce improperly initiated its investigation covering cell site transceivers and related subassemblies.
2. Commerce did not make a final determination that subassemblies were the same class or kind of merchandise as cell site transceivers.
3. Commerce did not have legal authority to issue a final antidumping order that expanded the final determination to include subassemblies with cell site transceivers.

4. The record did not support a determination of sales at less than fair value with respect to subassemblies since the record established there were no sales of subassemblies during the period of investigation.
5. Plaintiff should not be barred by the doctrine of laches from asserting that subassemblies should not have been included in the final antidumping order because plaintiff acted in a timely manner and defendant-intervenor suffered no injury.

Defendant argues that since cell site transceivers and related subassemblies thereof were consistently defined as "one class or kind" of merchandise throughout the investigation, Commerce was not required to make a separate determination of less than fair value as to subassemblies for them to be covered by the final determination and antidumping orders. Defendant contends further that plaintiff is barred from challenging the inclusion of the subassemblies in the class or kind of merchandise because it failed to exhaust its administrative remedies by failing to raise the issue before Commerce during the investigation. Defendant-intervenor and the *amicus* support defendant's contentions.

As to the Commission's determination, plaintiff also maintains that the Commission should not have included subassemblies in its final injury determination on the following grounds:

1. Subassemblies were not properly included in the Commission's final investigation because Commerce made a determination of LTFV sales only with respect to cell site transceivers and not with respect to subassemblies.
2. The Commission's final determination of injury is not supported by substantial evidence on the record.
3. The doctrine of laches is inapplicable since plaintiff asserted its claim in a timely fashion and defendant-intervenor suffered no harm.

Defendant argues that Commerce's determination of LTFV sales included both cell site transceivers and subassemblies, and that the Commission properly considered subassemblies.

OPINION

I. *The Commerce Determination*

Antidumping duties are to be imposed if Commerce determines that:

> a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value and the Commission determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise.

19 U.S.C. § 1673 (1982). Procedures for the initiation of antidumping proceedings are set out at 19 U.S.C. § 1673a as follows:

> (a) Initiation by administering authority.—An antidumping duty investigation shall be commenced whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty * * * exist.
>
> (b) Initiation by petition.—
>
> (1) Petition requirements.—An antidumping proceeding shall be commenced whenever an interested party * * * files a petition with the administering authority, on behalf of an industry which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time and upon such conditions, as the administering authority and the Commission may permit.

While it might have been better practice for the petitioner to have made specific allegations in regard to "related subassemblies" in the petition, it is clear that the petition's sweeping description of cellular technology and proposed cellular systems operations in the United States, together with its description of circumstances indicating sales at less than fair value, were sufficient to cover cell site transceivers as well as their related subassemblies. Petition at 7-18). At the beginning and throughout the investigatory process Commerce treated cell site transceivers and their related subassemblies as part of the same class or kind of merchandise. The Notice of Initiation of Investigation, 49 Fed. Reg. at 3100, the Preliminary Determination, 49 Fed. Reg. at 24,155, the Final Determination, 49 Fed. Reg. at 43,081, and the Antidumping Duty Order, 50 Fed. Reg. at 307, all indicate the scope of the investigation covered "cell site transceivers and related subassemblies."

Moreover, Commerce's contacts with plaintiff during the course of the investigation indicate that the scope of the investigation included subassemblies. On March 2, 1984 Commerce sent plaintiff a request for information. The request was accompanied by a letter, which stated in part:

> We are presently conducting an antidumping investigation involving cell site transceivers and related subassemblies from Japan. The merchandise covered by this investigation is part of the radio frequency (RF) equipment in the base station (cell site) of a cellular radio communication system. This single package RF equipment functions as a locating receiver and provides simultaneous two-way voice and data communications between the base station and the subscriber's mobile telephone by using different frequencies to transmit and receive. Subassemblies are an assemblage of component parts dedicated for use in cell site transceivers as defined above. *Cell site transceivers and related subassemblies* are currently classified under item number 685.2976 of the *Tariff Schedules of the United*

States Annotated (TSUSA). For your convenience, we have enclosed a description of the applicable TSUSA items.

Court No. 85-02-00185 Record at Doc. 24 (emphasis added). The request for information sent to plaintiff covered both cell site transceivers and related subassemblies. *Id.* at Doc. 23. Plaintiff responded to the portions of the questionnaire covering subassemblies, indicating that it had not sold cell site transceiver assemblies in the United States, third countries, or Japan. *Id.* at 38, response at 5. Furthermore, since the petitioner could not obtain samples of the merchandise and since plaintiff was presumably the only one that had them, no subassemblies having been imported into the United States, there was not adequate information in regard to the related subassemblies to enable the preparers of the petition to be more specific.

In any event plaintiff was aware from the very beginning that the antidumping investigation included the related subassemblies and that they were being treated by Commerce as the same class or kind of merchandise as cell site transceivers. At no time during the course of the investigation before Commerce, to and including the publication of the final determination, did plaintiff raise any question of whether or not subassemblies were included within the scope of the investigation or dispute. The fact that plaintiff endeavored to raise the issue before the publication of the final Order was of no effect since the issuance of the final antidumping Order was a ministerial act and not the final expression of the administrative determination. *Royal Business Machines, Inc.* v. *United States,* 1 CIT 80, 86, 507 F. Supp. 1007, 1012 (1980).

Plaintiff did raise the issue of whether or not the related subassemblies were included within the scope of the investigation; not before Commerce but before the Commission, which was in the process of making its final injury determination. Plaintiff clearly could have raised the issue before Commerce during the investigation and Commerce could have examined the objection to the scope of the investigation at that time. Instead, plaintiff slept on its rights. It did not raise the question until the matter reached the Commission. Laches would prevent plaintiff from raising the issue after the final determination by Commerce.

The Court does not have to rely upon laches, however, since plaintiff clearly failed to exhaust its administrative remedies. Generally, a reviewing court would usurp the function of the agency if it were to set aside an administrative determination upon a ground not previously presented, thereby depriving the agency of a chance to consider the matter. *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U.S. 143, 145 (1946). It has been stated:

> The law is not in accord either with an absolute statement that a reviewing court may not decide an issue not raised before the agency or with an absolute statement that a reviewing court may decide such an issue. The law is that the review-

ing court has power to exercise discretion in the light of the circumstances and the court's idea as to what justice requires.

4. K. Davis, Administrative Law Treaties, § 26:7 at p. 444 (2d ed. 1983).[2]

The Court holds that in the absence of extraordinary circumstances excusing the neglect to raise before Commerce the issue whether or not the related subassemblies were within the scope of the investigation, the Court will not permit the plaintiff to raise the issue after Commerce closed its investigation. The Court finds not only did plaintiff fail to offer an excuse for not raising the issue before Commerce, but further plaintiff participated in the Commerce investigation proceedings as though related subassemblies were within the scope of the investigation. Plaintiff cannot be heard to complain at this juncture in the proceedings that the issue, which it wished to have considered but never brought up before Commerce, did not receive full consideration.

Even if the petition had been insufficient, Commerce had the authority to self-initiate an antidumping investigation as to the related subassemblies to determine whether or not the elements necessary for the imposition of duties existed. *See* 19 U.S.C. § 1673a(a)(1982). Commerce also has power to reconsider decisions to initiate an investigation into alleged violations of antidumping regulations. *Gilmore Steel Corp.* v. *United States*, 7 CIT 219, 585 F. Supp. 670 (1984).

As to plaintiff's motion for judgment upon the agency record regarding Commerce's determination, Court No. 85-02-00135, the Court holds:

(1) The allegations in the petition were sufficient and included subassemblies. Even if the petition were inadequate under the circumstances of this case Commerce had the power to self-initiate an investigation of related subassemblies.

(2) The final determination of Commerce included subassemblies as the same class or kind of merchandise as cell site transceivers.

(3) Commerce had the legal authority to issue the final dumping order which implemented its final determination and in-

---

[2] The Trade Agreements Act of 1979, eliminated *de novo* review and provided that judicial review under the antidumping and the countervailing duty law be upon the administrative record. 19 U.S.C. §§ 1516(a)(2) and (b)(1)(B).

The legislative history of the Act is interesting. H.R. Rep. No. 317, 96th Cong., 1st Sess. 181 (1979) states:

> The Bill further amends present law to eliminate *de novo* review of determinations or assessments made pursuant to the antidumping and countervailing duty laws. The present standard of *de novo* review is both time consuming and duplicative. The rationale for *de novo* review is the need to safeguard the rights of all parties to an antidumping and countervailing duty proceedings [sic] which are informal and nonadversial and not subject to Administrative Procedure Act (APA) requirements. However, the amendments made by Title I of the Bill providing for substantially increased access by all parties to information upon which the decision of the administering authority or the ITC is based together with the requirement of a record of the proceedings has removed the need for review of this type. Therefore, the Bill generally provides for a standard of review whereby the administrative level determination is upheld unless unsupported by substantial evidence on the record. Reviewable interlocutory determinations as well as final determinations made so early in the proceedings as to preclude the development of an adequate record, e.g., a determination not to initiate an investigation upon a receipt of a petition, will be upheld unless found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

cluded subassemblies with cell site transceivers in implementing the final determination.

(4) The record amply supports a determination of sales at less than fair value with respect to subassemblies since they were treated as one class or kind of merchandise throughout the investigation.

(5) Although plaintiff would ordinarily be barred by the doctrine of laches from asserting that subassemblies should not have been included in the final antidumping order because plaintiff failed to act in a timely manner by raising the issue before Commerce, the failure by plaintiff to exhaust its administrative remedies by raising the issue before Commerce precludes plaintiff from raising the issue before this Court.

II. *The Commission Determination*

When Commerce makes an affirmative determination that merchandise is being dumped, it is required to notify the Commission immediately and "make available to the Commission such information as it may have relating to the matter under investigation." 19 U.S.C. § 1673a(d)(1982). In making its final injury determination, the Commission is governed by 19 U.S.C. § 1673d(1)(b), which provides in relevant part:

> (1) In General.—The Commission shall make a final determination of whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, *by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination* under subsection (a)(1) of this section. (Emphasis added.)

Plaintiff's first challenge to the Commission's determination in this case is that the Commission improperly considered subassemblies in its investigation because the subassemblies were not properly included in Commerce's determination. Since the Court finds that Commerce's determination did properly encompass subassemblies, plaintiff's first challenge must fail. The Commission had before it a determination of Commerce that included subassemblies as well as cell site transceivers, and therefore the Commission properly considered those subassemblies.

Plaintiff also argues that the Commission's determination as to subassemblies is not supported by substantial evidence in the record because the Commission did not make separate findings of fact or conclusions of law regarding subassemblies. As noted earlier, Commerce's investigation treated the subassemblies as the same class or kind of merchandise as cell site transceivers. The Commission in its determination therefore properly investigated injury to only one domestic industry—the industry producing cell site transceivers and related subassemblies. The Commission was not required to make separate findings of fact as to subassemblies as its

investigation covered only one industry. Moreover, it is clear from the record that the Commission had before it information regarding both cell site transceivers and their related subassemblies.

Because the Court finds that the Commission's determination is supported by substantial evidence on the record and in accordance with law, it is unnecessary to address the question whether plaintiff's challenge is barred by laches. Accordingly, the Court holds:

(1) The Commission properly considered cell site transceiver subassemblies because they were within the scope of Commerce's determination.

(2) The Commission's determination that a domestic industry is injured is supported by substantial evidence on the record because the Commission properly treated the manufacture of cell site transceivers and related s bassemblies as one industry and had before it information regarding both.

III. *Conclusion*

Both Commerce's determination, challenged in Court No. 84-02-00185, and the Commission's determination, challenged in Court No. 84-02-00187, are supported by substantial evidence on the record and otherwise in accordance with law. Both determinations are therefore sustained, and plaintiff's motions in both cases are denied.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/25	Re, C.J. March 12, 1986	Childcraft Education Corp.	73-11-03255, etc.	Item 737.90 17.5%	Item 678.50 5%	Childcraft Education Corp. v. U.S. 742 F.2d 1413 (1984)	New York "Touch and Match" and cassettes and/or cards for "Touch to Learn"
C86/26	Re, C.J. March 12, 1986	Marvell, Inc.	80-1-00005, etc.	No allowance under item 807.00 was made for fabric components, product of U.S. subjected to buttonhole and/or slit operations during assembly of the imported garments	Fabric components of U.S. origin subjected to buttonhole and/or pocket slit operations during foreign assembly of imported garments are subject to duty allowance afforded by item 807.00	U.S. v. Mast Industries, Inc., 668 F.2d 501 (1981)	Miami Wearing apparel
C86/27	Carman, J. March 13, 1986	E. Gluck Corp.	83-9-01273	Item 715.05 Various rates for modules Item 720.24 or 720.28 Various rates for cases Item 740.35 Various rates for bands	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% Item 656.25, 657.35, 657.25, or 656.20 Various rates	Agreed statement of facts	New York Electronic LCD watches consisting of modules, modules and cases; or modules, cases, and bands; items marked "A" Cases, items marked "B"

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/29	DiCarlo, J. March 13, 1986	Edwin M. Knowles China Co.	85-7-00916	Item 533.79 26%	Item 534.94 17.4%	Agreed statement of facts	Baltimore Coup-shape porcelain plate blanks
C86/30	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80-10-01829, etc.	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/31	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80-10-01832	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/32	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80-10-01833	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/33	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80-10-01834	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/34	DiCarlo, J. March 13, 1986	North American Foreign Trading Corp.	84-8-01114	Item 682.95 7.3%	Item 800.00 Free of duty	Agreed statement of facts	New York American goods returned; batteries
C86/35	DiCarlo, J. March 1986	North American Foreign Trading Corp.	84-6-00813	Item 684.62 8.5%	Item A684.62 Free of duty	Agreed statement of facts	New York Mini Hand Held Telephone

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/13	Re, C.J. March 12, 1986	Chori New York, Inc.	73-12-03315	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S., C.D. 4739	New York Not stated
V86/14	Re, C.J. March 12, 1986	Nichimen Co.	73-5-01324	Export value	Appraised values shown on entry papers less additions include to reflect current revaluation	C.B.S. Imports Corp. v. U.S., C.D. 4739	San Francisco; Galveston; Houston Not stated
V86/15	Watson, J. March 12, 1986	Texas Instruments Inc.	82-10-01366, etc.	Constructed value	24.91% of entered value	Agreed statement of facts	Dallas Semiconductor devices

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 86-71)

Customs Regulations Amendment Relating to the Customs Field Organization—Roberts Landing, Michigan

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Closing of Customs station.

SUMMARY: This document closes the Roberts Landing, Michigan, Customs station. Given the small volume of traffic crossing the Canadian-U.S. border at this point, and its proximity to other Customs stations, we believe the closure is warranted and in the public interest. This change will enable Customs and the Immigration and Naturalization Service to obtain more efficient use of their personnel, facilities, and resources, as well as realize a substantial annual savings.

EFFECTIVE DATE: May 1, 1986.

FOR FURTHER INFORMATION CONTACT: Bernie Harris, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

Customs ports of entry and stations are locations where Customs officers are placed for the purpose of accepting the entry of merchandise, collecting duties, examining baggage, clearing passengers, and enforcing the various provisions of the customs laws and other laws.

The significant difference between ports of entry and stations is that at stations, the Federal Government is reimbursed for:

(1) The salaries and expenses of its officers or employees for services rendered in connection with the entry or clearance of vessels; and

(2) Except as otherwise provided by the Customs Regulations, the expenses (including any per diem allowed in lieu of subsistence), but not the salaries of its officers or employees, for service rendered in connection with the entry or delivery of merchandise.

As part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to importers, carriers, and the public, by a document published in the FEDERAL REGISTER on October 17, 1985 (50 FR 42036), Customs proposed to amend § 101.4(c), Customs Regulations (19 CFR 101.4(c)), by deleting Roberts Landing, Michigan, from the list of designated Customs stations.

The Roberts Landing Customs station, located in the Detroit, Michigan, Customs district, is one of three auto ferry stations on the St. Clair River between the Customs ports of Port Huron and Detroit. Roberts Landing is a river crossing only; there is no town or village on the U.S. side of the river. Customs has determined that it is not cost-effective to maintain this station in view of the following factors: Its traffic is almost exclusively non-commercial; the ferry boat at the landing is too small to transport any vehicle larger than a medium size camper; the station is closed each year for a period of from 2 weeks to 4 months due to various reasons (vessel repairs, weather, river ice, etc.); the other two ferry stations on the St. Clair River (Algonac, which is 3 miles south; and Marine City, which is 5 miles north) are so close to Roberts Landing that minimal inconvenience will be caused to diverted traffic, and these other two stations could easily handle any overflow without incurring any increase in their operating costs. The Immigration and Naturalization Service has decided not to fill their vacant Inspector position located there. Closing Roberts Landing would enable Customs to realize a savings of over $100,000 annually.

DISCUSSION OF COMMENTS

Twenty-four comments were received in response to the notice, all opposed. The comments came from both Canadian residents and U.S. residents. There were two basic reasons expressed by the commenters for disapproving the closing; the negative economic impact resulting from the loss of tourism on both sides of the border, and the personal inconvenience to area Canadian and U.S. residents. Although we appreciate the concerns of the commenters, they do not mitigate the Congressional mandate to make more efficient use of our personnel, facilities, and resources. The fact remains that Roberts Landing is one of three auto ferry stations within an eight mile stretch of border. The close proximity of the stations at Algonac and Marine City minimizes any inconvenience occasioned by the closing of Roberts Landing. Customs can save more than $100,000 annually at a station where there is virtually no commercial traffic. Thus, the closing the Roberts Landing is warranted. Ac-

cordingly, the list of Customs districts, stations, and ports of entry having supervision, in § 101.4(c) is amended to reflect this change.

LISTS OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Imports, Organization.

AMENDMENTS TO THE REGULATIONS

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101, Customs Regulations (19 CFR Part 101), continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624, Reorganization Plan 1 of 1965, 3 CFR 1965 Supp.

2. The list of Customs districts, stations, and ports of entry having supervision, in § 101.4(c) is amended as follows:

By removing "Roberts Landing, Mich (Mail: Route 1, Aloonac, Mich.)." from the column headed "Customs stations" and by removing "Port Huron" from the column headed "Port of entry having supervision" in the Detroit, Michigan, Customs district.

EXECUTIVE ORDER 12291

Because the amendment relates to the organization of Customs it is not a regulation or rule subject to E.O. 12291, pursuant to § 1(a)(3) of that E.O.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of § 3 of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601, *et seq.*), it is hereby certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: March 14, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 1, 1986 (51 FR 11013)]

19 CFR Part 6

(T.D. 86-72)

Customs Regulations Amendments Relating to Overflight Exemptions and Reporting Requirements for Aircraft Arriving in the U.S.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by expanding the requirements for pilots to report notice of penetration of U.S. airspace, and by placing additional requirements upon those who seek an exemption from the landing requirements for aircraft arriving from areas south of the U.S.

Current regulations provide specifics regarding the requirements for reporting arrival, and include a list of designated airports at various border and coastline points at which designated aircraft must land. These amendments expand the coverage of existing requirements to: Include some flights arriving from Puerto Rico and all flights arriving from the U.S. Virgin Islands within the notice of penetration requirements; increase from 15 minutes to 1 hour the minimum time required for notice to be given prior to penetrating U.S. airspace; and require aircraft seeking exemptions from certain landing requirements to be equipped with functioning transponders and to provide additional justification for being granted an exemption.

The amendments are necessary because of the severity of the drug abuse problem, the major increase in illegal drug importations by use of aircraft, and the need for action to expand the effectiveness of drug smuggling enforcement. Customs has found that because aircraft arriving in U.S. airspace from certain areas south of the mainland U.S. are exempt from current reporting requirements, and because overflight exemption requirements are too lax, certain potentially high-risk flights are able to bypass the best drug interdiction efforts of Customs. These amendments seek to remedy that situation.

EFFECTIVE DATE: April 30, 1986.

FOR FURTHER INFORMATION CONTACT:

Operational aspects: Thomas Hargrove, Office of Inspection and Control, (202-566-5607).

Legal aspects: John A. Mathis, Carrier Rulings Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, (202-566-5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The National Narcotics Intelligence Consumers Committee has documented that the supply of illegal drugs to the U.S. market and the subsequent extent of drug abuse has reached monumental proportions. Illegal drug use increased an estimated 15 percent in the U.S. in 1984, according to the Committee. The severity of the drug abuse problem, the preponderance of drug users, and the major increases in volumes of illegal drug importations in the U.S. are indicated by the significant increase in drug-related deaths, medical care, arrests, and seizures.

The smuggler organization has solidified a dominant position in the U.S. through the penetration of strategic points in the economy. Areas to the south of the U.S. are major sources of illegal drugs destined for the U.S. Smuggling by air is the preferred mode of transportation for high-cost narcotics, with cocaine and marijuana smuggling representing particularly high risk areas. A Stanford Research Institute Study (not associated with Stanford University) indicates that magnitude of the air smuggling threat at approximately 6,700 flights, annually. Although recent air interdiction activities in the southeastern U.S. have resulted in many arrests and seizures, an end to the prevalence of drug abuse in the U.S. is not in sight.

To address this national problem, it is necessary to take action to expand the effectiveness of smuggling enforcement. In 1975, the Customs Regulations were amended by adding a new § 6.14 (19 CFR 6.14), to provide for a notice of intended arrival for private aircraft arriving in the U.S. via the U.S./Mexican Border.

Because of the magnitude of the drug problem, and in direct response to Executive and Congressional directives, by an interim regulation published as T.D. 82-52 in the Federal Register on March 24, 1982 (47 FR 12620), the notice requirements were extended to private aircraft arriving in the U.S. via the Gulf of Mexico, Pacific, and Atlantic Coasts. These interim regulations were adopted as a final rule by publication of T.D. 83-192 in the Federal Register on September 15, 1983 (48 FR 41381).

By publication of T.D. 84-236 in the Federal Register on November 29, 1984 (49 FR 46885), § 6.14 was further amended to extend the reporting requirements to certain commercial aircraft arriving from areas south of the U.S. By expanding the definition of private aircraft to include certain commercial flights, Customs sought to increase enforcement coverage to further stem the flow of illicit narcotics. In spite of previous efforts, we have found that there

remain certain gaps in the reporting requirements provided in Part 6, Customs Regulations (19 CFR Part 6).

Accordingly, by notice published in the Federal Register on April 1, 1985 (50 FR 12819), it was proposed to further amend Part 6, Customs Regulations, to enhance enforcement capabilities. The major thrust of the proposal was to extend the minimum advance notice of U.S. airspace penetration requirement from 15 minutes to 1 hour, to include aircraft arriving from the U.S. Virgin Islands and Puerto Rico in the notice requirements, to require aircraft pilots seeking exemption from the requirements to land at a designated airport, to require pilots to certify the aircraft to be equipped with a functioning transponder (to be activated during overflight), and to provide detailed reasons for the exemption request.

Based in part on our consideration of the comments received in response to the notice, we have decided to make some minor changes to the amendments as initially proposed. These include moving the definition of "Place" from § 6.1 to § 6.14, excluding from the advance notice requirements some flights from Puerto Rico (as explained later in this document), and including the boundaries of the Air Defense Identification Zone as the point beyond which advance reports of airspace penetration must be made.

Analysis of Comments

Eight comments were received in response to the April 1, 1985, Federal Register notice. Of these, two expressed wholesale support for the proposal, five were critical of at least some elements, and one offered general comments and suggestions for further amendments.

In addition to the amendments proposed to § 6.14, it was also proposed to amend § 6.1 by adding a definition of "place" to mean anywhere outside of U.S. airspace. Two commenters state that placement of the definition in § 6.1 is incorrect and could be confusing as concerns other sections within Part 6. It is stated that what is needed is more concise definition of "place", and that, to avoid confusion, the definition should appear in § 6.14 itself.

We agree. Accordingly, instead of amendment § 6.1, the definition is being added to § 6.14(e). The definition has also been altered to conform to the boundaries of the U.S. military Air Defense Identification Zone (ADIZ). This should eliminate all confusion since the boundaries of the ADIZ are well known to pilots.

One commenter expressed concern over the inclusion of Puerto Rico as a location from which aircraft must provide advance notice of U.S. airspace penetration.

We have reconsidered this matter and have determined that the advance notice requirement will not be necessary for flights from Puerto Rico which are conducting flight by Instrument Flight Rules (IFR). It is our understanding that nearly all flights between

Puerto Rico and the Continental U.S. are conducted under IFR and are, therefore, identifiable to Customs through liaison with the Federal Aviation Administration.

By far, the greatest amount of concern was expressed over the proposal to extend the required advance notice time limit from 15 minutes to no less than 1 hour prior to U.S. airspace penetration. The major objection raised is that inadequate communication facilities may exist in many of the more remote locations from which advance notice would be required.

We are aware that there may be some initial difficulties associated with the new rules. Customs personnel will work with members of the flying public to minimize any difficulties. Given the magnitude of the narcotics smuggling problems, however, any opportunity for making in-roads must be tried, potential problems notwithstanding. A 1-hour prior notification is not unique in the western hemisphere. Many of the locations from which extended prior notice would be required, themselves require 1-hour notice or even longer. Furthermore, the 1-hour time limit is a minimum. Customs will accept notification at any time longer than 1 hour, for example, at the time a pilot who intends to depart the U.S. files a flight plan with the FAA.

Executive Order 12291

This is not a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Under the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that these amendments will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 requires that Customs must inform the public why it is collecting this information, how it will use it, and whether it must be given to Customs. Customs requires the information in order to carry out the laws and regulations which it administers. This regulation applies to private aircraft arriving in the U.S. via the U.S./Mexican border or the Atlantic, Pacific, and Gulf coasts, or any place in the Western Hemisphere south of 30 degrees north latitude, and it relates to the processing of the aircraft and its passengers. The information is used for arranging appropriate Customs services for arrival, inspection processing, and enhanced enforcement entry control for effective violator interdiction. The requirements are mandatory but the regulation provides a means for requesting an exemption from the landing requirements. The granting of the exemption is at the au-

thority of Customs. Pursuant to the Paperwork Reduction Act of 1980, the Office of Management and Budget has approved the collection of information requirements and assigned control number 1515–0098 to the reporting requirements contained in this document.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

Lists of Subjects in 19 CFR Part 6

Air carriers, Air transportation, Aircraft, Airports.

Amendments to the Regulations

Part 6, Customs Regulations (19 CFR Part 6), is amended as set forth below:

Part 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote. 11), 1624, 49 U.S.C. 1474, 1509:
§ 6.14 also issued under 49 U.S.C. 1372: § 6.25 also issued under 48 U.S.C. 1460(i).

2. The second sentence of § 6.14(a) is amended by removing the words "15 minutes", and inserting, in their place, the words "1 hour".

3. Section 6.14(b) is revised to read as follows:

§ 6.14 Private aircraft arriving from areas south of the U.S.

* * * * * * *

(b) *Advance report of penetration of U.S. airspace via Gulf and Atlantic Coasts.* All private aircraft arriving in the Continental U.S. via the Gulf of Mexico and Atlantic Coasts from a place in the western Hemisphere south of 30 degrees north latitude, from any place in Mexico, from the U.S. Virgin Islands, or (notwithstanding the definition of "United States" in § 6.1(b)) from Puerto Rico, which if from Puerto Rico, are conducting flight under visual flight rules (VFR), shall furnish a notice of intended arrival to Customs at the nearest designated airport to point of crossing listed in paragraph (g) of this section for the first landing in the U.S. The notice must be furnished at least 1 hour before crossing the U.S. coastline. The notice may be furnished directly to Customs by telephone, radio, or other means, or may be furnished through the Federal Aviation Administration to Customs. The requirements to furnish

a notice of intended arrival shall not apply to private aircraft departing from Puerto Rico and conducting flight under instrument flight rules (IFR) until crossing the U.S. coastline or proceeding north of 30 degrees north latitude.

4. Section 6.14(c)(5) is amended by removing the parenthetical word "(foreign)".

5. Section 6.14(c)(7) is revised to read as follows:

§ 6.14 Private aircraft arriving from south of the U.S.

* * * * * * *

(c) * * *

(7) Name of U.S. airport of first landing (designated airport listed in paragraph (g) of this section *nearest* to point of crossing unless an exemption has been granted in accordance with paragraph (f) of this section, or if the aircraft has not landed in foreign territory or is arriving direct from Puerto Rico, or if the aircraft was inspected by Customs officers in the U.S. Virgin Islands); and

6. Section 6.14(d) is revised to read as follows:

§ 6.14 Private aircraft arriving from south of the U.S.

* * * * * * *

(d) *Landing requirement.* Private aircraft required to furnish a notice of intended arrival in compliance with paragraphs (a), (b), and (c) of this section shall land for Customs processing at the *nearest* designated airport to the border or coastline crossing point as listed in paragraph (g) of this section, unless exempted from this requirement in accordancce with paragraph (f) of this section. In addition to the requirements of this paragraph, private aircraft commanders must comply with all other landing and notice of arrival requirements. This requirement shall not apply to private aircraft which have not landed in foreign territory or are arriving directly from Puerto Rico or if the aircraft was inspected by Customs officers in the U.S. Virgin Islands.

7. Section 6.14(e) is amended by removing the title *"Private aircraft defined"*., and by inserting, in its place, the title "Definitions", by designating the existing paragraph as § 6.14(e)(1), and by inserting a new paragraph thereafter designated as § 6.14(e)(2), to read as follows:

§ 6.14 Private aircraft arriving from areas south of the U.S.

* * * * * * *

(e) * * *

(2) The term "place" as used in this section means anywhere outside of the inner boundary of the Atlantic (Coastal) Air Defense Identification Zone (ADIZ) south of 30 degree north latitude, anywhere outside of the inner boundary of the Gulf of Mexico (Coastal) ADIZ, or anywhere outside of the inner boundary of the Pacific (Coastal) ADIZ south of 33 degrees north latitude.

8. Section 6.14(f)(1) (iii) and (xi), respectively, are revised to read as follows:

§ 6.14 Private aircraft arriving from areas south of the U.S.

* * * * * * *

(f) * * *

(iii) A statement that the aircraft is equipped with a functioning transponder which will be in use during overflight and that overflights will be made in accord with instrument flight rules (IFR);

* * * * * * *

(xi) Detailed reasons for overflight exemption, stated in terms of savings in cost and time, safety considerations, and convenience.

9. Section 6.25(c)(1) is amended by removing the words "which are not inspected by Customs officers in the Virgin Islands".

10. Section 6.25(c)(2) is amended by removing the words "which are not inspected by Customs officers in the Virgin Islands".

11. Section 6.25 is amended by removing paragraph (c)(3), and by redesignating paragraphs (c)(4) and (5) as paragraphs (c)(3) and (4), respectively.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 24, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 31, 1986 (51 FR 11004)]

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19 CFR Parts 18, 24, 112, 113, 141, 144, 146, 178, and 191

(T.D. 86-16)

Foreign Trade Zones; Specialized and General Provisions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document corrects two errors in a document which amended the Customs Regulations relating to foreign trade zones by providing a new audit-inspection method of zone supervision by Customs. The document was published as T.D. 86-16 in the FEDERAL REGISTER on Tuesday, February 11, 1986 (51 FR 5040).

FOR FURTHER INFORMATION CONTACT: Marcus Sircus, Regulatory Audit Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-2812).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In FR Doc. 86-2399, appearing at page 5040 in the issue of Tuesday, February 11, 1986, on page 5063, in the second column, under the heading "§ 24.13 [Amended]," the explanation of the amendment to § 24.13 is incorrectly worded. The correct explanation reads as follows:

§ 24.13 [Amended]

2. Section 24.13 is amended by inserting, in the first sentence of paragraph (c), the words "a foreign trade zone operator" before the words "and bonded warehouse proprietors", and by inserting, in the first sentence of paragraph (f), the words "foreign trade zone operator or" before the words "Customs bonded warehouse proprietor".

On page 5064, in the third column, under the heading **"§ 191.165 Same condition drawback merchandise and merchandise not conforming to sample or specifications or shipped without the consent of the consignee."**, the first paragraph, with the heading "Drawback entry", is incorrectly cited, parenthetically, as paragraph "(d)". The correct parenthetical citation should be paragraph "(b)".

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

Dated: March 27, 1986.

[Published in the Federal Register, April 1, 1986 (51 FR 11012)]

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 85-2082, 85-2158)

ALSTHOM ATLANTIQUE AND COGENEL, INC., APPELLEES *v.* UNITED STATES, APPELLANT/CROSS-APPELLEE AND WESTINGHOUSE ELECTRIC CORP., APPELLANT

A. David Lafer, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellant United States. With him on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrences*, Assistant Director.

Richard O. Cunningham, Steptoe & Johnson, of Washington, D.C., argued for appellant Westinghouse. With him on the brief were *W. George Grandison*, *Kevin J. Brosch* and *Barbara A. Pollack*.

Joseph F. Donohue, Sr., Donohue & Donohue, of New York, New York, argued for appellees.

Appealed from: U.S. Court of International Trade.

Judge PAUL RAO.

(Appeal Nos. 85-2082, 85-2158)

ALSTHOM ATLANTIQUE AND COGENEL, INC., APPELLEES *v.* UNITED STATES, APPELLANT/CROSS-APPELLEE AND WESTINGHOUSE ELECTRIC CORP., APPELLANT

(Decided March 24, 1986)

Before MARKEY, *Chief Judge*, RICH and SMITH, *Circuit Judges*.

SMITH, *Circuit Judge*.

In this antidumping case, appellants, the United States and Westinghouse Electric Corporation, appeal from a Court of International Trade decision remanding an administrative determination by the International Trade Administration, Department of Commerce (ITA), and holding that the ITA, during its review pursuant to section 751 of the Trade Agreements Act of 1979, could change the scope of an antidumping finding made by the Department of the Treasury (Treasury). We reverse.

I. Issues

The principal question before this court is whether the lower court erred, as a matter of law, in not dismissing as untimely, the challenge of appellees Alsthom Atlantique and Cogenel, Inc. (Alsthom) to Treasury's antidumping determination with respect to large power transformers from France. We also address whether the lower court erred in holding that the ITA has the authority, during the course of a section 751 review, to change the scope of an underlying antidumping determination made by Treasury.

II. Background

The lengthy chronology of events leading up to the current dispute began on March 11, 1970, when a petition was filed with the Treasury by Westinghouse Electric Corporation, requesting Treasury to initiate an antidumping investigation of large power transformers from France. The Westinghouse petition indicated a possibility that large power transformers from France were being, or were likely to be, sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended.[1] On June 17, 1970, an Antidumping Proceeding Notice issued by Treasury was published in the Federal Register announcing its plans to institute an inquiry to verify the information submitted by Westinghouse and to obtain the facts necessary to reach a determination as to the fact or likelihood of sales at less than fair value.[2] Treasury proceeded to conduct its inquiry, which included an investigation of Alsthom Savoisienne, the corporate predecessor of Alsthom Atlantique.

On June 11, 1971, Treasury, in response to questions concerning the scope of its antidumping investigation, issued instructions indicating that the Antidumping Proceeding Notice with respect to large power transformers from France was being amended to clarify Treasury's intent in the original notice.[3] These instructions stated that the Antidumping Proceeding Notice applied to "all types of transformers rated 10,000 KVA or above, * * * including but not limited to shunt reactors." Treasury's notice explicitly indicated that Treasury was investigating, and that its findings would apply to, all types of large power transformers including shunt reactors.

On October 21, 1971, Treasury published a "Withholding of Appraisement Notice" with regard to large power transformers from France.[4] This notice announced Treasury's determination that there were "reasonable grounds to believe or suspect that the purchase price * * * of large power transformers from France is less, or likely to be less, than the foreign market value." The notice further indicated that Treasury was directing Customs officers to

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[1] 19 U.S.C. § 160 *et seq.*, *repealed by* Pub. L. No. 96-39, tit. I, § 106(a), 93 Stat. 193 (1979).
[2] 35 Fed. Reg. 9934 (1970).
[3] 36 Fed. Reg. 11,308 (1971).
[4] 36 Fed. Reg. 20,374 (1971).

withhold appraisement of large power transformers from France. On April 25, 1972, the United States Tariff Commission published its determination that an industry in the United States was being injured by less than fair value imports of large power transformers from France.[5] On June 14, 1972, Treasury published its finding of dumping with regard to large power transformers from France.[6] No further administrative action was taken with respect to large power transformers from France until after January 1, 1980.

The Trade Agreements Act of 1979 transferred the responsibility from the Customs Service to the ITA for determining the applicable antidumping duties.[7] The act also amended the Tariff Act of 1930 to provide for the annual review of "the amount of any antidumping duty." Pursuant to this authority, the ITA on March 28, 1980, published in the Federal Register a notice that it was conducting administrative review of 83 outstanding determinations of dumping.[8] On April 9, 1980, after the ITA announced its intent to conduct an administrative review and prior to its preliminary results of the review, Cogenel, Inc., Alsthom's subsidiary and United States importer of large power transformers from France produced by Alsthom, requested that the ITA "modify" the Treasury's antidumping finding by removing Alsthom Unelic (corporate successor to Alsthom Savoisienne, corporate predecessor to Alsthom Atlantique) from the finding on the basis of "changed circumstances" pursuant to 19 C.F.R. §§ 353.53–.54.[9]

On June 25, 1981, the ITA published a notice of "Preliminary Results of Administrative Review of Antidumping Finding" with regard to large power transformers from France.[10] Due to Alsthom's failure to provide specific information regarding the merchandise sold in its home market, the ITA preliminarily determined to postpone appraisement of entries and to establish a cash deposit rate based upon the best information available.

Following publication of the notice of the preliminary results of ITA's section 751 review, Alsthom requested a hearing to discuss whether shunt reactors were within the "class or kind of foreign merchandise" covered by Treasury's original antidumping order on large power transformers from France. The hearing was held on July 30, 1981. At the hearing, Alsthom asserted that shunt reactors were not subject to Treasury's antidumping order since there was never a valid finding that shunt reactors had been imported, had

[5] 37 Fed. Reg. 8136 (1972).
[6] 37 Fed. Reg. 11,772 (1972).
[7] Trade Agreements Act of 1979, 19 U.S.C. § 1675 (1982).
[8] 45 Fed. Reg. 20,511-12 (1980).
[9] Under § 353.53, whenever the Secretary of Commerce determines that sales of merchandise subject to an antidumping order are no longer being made at less than fair value, and that there is no likelihood of resumption of sale at less than fair value, he may act to revoke or terminate, in all or in part, such order. However, § 353.54 requires a firm applying for a revocation of a dumping finding to demonstrate to the ITA that sales of the merchandise are no longer made at less than fair value, and to satisfy the ITA that there is no likelihood of resumption of sales at less than fair value.
[10] 46 Fed. Reg. 32,928 (1981).

been sold at less than fair value, or had injured or threatened to injure an industry in the United States.

On March 10, 1982, the ITA published its notice of "Final Results of Administrative Review of Antidumping Finding" with regard to large power transformers from France.[11] The ITA determined that shunt reactors were clearly included in Treasury's antidumping finding, using the same language set forth by Treasury in the original Antidumping Proceeding Notice of June 11, 1971. The ITA held that the scope of the antidumping finding could not be changed during a section 751 administative review since it was clear that shunt reactors were included in the subject class or kind of merchandise, large power transformers, throughout the administrative proceeding. The ITA further ruled that not all elements of a class or kind of merchandise must be exported to the United States during the period of investigation in order for such elements to be within the scope of an antidumping finding order and that not all elements must be sold at less than fair value.

Alsthom brought action in the Court of International Trade pursuant to 19 U.S.C. § 1516(a)(2) and 28 U.S.C. § 1581(c) challenging ITA's section 751 final results of administrative review with respect to large power transformers from France. The lower court, relying on its decision in *Diversified Products Corp.* v. *United States*,[12] declared the action timely, accepting Alsthom's assertion that it was contesting ITA's section 751 review of Treasury's antidumping determination of large power transformers from France, and not the underlying Treasury determination itself. The lower court issued a memorandum opinion and order remanding the case to the ITA because, in the view of the lower court, the ITA had erred in its conclusion that it had no authority, in the context of a section 751 review, to alter the scope of the antidumping finding established by Treasury.[13] For the reasons set out below, we hold that the lower court erred both (1) in not dismissing Alsthom's appeal as untimely and (2) in determining that the ITA has authority, during a section 751 review, to alter the scope of an antidumping determination established by Treasury.

III. Analysis

A. *Timeliness of Appeal.*

Judicial review of countervailing and antidumping duty determinations is governed by the Transitional Rules, section 1002(b)(3) of title X of the Trade Agreement of 1979.

> (3) CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS.—The amendments made by this title shall apply with respect to the review of the assessment of, or

[11] 47 Fed. Reg. 10,268 (1982).
[12] *Diversified Products Corp.* v. *United States*, 572 F. Supp. 883 (Ct. Int'l Trade 1983).
[13] *Alsthom Atlantique* v. *United States*, 604 F. Supp. 1234 (Ct. Int'l Trade 1985).

> failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

The Transitional Rules, in effect, set out guidelines indicating to the complainant the proper procedure he should follow in obtaining judicial review of an antidumping or countervailing duty determination.

Under the Transitional Rules, the complaint's initial inquiry is directed to whether the antidumping finding concerning the article in question was "made by the Secretary of the Treasury or the International Trade Commission before the effective date." If the antidumping finding was made after January 1, 1980, then irrespective of whether an assessment of antidumping duty was performed, the complainant may seek judicial review, pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c), of all section 751 administrative reviews within 30 days of the date they are published in the Federal Register. If, however, the antidumping finding was made prior to the effective date, then a further question must be addressed, namely, whether there has been an assessment of antidumping duty subject to the antidumping finding. If no assessment of such duty had been made before the effective date, then the Transitional Rules direct that review of the antidumping finding "shall be subject to review in accordance with the law in effect on the day before the effective date." Under such prior law, importers of the merchandise covered by Treasury's antidumping determination must wait until an entry of merchandise is liquidated, and then must protest that liquidation pursuant to 19 U.S.C. § 1514 (1976). Then, if that protest is denied as provided in 19 U.S.C. §1515 (1976), the importer may challenge that denial in the Court of International Trade pursuant to 28 U.S.C. § 1581(a).

Application of the guidelines set forth by the Transitional Rules to the present case directs our first inquiry to when the articles in question, shunt reactors, were subject to an antidumping funding. Treasury, from the outset, specifically included shunt reactors in the scope of its 1971 antidumping investigation of large power transformers from France. The Transitional Rules, therefore, direct our second inquiry to whether there has been an assessment of antidumping duty on shunt reactors prior to the effective date. Since no such assessment had been made, the Transitional Rules dictate the judicial review of the antidumping determination may only be obtained in accordance with the law in effect on the day

before the effective date. Therefore, we arrive at our conclusion that Alsthom's challenge was untimely and should have been made pursuant to 28 U.S.C. § 1581(a) only after exhausting the administrative procedures set forth by 19 U.S.C. §§ 1514-1515 (1976).

Alsthom attempted to challenge Treasury's inclusion of shunt reactors within the scope of its antidumping determination concerning large power transformers from France by bringing action in the Court of International Trade pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). The lower court accepted Alsthom's appeal from the ITA relying on the previous Court of International Trade decision of *Diversified Products Corp.*[14] as authority. The lower court accepted Alsthom's position that Alsthom was contesting ITA's section 751 review of Treasury's antidumping determination, and not the underlying Treasury determination itself. However, as will be shown below, *Diversified Products* is distinguishable from the present case and it was error for the lower court to rely on it in accepting Alsthom's appeal of the ITA decision.

The history of the antidumping determination in *Diversified Products* began in 1971 when a complaint was filed with the Treasury by an intervenor requesting initiation of a dumping investigation of bicycle speedometers from Japan. In 1972, Treasury determined that bicycle speedometers from Japan were being sold at less than fair value. Shortly after enactment of the Trade Agreements Act of 1979, the ITA began its review of all prior dumping findings of the Treasury Department. This review included a determination whether double-gear hub drive speedometers, which had not yet been developed at the time of the 1972 dumping investigation, belonged to the class or kind of merchandise encompassed in the 1972 finding. During its section 751 review of the bicycle speedometer dumping determination, the ITA determined that double-gear hub speedometers were within the scope of the 1972 dumping finding. Diversified, pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c), appealed the ITA's determination to the Court of International Trade, contending that double-gear hub drive speedometers were beyond the scope of the 1972 antidumping determination. Although the underlying antidumping determination regarding bicycle speedometers from Japan was made by Treasury in 1972, the specific recognition of double-gear hub drive speedometers within the scope of Treasury's 1972 determination was not done until after the effective date.

The lower court mistakenly relied on *Diversified Products* as controlling in this case because of the following factual distinctions which, under the Transitional Rules, result in different procedural requirements for obtaining judicial review of antidumping or countervailing duty determinations. First in *Diversified Products*, the articles in question, double-gear hub drive speedometers, had not

[14] *Diversified Products*, 572 F. Supp. 883.

yet been developed at the time of Treasury's underlying antidumping determination of bicycle speedometers from Japan; while in the present case, shunt reactors had been developed prior to Treasury's antidumping determination of large power transformers from France. Second, in *Diversified Products*, it was the ITA which determined double-gear hub drive speedometers were within the scope of Treasury's antidumping finding; not Treasury, which in the present case had specifically included shunt reactors in the scope of its antidumping determination. Finally, in *Diversified Products*, double-gear hub drive speedometers were not determined to be within the scope of the underlying antidumping determination until after the effective date of the Trade Agreements Act of 1979; while in the present case, shunt reactors were included within the scope of the underlying antidumping determination prior to the effective date.

On appeal to this court, Alsthom asserts that its argument was not with the Treasury but with the ITA. Alsthom points out it was seeking a judgment in the lower court that the ITA determination "that shunt reactors were within the class of imported merchandise subject to the outstanding dumping order" was contrary to law. Alsthom specifically argues that: (1) transformers and shunt reactors are two separate classes or kinds of electrical equipment; (2) the Treasury, by including shunt reactors in its antidumping investigation of large power transformers from France, extended the scope of the investigation to include two classes or types of electrical equipment; (3) only merchandise found to have been sold at less than fair value can be included in an antidumping order; (4) the Treasury notice of sales at less than fair value did not mention shunt reactors; and (5) even assuming that shunt reactors were a specific type of large power transformer, none of them were imported.

Alsthom's assertion that its argument was not with the Treasury but with the ITA is untenable. In view of Alsthom's contentions as a whole, it is clear that Alsthom was seeking judicial review of Treasury's antidumping determination and not ITA's section 751 review. Alsthom's dissatisfaction with the Treasury's antidumping determination of shunt reactors cannot be cloaked in the guise of error on the part of the ITA in order to circumvent the Transitional Rules' procedural requirements for judicial review of antidumping determinations made prior to the effective date. We need not reach the merits of Alsthom's arguments concerning the inclusion of shunt reactors within the scope of Treasury's antidumping determination at this time.

B. *ITA Powers To Clarify Scope.*

The lower court, relying on *Diversified Products*, remanded this case to the ITA for a determination as to whether shunt reactors were within the class or kind of merchandise encompassed by large power transformers. The lower court specifically found the ITA to

be in error as to its initial determination that it had no authority to modify the scope of an underlying antidumping determination by Treasury. For the reasons set out below, we reverse the lower court on this issue.

Court of International Trade case law correctly recognizes that the ITA section 751 review of an antidumping determination of Treasury is limited by the scope of the underlying finding.[15] Although the ITA has the power, during a section 751 review, to determine whether an unclassified article is within the scope of an original Treasury antidumping finding,[16] the ITA cannot change the scope of an underlying antidumping determination when Treasury has *specifically* included the article within the scope of its underlying determination.[17]

Here, the Treasury made its antidumping determination in 1972. The Treasury's actions during its investigation indicate that its original less than fair value investigation involved a single class or kind of merchandise—large power transformers from France. The Treasury *specifically* determined that the class or kind of merchandise—large power transformers—included several forms of transformers including shunt reactors. There is no question that the class or kind of merchandise initially investigated by the Government included shunt reactors.

Alsthom contends that 19 U.S.C. § 1673 invested the ITA with the obligation to take up antidumping investigations where it found them in 1980 and to review every fact that was needed to fix the amount of dumping duty or deposit. Alsthom asserts that, in order for the ITA to perform this statutory task, the ITA first must have determined that there was an existing dumping finding that included shunt reactors, namely, whether shunt reactors are of the same type or class of merchandise as large power transformers. While it is true that the ITA must determine whether there was an existing dumping finding that included the item, once the ITA determines that the Treasury included the item under its original antidumping determination, the ITA's inquiry into that issue ceases. Alsthom's assertion, if accepted, would lead the ITA into an impossible task of reviewing de novo each and every Treasury antidumping determination to determine whether Treasury correctly included the article in question within the scope of its underlying antidumping determination. In a section 751 review, the ITA does not have the power to substitute its judgment for Treasury's when Treasury has specifically included an item within its antidumping determination.

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[15] *See Royal Business Machs., Inc.* v. *United States*, 507 F. Supp. 1007 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (CCPA 1982); *Diversified Products*, 572 F. Supp. 883.

[16] *Id.* at 889.

[17] *Royal Business*, 507 F. Supp. at 1014.

IV. Conclusion

In view of the foregoing, we hold that Alsthom's challenge to the underlying antidumping determination made by the Treasury should have been dismissed by the lower court on the grounds of prematurity. The lower court further erred in determining that the ITA has the authority, during a section 751 review, to change the scope of Treasury's underlying dumping finding and in remanding the case back to the ITA.

REVERSED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

151-376 O - 86 - 3

Decisions of the United States Court of International Trade

(Slip Op. 86-30)

RAMON AZURIN AND GREGORIO ARANETA, PLAINTIFFS *v.* UNITED STATES AND WILLIAM VON RAAB, COMMISSIONER OF THE UNITED STATES CUSTOMS SERVICE, DEFENDANTS

Court No. 86-03-00336

Before DICARLO, *Judge.*

Plaintiffs, in an action for mandamus to compel the release of property in the custody of the United States Customs Service (Customs), move for a temporary restraining order preventing Customs from transferring copies of documents in Customs custody to any Committee of the United States House of Representatives, any representative of the Republic of the Philippines, or any other party, claiming that such transfer would violate Customs regulations, and plaintiffs' rights under the fourth and fifth amendments to the Constitution and to privacy.

Held: Plaintiffs, whose only interest in the documents is as agents for former president of the Republic of the Philippines, do not have a sufficient interest in the documents to assert that their rights to privacy will be violated by disclosure, nor do they have standing to assert the rights of the former president, who has not submitted to the jurisdiction of the Court.

[Plaintiffs' motion for a temporary restraining order is denied.]

(Decided March 17, 1986)

Anderson, Hibey, Nauheim & Blair (Eric I. Garfinkel and *Richard A. Hibey),* for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(J. Kevin Horgan* and *Elizabeth Seastrum),* for defendants.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs seek a temporary restraining order preventing the United States Customs Service (Customs) "from transferring * * * to any Committee of the United States House of Representatives, any representatives of the Republic of the Philippines, or to any other person"[1] originals or duplicates of property that arrived in the United States with Ferdinand E. Marcos, the

[1] Motion for Temporary Restraining Order at 1.

former president of the Republic of the Philippines, and his party on Februry 26, 1986.

Plaintiffs' motion is denied.

BACKGROUND

Arriving in the United States at Hickam Air Force Base, Hawaii, on February 26, 1986, Mr. Marcos and his party brought with them currency, documents, jewelry and other property. On March 7, 1986, plaintiff Araneta filed Customs Form 7501 and Entry Summary for certain property as "attorney-in-fact" for Mr. Marcos as importer of record.[2] On March 10, 1986, plaintiff Azurin executed a Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments, on behalf of Mr. Marcos, covering currency. Neither plaintiff claims an ownership interest in any of the property currently in Customs custody.

Plaintiffs allege that all procedures incidental to Customs inspection and processing of the property were completed on March 12, 1986, but that Customs had received instructions not to release the property.

On March 13, 1986, plaintiffs, uncertain as to which court had jurisdiction, commenced mandamus actions in this Court and in the United States District Court for the District of Hawaii[3] seeking to compel Customs to release the property to plaintiffs.

In both mandamus actions it is alleged that Customs retention of the property violates section 142.19(b) of the Customs Regulations, 19 C.F.R. § 142.19(b) (1986), and plaintiffs' rights to freedom from unreasonable search and seizure, due process, and privacy. Plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1581(i) (1) and (4) (1982). The Court finds that it has jurisdiction over the mandamus action.

Simultaneously with the filing of the actions for mandamus, plaintiffs sought temporary restraining orders in both courts to prevent Customs from releasing copies of the documents in Customs possession pursuant to formal requests from the Chairman and Ranking Minority Member of the Subcommittee on Asian and Pacific Affairs of the Foreign Affairs Committee of the United States House of Representatives and the Republic of the Philippines.[4] Plaintiffs claim a constitutional right to privacy would be violated by release of the documents.

At a conference immediately following the filing of plaintiffs' complaint and motion for restraining order, the Court directed that briefs be filed by the close of business the following day, and that counsel for both parties appear for oral argument on the motion on March 15, 1986.

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[2] Copies of the customs documents were received by the Court on March 17, 1986.

[3] *Azurin* v. *von Raab*, Civ. No. 86-0189 (D. Haw.).

[4] These requests are described *infra* at p. 10.

On March 14, 1986 the Court was informed by plaintiffs' counsel that the District Court for the District of Hawaii had issued a temporary restraining order *ex parte* enjoining defendant for ten days from allowing access to the property described in the Customs Form 7501 'except to those persons entitled to access pursuant to lawful subpoena, other legal process compelling production, or pursuant to the laws or treaties of the United States." [5] Since the order issued by the district court did not unconditionally prohibit access to the documents, plaintiff did not withdraw their motion for restraining order in this Court.

The Temporary Restraining Order

Although the motion before the Court is for a temporary restraining order, plaintiffs in their brief say the criteria for granting a preliminary injunction are appropriately applied to its motion. Since defendants received notice of plaintiffs' motion, and both parties were afforded an opportunity to be heard orally and in writing, the Court will consider, under an appropriately relaxed evidentiary standard, the criteria for issuance of a preliminary injunction. *Levas & Levas* v. *Village of Antioch*, 684 F.2d 446, 448 (7th Cir. 1982); *Ragold, Inc.* v. *Ferrero, U.S.A., Inc.*, 506 F. Supp. 117, 122-23 (N.D. Ill. 1980); 11 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 2951, at 499 (1973). These criteria are: (1) threat of immediate irreparable harm; (2) likelihood of success on the merits; (3) that the public interest would be better served by issuing rather than by denying the injunction; and (4) whether the balance of hardships on the parties favors issuing the injunction. *See Zenith Radio Corp.* v. *United States*, 1 Fed. Cir. 74, 76, 710 F.2d 806, 809 (1983); *S.J. Stile Associates, Ltd.* v. *Snyder*, 68 CCPA 27, 30, 646 F.2d 522, 525 (1981).

Irreparable Harm

An injury is irreparable if it cannot be undone through monetary remedies. *S.J. Stile Associates, Ltd.* v. *Snyder, supra; Spiegel* v. *City of Houston*, 636 F.2d 997 (5th Cir. 1981). Plaintiffs allege that their privacy rights will be irreparably injured if the documents are released. The Court agrees that "the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief." *Deerfield Medical Center* v. *City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). But, for reasons stated in the following section of this opinion, the Court believes that plaintiffs have stated no privacy rights in this action, and, therefore, will suffer no irreparable injury if their motion is denied.

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[5] *Azurin* v. *von Raab*, Civ. No. 86-0189, at 2 (D. Haw. Mar. 13, 1986) (temporary restraining order).

Likelihood of Success

"It is unnecessary for plaintiffs to establish likelihood of success on the merits with 'mathematical probability'. *Committee to Preserve American Color Television and Imports Committee* v. *United States*, 4 CIT 202, 204, 551 F.Supp. 1142, 1144 (1982)." *American Institute for Imported Steel, Inc.* v. *United States*, 8 CIT 314, Slip Op. 84-132, at 8 (1984).

Plaintiffs make two claims: that Customs is unlawfully holding their property, and should return it to them, and that Customs is about to release unlawfully copies of the property to third parties.[6] The Court will consider the likelihood of success of each of these claims.

1. The Mandamus Claim To Compel Customs To Release the Property to Plaintiffs

Plaintiffs claim that Customs refusal to release the property to them violates section 142.19(b) of the Customs Regulations, 19 C.F.R. § 142.19(b), and violates plaintiffs' constitutional rights to be free from unreasonable search and seizure, to due process, and to privacy.

Plaintiffs' contention that 19 C.F.R. § 142.19(b)[7] requires Customs to release property that it has reason to believe may have been imported in violation of the laws or treaties of the United States cannot withstand scrutiny. Section 142.19(b) does not compel Customs to release imported merchandise, but recites the conditions upon which merchandise may be released. Indeed, section 142.19(b)(2) says that merchandise "shall not be released" unless Customs "determines that the merchandise may be admitted into the commerce of the United States."

Section 499 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1499 (1982), provides in part:

> *Imported merchandise*, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised,

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[6] Plaintiffs' complaint states only the first of these claims; the second is contained in their motion for a temporary restraining order. At oral argument on March 15, 1986 plaintiffs orally moved, at the Court's suggestion, to amend their complaint to allege the second claim. Defendants have contested the Court's jurisdiction over this claim. The jurisdictional basis of the second claim is not alleged, but is presumably 28 U.S.C. § 1581(i). Since the Court denies the requested relief, it need not decide the jurisdictional issue. *See Secretary of the Navy* v. *Avrech*, 418 U.S. 676, 677-78 (1974) (per curiam) ("Without the benefit of further oral argument, we are unwilling to decide the difficult jurisdictional issue * * *. We believe that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is thus foreordained.")

[7] 19 C.F.R. § 142.19 states in relevant part:

> Merchandise, for which an entry summary serves as both an entry and an entry summary, shall not be released from Customs custody until an appropriate bond has been filed, or the entry has been liquidated, as follows:
>
> * * * * * * *
>
> (b) *After liquidation.* If a bond has not been filed in accordance with paragraph (a) of this section, the merchandise shall not be released before:
>
> (1) The entry has been liquidated and the full amount of all duties and taxes due, including dumping or other special duties and charges, has been paid or the right to free entry established.
>
> (2) The district director determines that the merchandise may be admitted into the commerce of the United States, and
>
> (3) All documents relating to the merchandise which are required by law or regulation have been filed.

> *shall not be delivered from customs custody,* except under such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized, to enforce *until it has been inspected, examined, or appraised and is reported by the appropriate customs officer to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States* [emphasis added].

See United States v. *Garber,* 626 F.2d 1144, 1155 (3d Cir. 1980) ("customs custody of imported goods continues until the merchandise has been inspected, found to be correctly invoiced, and found to otherwise comply with the laws of the United States"). Customs regulations require that Customs hold imported merchandise until it has been examined. 19 C.F.R. §§ 142.3, 142.7 (1986).[8]

Defendants allege that Customs has not completed its inspection of the merchandise, and that there are conflicting claims to the imported property. The Central Bank of the Philippines has commenced an action in the United States District Court for the District of Hawaii seeking return of the currency. *Republic of the Philippines* v. *Marcos,* Civ. No. 86-0155 (D. Haw.). On March 14, 1986, the United States filed a motion to intervene, to file an answer, and a counterclaim in the nature of an interpleader in that action, in which the United States requests the District Court to determine the lawful owner of the currency and other merchandise currently in the possession of Customs. The Republic of the Philippines and the Asian and Pacific Affairs Subcommittee of the Foreign Affairs Committee of the House of Representatives have formally requested copies of all documents brought into the United States by Mr. Marcos and his party.[9] The purpose of both these requests is, in part, to investigate conflicting claims with respect to the ownership of the property claimed by plaintiffs.

Plaintiffs claim that *Fonseca* v. *Regan,* 734 F.2d 944 (2d Cir. 1984), supports their position that Customs must relinquish the property to them. In that case, plaintiff Fonseca sought to recover possession of a suitcase containing $250,000 misdirected to a New York airport from Bogota, Columbia. Plaintiff had no intent to enter the merchandise into the United States, nor did the United

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[8] Customs laws and regulations grant Customs broad authority to search and impound merchandise arriving in the United States. *See, e.g.,* 19 C.F.R. §§ 162.5, 162.6.

[9] On March 6, 1986 the Republic of the Philippines through counsel requested that the United States provide "all documents of any kind whatsoever * * * including, but not limited to, asset books, deeds, notes, security instruments, stocks, bonds, any and all negotiable instruments and any and all records of any kind whatsoever." Letter from Mark D. Bernstein to George Roberts, Director, United States Customs Service (Mar. 6, 1986). By diplomatic notes exchanged March 15, 1986, the Republic of the Philippines and the United States entered into an agreement by which the United States agreed to provide the Philippines "with copies of documents requested by it and relevant to its investigation that are now in the possession of U.S. Customs Service and taken into custody in Honolulu on February 26, 1986. It is understood that these documents will be used only for legitimate governmental purposes." The letter from counsel and agreement were provided to the Court as exhibits by defendants at the March 15, 1986 oral argument. *See also* Convention Between the Government of the United States of America and the Government of the Republic of the Philippines with Respect to Taxes on Income, Oct. 1, 1976, Art. 26, T.I.A.S. No. 10417 (contracting parties agree to exchange information "for the prevention of fraud or for the administration of statutory provisions concerning taxes").

States "demonstrate any colorable claim adverse to that of Fonseca, or even the presence of a legitimate individual claimant." *Id.* at 950. In this action the property was submitted to Customs custody for entry into the United States, and there are claims adverse to plaintiffs.

Plaintiffs say Customs would be without authority to hold property even in a case where it believed the property was stolen outside the United States and entered in violation of 18 U.S.C. § 2314 (1982).[10] For the reasons stated above, the Court finds no support for this view.

Plaintiffs also contend that Customs refusal to return the property to plaintiffs violates their rights under the fourth and fifth amendments to the Constitution, and to privacy.

The Court finds there is little likelihood of success with respect to plaintiffs' fourth amendment claim. There is no fourth amendment interest with respect to information voluntarily given to a government agency; such information cannot be subject to unreasonable search and seizure.[11] *See Couch* v. *United States,* 409 U.S. 322, 335 (1973).

Plaintiffs' claim of deprivation of property without due process in violation of the Fifth Amendment is premature. Plaintiff cites as authority *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency,* 461 U.S. 555 (1983). In that case the Supreme Court applied a four part test to determine if the length of time between seizure of property at the border and the initiation of legal process to determine rights in the property violated due process: length of delay, the reason for the delay, assertion of the claimant's right to recover the property, and prejudice to the claimant.[12] Here, the government has held the property less than three weeks. As stated *supra,* Customs says it has not finished inspecting the property, and that there are substantial indications of conflicting claims to the property. Plaintiffs have made only the barest allegation of prejudice in being deprived of use of the property.[13] *See United States* v. *Von Neumann,* 54 U.S.L.W. 4065 (U.S. Jan. 14, 1986).

Plaintiffs present no authority, and the court finds none, which compels Customs to release the imported merchandise to plaintiffs.

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[10] 18 U.S.C. § 2314 provides in part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 of more, knowing the same to have been stolen, converted or taken by fraud * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

See *United States* v. *Burger,* 728 F.2d 140 (2d Cir. 1984); *United States* v. *Noe,* 634 F.2d 860 (5th Cir.), *cert. denied,* 454 U.S. 876 (1981).

[11] For this reason, and for reasons discussed *infra,* plaintiffs have no constitutional rights to privacy violated by Customs continued retention of the property.

[12] The Court held that an 18-month delay in bringing forfeiture proceedings was reasonable since the government was diligently processing a mitigation petition and pursuing related criminal proceedings, and the claimant never indicated desire for speedy commencement of civil forfeiture proceedings.

[13] Plaintiffs' counsel alleges the denial of access to the property has caused plaintiffs "serious personal inconvenience and concern for unlawful invasion of their rights in the property." Affidavit of Richard A. Hibey, at ¶6.

The Court holds that plaintiffs have no likelihood of success, at the present time, on their mandamus claim.

2. The Privacy Claim To Enjoin Customs From Releasing Copies of the Property to Third Parties

Turning to plaintiffs' claims that their constitutional privacy rights are violated if Customs releases copies of the property to third parties, the question before the Court is whether plaintiffs assert a constitutionally protected interest in the property. Plaintiff Azurin asserts only that he executed a currency declaration form. Plaintiff Araneta alleges that he executed the entry as an "attorney-in-fact."

"Ordinarily, one may not claim standing * * * to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1952). Plaintiffs make no claim that there is some "genuine obstacle" to the third party's assertion of its own rights, *Singleton* v. *Wulff,* 428 U.S. 106, 114–16 (1976), or that the privacy rights of the third party would be "diluted or adversely affected" should that party appear. *Cf. Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1962).

Plaintiffs do not provide any reason other than "convenience" why the party-in-interest, Mr. Marcos, is not a plaintiff in this action.[14]

The Court holds that since the plaintiffs have not asserted any ownership in the property or that they have any personal privacy right that is threatened with violation by Customs, and since they have not shown that they are entitled to assert the constitutional rights of third parties,[15] there is little likelihood that they will succeed on their claim seeking to enjoin release of copies or originals of documents.

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[14] At oral argument, there was the following colloquy with plaintiffs' attorney:

JUDGE DiCARLO: Are you saying these gentlemen who are acting as attorneys have a privacy interest in the property? Or is their interest to get the property back in their possession?

MR. HIBEY: Their purpose is to get the property back into the lawful possession of their principal, Ferdinand Marcos.

* * * * * * *

JUDGE DiCARLO: My only question is privacy interest; the constitutional rights raised by the plaintiffs. Who has those constitutional rights? Are they personal * * * to the people who have direct interest in the property?

MR. HIBEY: My suggestion to the Court is that they are personal, but not necessarily exclusive, that they have—that there is an umbrella which covers both by virtue of the fact that the principal here is clearly identified. That instead of using a customhouse broker, which is, I understand is not an unusual way for papers to be processed, he simply used individuals within his own retinue.

JUDGE DiCARLO: There are some situations in which a person is unable to present his own privacy claims, raise his own constitutional rights, and things such as that. Is there any reason why the actual owner of the properties in this case is unable or was unable to be a plaintiff in this action and raise the personal right of privacy for himself?

MR. HIBEY: It was only a matter of convenience that caused the papers to be executed in the way that they were executed.

JUDGE DiCARLO: So there was no reason why the owner of the property could not have appeared as a plaintiff, could not have asserted his own privacy rights, and could not have signed an affidavit as to how he would be individually injured, is that correct?

MR. HIBEY: I think that's correct * * *.

Transcript at 18–19.

[15] The Court will not speculate why Mr. Marcos did not submit to the jurisdiction of the Court.

The Public Interest and the Balance of Hardships

Defendants argue that "[i]f the United States reneges on its promise to the new Philippine Government of President Aquino to release to a specially established Philippine commission copies of these documents for purposes of their examination and investigation, the foreign relations of this country with an important and strategically critical Far Eastern nation may be adversely affected." [16] In support of that claim defendants submitted an affidavit by Michael H. Armacost, Under Secretary of State for Political Affairs, describing the importance and extent of the relationship between the Philippines and the United States, the profound changes which have recently occurred in the Philippines, and the importance to the foreign policy of the United States to fulfill the nation's pledge to assist the Aquino government in its investigation of the Marcos assets.

Inherent in plaintiffs' argument is the claim that the public interest is better served by protecting their asserted constitutional privacy rights than by disclosing copies of the documents to third parties.

The Court recognizes that there may be circumstances in which the public interest requires that constitutional rights of individuals outweigh foreign policy concerns. However, since the Court finds that plaintiffs' constitutional rights are not threatened and that plaintiffs may not assert the constitutional rights of a third party, the Court holds that the public interest would be best served by denying the motion.

In view of the Court's finding that each of the above factors favors denial of the motion, the balance of the equities weighs in favor of defendants.

The motion is denied. So ordered.

(Slip Op. 86-31)

ICC INDUSTRIES, INC.; ICD GROUP, INC., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 84-2-00252

Before WATSON, *Judge.*

OPINION

[Plaintiffs' motion for judgment on the agency record denied.]

(Decided March 19, 1986)

CRITICAL CIRCUMSTANCES

The court sustains the determinations of the Department of Commerce that criti-

[16] Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order at 25.

cal circumstances existed with respect to the importation of potassium permanganate from the Peoples Republic of China; and further sustains the determination of the International Trade Commission that the circumstances justified the retroactive imposition of antidumping duties in order to prevent the recurrence of material injury.

Brownstein Zeidman and Schomer (*Steven P. Kersner* and *Donald S. Stein* of counsel), for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, (*J. Kevin Horgan*, attorney Commercial Litigation Branch); *Berniece A. Browne*, Senior Trial Counsel, Office of the Assistant General Counsel for Import Administration, Department of Commerce; *Carol McCue Veratti*, attorney, Office of the General Counsel, United States International Trade Commission, for defendants.

WATSON, *Judge:* This action challenge agency determinations [1] which gave a retroactive effect to the imposition of antidumping duties on importations of potassium permanganate from the Peoples Republic of China (PRC). To achieve retroactive effect the Commerce Department had to make a final determination that "critical circumstances" existed under the terms of 19 U.S.C. § 1673d(a)(3)[2] and then the International Trade Commission had to make additional finding under 19 U.S.C. § 1673d(b)(4)(A)[3] that retroactive duties were needed to prevent a recurrence of material injury. Both of these determinations are challenged as being unsupported by substantial evidence and otherwise not in accordance with the law.

Normally, a determination that importations are being sold at less than fair value will begin to have an effect only as to those entries of merchandise entered after the date of publication of the notice of the preliminary determination by the Commerce Department. Liquidation of those entries will be suspended and the posting of security for the payment of estimated duty will be ordered in

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[1] The final determination of the Department of Commerce was published in 48 Fed Reg. 57347.
The final determination of the International Trade Commission was published in 49 Fed Reg. 3148 and USITC Publication 1480 (January 1984).

[2] 19 U.S.C. § 1673d(a).
* * * * * * *
(3) Critical circumstances determinations.—If the final determination of the administering authority is affirmative, then that determination, in any investigation in which the presence of critical circumstances has been alleged under section 1673b(e) of this title, shall also contain a finding of whether—
(A)(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or
(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and
(B) there have been massive imports of the merchandise which is the subject of the investigation over a relatively short period.

[3] 19 U.S.C. § 1673d(b)
* * * * * * *
(4) Certain additional findings.—
(A) If the finding of the administering authority under subsection (a)(2) of this section is affirmative, then the final determination of the Commission shall include a finding as to whether the material injury is by reason of massive imports described in subsection (a)(3) of this section to an extent that, in order to prevent such material injury from recurring, it is necessary to impose the duty imposed by section 1673 of this title retroactively on those imports.
* * * * * * *

the manner set out in 19 U.S.C. § 1673b(d).[4] However, in conditions known as "critical circumstances", under the terms of 19 U.S.C. § 1673b(e)(2)[5] the suspension of liquidation and the ultimate obligation to pay antidumping duty can apply to entries of merchandise made during the ninety-day period *prior* to the normal date of suspension of liquidation.

The law provides that if the Commerce Department finds that massive importations have occurred and there is either a history of dumping or actual or constructive knowledge by the importers that the merchandise under investigation is being dumped, then the ultimate determination can affect unliquidated entries made in the expanded, pre-suspension ninety-day period.

The "critical circumstances" which justify the expanded effect of the investigative determination can be determined by the Commerce Department as a preliminary matter under 19 U.S.C. § 1673b(e), or, even if the preliminary determination on that question is negative, can be found as part of the final determination under 19 U.S.C. § 1673d(a)(3).

As a preliminary matter, "critical circumstances" may be found on the basis of belief or suspicion by the Commerce Department that the statutory conditions are present. As a final matter, however, given the standard of judicial review to which it is subjected under 19 U.S.C. §§ 1516a(a)(2)(B)(i) and 1516a(b)(1)(B), the determination must be supported by substantial evidence.

In this case, because there ws no history of dumping of potassium permanganate from the Peoples Republic of China, the final determination depends first, on the existence of massive imports, a fact which is amply supported by substantial evidence, and, second, on a finding that the importers knew or should have known that the merchandise was selling at less than fair value. The latter finding is disputed by plaintiffs.

The determination by the Department of Commerce that importers knew or should have known that the potassium permanganate was being sold at less than fair value was expressed, at 48 Fed. Reg. 57349-50, as follows:

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[4] 19 U.S.C. § 1673b

* * * * * * *

(d) Effect of determination by the administering authority.—If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority—

(1) shall order the suspension of liquidation of all entries of merchandise subject to the determination which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of the determination in the Federal Register.

(2) shall order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry for the merchandise concerned equal to the estimated average amount by which the foreign market value exceeds the Untied States price.

* * * * * * *

[5] 19 U.S.C. § 1673b(e)

* * * * * * *

(2) Suspension of liquidation.—If the determination of the adminstering authority under paragraph (1) is affirmative, then any suspension of liquidation ordered under subsection (d)(1) of this section shall apply, or, if notice of such suspension of liquidation is already published, be amended to apply, to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the date on which suspension of liquidation was first ordered.

> . . . After considering all of the circumstances in this industry, we conclude that U.S. importers knew or should have known that potassium permanganate from the PRC was being sold in the United States at less than its fair value. The following factors have led us to that conclusion:
> First, since U.S. importers admitted that the potassium permanganate bought at "competitive prices" in the European market and subsequently imported into the United States was PRC material, they were clearly aware of the price at which potassium permanganate from the PRC, both directly from the PRC and indirectly through Europe, was being sold for in the U.S. and European markets.
> Second, since importers were also aware of pricing of potassium permanganate in the U.S. market place from the two other alternative sources (Carus [the United States producer] and Spain), they were aware of the entire range of pricing in a market place where pricing is a major factor in determining sales.
> Third, since Spain is not a state-controlled economy country and the only other principal producer of the product that exports to the United States, importers knew or should have known, at least generally, what the value of the product is in market economy countries, and thus the minimum likely fair value of the PRC merchandise.
> Fourth, during the period of March through July, 1983, (from Initiation of this investigation), the unit price of potassium permanganate imported into the U.S. from the PRC was 22% less than permanganate imported from Spain (all other sources). Importers should have known how to anticipate our antidumping methodology for Spain. They clearly knew that potassium permanganate from the PRC was being sold well below the Spanish price.
> Fifth, knowing that potassium permanganate from the PRC was priced significantly below that sold by the only other non-U.S. market economy producer (i.e., the most likely source of our fair value standard), importers knew or should have known that the PRC exports were at less than fair value.
> Based on the preceding analysis, we determine that the unique circumstances found in this industry are such that we can impute knowledge of sales at less-than fair value to the importers even though they could not anticipate the exact basis for our fair value determination.

When the conclusions of the Commerce Department are reduced to essentials, the five supporting factors are really one—that the importer knew that the price at which they were importing was 22% below the price of importations from Spain. This is the most concrete and "damaging" piece of knowledge attributed to the importers—the price was 22% below the lowest price at which the merchandise was being sold to the United States.

The question then becomes whether this sort of knowledge, i.e., of price differential alone, is sufficient to establish or impute knowledge on the part of the importer that the product is being

sold at less than fair value. The Commerce Department is concerned that if it cannot make inferences and attribute knowledge of dumping based on knowledge of price differentials, massive injurious imports from state-controlled economies can enter with impunity during the first dumping investigation of a product from those countries.

This would come about because a foreign market value in a country with a state-controlled economy may not be immediately ascertainable under 19 U.S.C. § 1677b(a). This is a circumstance which is recognized in 19 U.S.C. § 1677b(c)[6] in which special indirect methods have been provided for determining the foreign market value of merchandise in state-controlled economies.

Although the issue is not without its difficulties, the court is of the opinion that in a close-knit international market for a fungible commodity, a price differential between the price from a state-controlled economy and the price from a market economy, of the magnitude involved here, is sufficient to alert importers to the fact that the product from the state-controlled economy is being sold at less than fair value. Accordingly, it may fairly be said that, even considering that there is no immediately ascertainable market value in the home market of a state-controlled economy and even absent any knowledge of how fair market value would ultimately be calculated for the country of production, the importers should have known that the price was "too good to be true" and too low to emerge unscathed from administrative scrutiny.

It must be admitted that this situation represents a minimal factual predicate for imputing knowledge to an importer and a considerable allowance of discretion to the agency. But in view of the possibility that otherwise the law could not cope with the first occurrence of massive, dumped imports from a state-controlled economy, it appears to be an unavoidable exercise of agency expertise in an emergency situation. When done with attention to the structure of the international market, the nature of the commodity and the magnitude of the price differential, it is a permissible determination and those factors constitute substantial evidence in these circumstances.

In sum, the determination of the Commerce Department is within the range of discretion it has been accorded, *Consumer Products Div., SCM Corp.* v. *United States,* 753 F.2d 1033 (Fed. Cir.

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[6] 19 U.S.C. § 1677b

* * * * * * *

(c) State-controlled economies.—If available information indicates to the administering authority that the economy of the country from which the merchandise is exported is State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the administering authority shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either—

(1) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-State-controlled-economy country or countries is sold either—

(A) for consumption in the home market of that country or countries, or

(B) to other countries, including the United States; or

(2) the constructed value of such or similar merchandise in a non-State-controlled-economy country or countries as determined under subsection (e) of this section.

1985), and is supported by the degree of evidence which has been found sufficient in such matters. *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

Plaintiffs have also challenged the final determination of the International Trade Commission (ITC) on the subject of critical circumstances for failing to separately find a causal link between the massive imports and the material injury.

The statutory language governing the ITC determination reads as follows:

> 19 U.S.C. § 1673d
>
> (b) * * *.
> (4) Certain additional findings.
> (A) If the finding of the administering authority under subsection (a)(2) of this section is affirmative, then the final determination of the Commission shall include a finding as to whether the material injury is by reason of massive imports described in subsection (a)(3) of this section to an extent that, in order to prevent such material injury from recurring, it is necessary to impose the duty imposed by section 1673 of this title retroactively on those imports.

In the opinion of the court, where a finding has been made that imports priced at less than fair value are being knowingly entered in massive quantities during an investigation, the ITC is not required by law or considerations of fairness to isolate the massive quantities and make them the separate subject of an injury determination.

In those circumstances it is sufficient if the ITC concentrates on the capacity of these massive imports to render ineffectual the normal imposition of duties (prospectively from the date of publication of the preliminary determination) and thereby bring about a recurrence of the material injury primarily caused by normal levels of importation.

It must be admitted that the language of 19 U.S.C. § 1673d(b)(4)(A) can be read as requiring that material injury be attributed to the massive imports by themselves, rather than to the entire corpus of normal and massive imports, as was done here. But that reading, although it is possible, does not harmonize with the special purpose of a provision for critical circumstances. In this instance, the clear emergency purpose of the provision justifies a greater than normal flexibility in its interpretation and in the analysis and treatment of massive imports entered during an investigation.

With some effort, it is possible to read this provision as speaking to the material injury caused by both normal and massive imports, with the participation of the massive imports being more as an instrument of recurrence than as an original or separate cause. It is even possible to read this provision as presuming the participation of the massive imports in the material injury caused by the normal

imports and focusing on whether that presumed participation is to an extent which necessitates the retroactive imposition of duty.

These are flexible readings, and the necessary result could have been expressed far more clearly in the statute. What is important however, is that these readings harmonize with the purposes of retroactive duty better than a rigid construction.

On the other hand, a strict interpretation of the language to require a separate injury determination for the massive imports, raises the problem that it may be administratively impossible to measure the actual injurious effect of massive importations entered during the investigation. This might be due to the time limits on the investigation and the possibility that the investigation ends before the normal measurable market response can be ascertained. While the degree of investigative difficulty would not be a factor in the face of a clear legislative requirement, it does influence the interpretation when reasonable alternatives are available.

This result is not unfair because it still requires the application of expertise to evidentiary facts regarding the massive imports, albeit not to the extent required if the massive imports were the subject of a discrete injury investigation. It is the massiveness itself which can be measured and evaluated.

The volume of the massive imports is the crucial subject. Given the underlying knowledge or pattern of dumping during an investigation and the peculiar urgency of the situation, it is sufficient if the ITC finds that the volumes will cause a recurrence of injury if retroactive duty is not imposed.

Given the express legislative intent to deter circumvention of the law by those who would increase imports during the process of investigation, it would seem that the purpose of the additional provision for critical circumstances is to prevent recurrence of the injury already being caused by previous imports. *See,* H. Rep. No. 317, 96th Cong., 1st Sess. 63 (1979).

Massive imports which arrive during the investigation and are found by the Commerce Department to have a history of dumping or to be knowingly bought at less than fair value do not have to be the subject of a separate injury analysis. Their injurious effect, coming on top of previous importations found to be injurious, may be easily and legitimately inferred. As to them, the requirement of additional findings is not meant to complicate the Commission's analysis of causation, but merely to require the Commission to determine whether the extent of massive imports will carry the injury already found to have occurred, beyond its normal duration unless retroactive duties are imposed.

On this subject, there is good reason to credit the expertise of the ITC. If a high degree of deference to the agency is justified anywhere, it is justified in its analysis of massive imports entered with questionable motives during an investigation. Cf. *Matsushita Elec-*

tric Industrial Co., Ltd. v. *United States,* 750 F.2d 924 (Fed. Cir. 1984).

The evidence of record clearly supports the determination that massive importations during the period from April through July 1983 were of such an extent that, in order to prevent the recurrence of material injury, retroactive duties had to be imposed. In April 1983 alone, importations were almost four times greater than in the entire period from April through July 1982. This being the case, the ITC's additional findings were, in these circumstances, supported by substantial evidence.

For the reasons discussed above the court finds that both determinations at issue here were supported by substantial evidence and were otherwise in accordance with the law. Accordingly, plaintiffs' motion for judgment is hereby denied and it is further

ORDERED that the Department of Commerce, International Trade Administration's final affirmative determination of sales at less than fair value of potassium permanganate from the Peoples Republic of China, 48 Fed. Reg. 57347 (December 29, 1983), and the International Trade Commission's final affirmative determination of material injury with respect to potassium permanganate from the Peoples Republic of China, 49 Fed. Reg. 3148 (January 25, 1984), be, and they hereby are, sustained in all respects.

(Slip Op. 86-32)

EAC ENGINEERING DIVISION OF THE EAST ASIATIC CO., INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 82-1-00096

Before: RE, *Chief Judge.*

SPARK DETECTORS

(Decided March 20, 1986)

Metzger, Shadyac & Schwartz (Carl Schwartz and Wesley K. Caine), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Florence M. Peterson),* for the defendant.

RE, CHIEF JUDGE: This action is before the Court pursuant to the Court's order of remand dated November 26, 1985, *EAC Engineering Div. of the East Asiatic Co.* v. *United States,* 9 CIT ——, 624 F. Supp. 569 (1985).

The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from the Federal Republic of Germany, and described on the customs invoices as "spark detection systems." The merchandise was classified by the Customs Service as "optical instruments"

under item 712.05 of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty of 25 per centum ad valorem.

Plaintiff protested this classification, contending that the merchandise was properly classifiable under item 712.15, TSUS, as "Instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or similar radiations, and parts thereof," with a duty rate of 6.7 per centum ad valorem in 1980 and 7 per centum ad valorem in 1979. Alternatively, plaintiff contended that the merchandise was classifiable under either item 712.49, TSUS, a "basket" provision for electrical measuring and checking instruments, or under items 688.40 or 688.45, TSUS, depending upon the year of importation, as electrical articles not specially provided for.

On the parties' cross-motions for summary judgment, this Court determined that the Customs Service's original classification of the imported "spark detectors" as "optical instruments" under item 712.05, TSUS, was incorrect. *EAC Engineering Div. of the East Asiatic Co.* v. *United States*, 9 CIT ——, 623 F. Supp. 1255, 1261 (1985). Since material issues of fact pertaining to the plaintiff's proposed alternative classifications remained unresolved, the Court remanded the action to the Customs Service. The remand was intended to permit the Customs Service to consider the alternative classifications at the administrative level, and to determine the appropriate classification of the imported merchandise. In order to ensure expeditious resolution of this dispute, the Court retained jurisdiction over the action.

On remand, the Customs Service determined that the imported merchandise was properly classifiable under items 688.40 or 688.45, TSUS, depending upon the year of entry, as electrical articles not specially provided for. Plaintiff has advised the Court by letter that it is "fully satisfied" with Customs determination.

Based upon the Customs Service's determination on remand, and plaintiff's agreement that the imported "spark detectors" should be classified as electrical articles not specially provided for, it is hereby

ORDERED that the Customs Service reliquidate the subject merchandise under either item 688.40 or item 688.45, according to the date of entry.

(Slip Op. 86-33)

YURI FASHIONS CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT AND AMERICAN FIBER/TEXTILE/APPAREL COALITION, DEFENDANT-INTERVENOR

Court No. 84-12-01807

Before DICARLO, *Judge*.

Plaintiff challenges exclusion of merchandise imported from the Commonwealth of the Northern Mariana Islands (CNMI), an insular possession of the United States.

Applying 19 C.F.R. § 12.130(b), a regulation issued pursuant to the President's authority to regulate textile imports, the Customs Service determined the country of origin of the merchandise was Korea and excluded the merchandise because it was not accompanied by export visas from Korea. Plaintiff says the merchandise is a product of the CNMI pursuant to General Headnote 3(a) of the Tariff Schedules of the United States, and that section 12.130(b) is *ultra vires* as applied to its merchandise. Plaintiff also seeks a declaratory judgment that (1) section 12.130 is invalid as applied to products of the CNMI and (2) a directive by the Chairman of the Committee for the Implementation of Textile Agreements (CITA) excluding some products imported from the CNMI from the application of section 12.130 is *ultra vires*.

Held: General Headnote 3(a) expressly speaks only to the rates of duty for articles imported into the United States from insular possessions. Congress has not limited its delegation of authority to the President to define products of "countries" for textile restraint purposes to exclude from such restraints imports from insular possessions. Plaintiff lacks standing to seek a declaratory judgment (1) that the regulation is invalid as applied to products of the CNMI, since plaintiff's merchandise is a product of Korea, and (2) That the CITA directive is *ultra vires*, since plaintiff fails to allege and facts indicating that it is adversely affected or aggrieved by the directive.

[Defendant's cross-motion for summary judgment granted.]

(Decided March 24, 1986)

Barnes, Richardson & Colburn (Andrew P. Vance and *Michael A. Johnson*) for plaintiff.

Donald C. Woodworth for *amicus curiae* Commonwealth of the Northern Mariana Islands.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division Department of Justice (*Velta A Melnbrencis*) for defendant.

Miller & Chevalier, Chartered (*Donald Harrison*) for defendant-intervenor.

Memorandum Opinion and Order

DiCarlo, *Judge:* Plaintiff challenges the exclusion of sweaters imported from the Commonwealth of Northern Mariana Islands (CNMI) and seeks a declaratory judgment that a regulation, 19 C.F.R. § 12.130(b) (1985),[1] defining textile products of insular possessions of the United States of purposes of quota restraints, is *ultra vires* and void.

Plaintiff's merchandise was denied entry on the grounds it was not accompanied by export visas from the Republic of Korea (Korea), which the United States Customs Service (Customs) maintained was the country of origin of the merchandise, pursuant to 19 C.F.R. § 12.130(b). Plaintiff says its merchandise is a product of the CNMI for all purposes, pursuant to General Headnote 3(a) of the Tariff Schedules of the United States (TSUS), and cannot be excluded from entry as a product of Korea by virtue of 19 C.F.R. §

[1] 19 C.F.R. § 12.130 was published as an interim regulation by T.D. 84-171 Fed Reg. 31248 (August 3, 1984) and as a final regulation by T.D. 85-38, 50 Fed. Reg. 8710 (March 5, 1985). Plaintiff's merchandise was excluded by virtue of the interim regulation. Since plaintiff's merchandise would also be be excluded under the final regulation, which differs, with respect to insular possessions, from the interim regulation only in form, the court considers the final regulation. *See infra*, note.

12.130(b). Plaintiff also argues that regulation is *ultra vires* as applied to the CNMI.

Plaintiff alleges jurisdiction pursuant to 28 U.S.C. §§ 1581(a)[2] 1581(i)(3) (1982), and seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 (1982) and Rule 57 of the Rules of this Court.

The American Fiber/Textile/Apparel Coalition, a coalition of twenty-one American trade associations and unions whose members are involved in production of textiles and textile products, was granted leave to intervene as a party defendant in that part of this action brought under 28 U.S.C. § 1581(i).[3] The CNMI, through its Resident Representative to the United States, was granted leave to appear as *amicus curiae*.

Plaintiff moves, and defendant cross-moves, for summary judgment. The parties agree that no issues of material fact are disputed.

The Court holds that 19 C.F.R. § 12.130(b) does not conflict with General Headnote 3(a).

I. The Exclusion of Plaintiff's Merchandise

In November, 1984 plaintiff attempted to enter a shipment of sweaters processed in the CNMI from components made in Korea. The merchandise was accompanied by a completed Customs Form 3229, certifying that more than fifty percent of the total value of the merchandise was added by materials made and labor performed in the CNMI. Applying 19 C.F.R. § 12.130, Customs determined that the country of origin of the sweaters was Korea.[4] Since the merchandise was not accompanied by export visas from Korea, the merchandise was refused entry.

Plaintiff contends that General Headnote 3(a), TSUS, precludes application of 19 C.F.R. § 12.130 to its merchandise. Plaintiff says that its merchandise is a "product of manufacture" of the CNMI

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[2] Plaintiff protested the exclusion of its merchandise and demanded action on the protest within 30 days pursuant to 19 C.F.R. § 174.21(b) (1984). Plaintiff brought the action under 19 U.S.C. § 1515(b) (1982) and 28 U.S.C. §1581(a) when no action was taken, and the protest deemed denied, after 30 days.

[3] 28 U.S.C. § 2631(j)(1)(A) (1982) provides that

> Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—
>
> no person may intervene in a civil action under section 515 * * * of the Tariff Act of 1930 * * *.

Thus intervention is not permitted where the court has jurisdiction under 28 U.S.C. § 1581 (a) over a cause of action to contest the denial of a protest under 19 U.S.C. § 1515.

[4] 19 C.F.R. § 12.130 changed the country of origin requirements for textiles and textile products subject to quantitative restraints. In order for a textile product manufactured in two countries to have the second country as its country or origin for quota purposes, the product must undergo "substantial transformation" in the second country. Section 12.130(b) states in part:

> For the purpose of this section * * * a textile or textile product, subject to section 204, Agricultural Act of 1956, as amended, imported into the customs territory of the United States, shall be a product of a particular foreign territory or country, or insular possession of the U.S., if it is wholly the growth, product, or manufacture of that foreign territory or country, or insular possession. However * * * a textile or textile product, subject to section 204, which consists of materials produced or derived from, or processed in, more than one foreign territory or country, or insular possession of the U.S., shall be a product of that foreign territory or country, or insular possession where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

See Mast Industries, Inc. v. Regan, 8 CIT 214, 596 F. Supp. 1567 (1984) (upholding section 12.130 as within the authority delegated to the President under section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 (1982)).

under General Headnote 3(a) for all purposes, and may not have another country as its country of origin for textile restraint purposes unless so provided for by act of Congress. The Court disagrees.

A. General Headnote 3(a)

By its terms, General Headnote 3(a)[5] regulates only the *duty* paid on imports from insular possessions, such as the CNMI. The headnote is captioned "Rates of Duty" and it expressly speaks only to the "rates of duty" for articles imported into the customs territory of the United States.

The Court agrees with the recent holding of the Court of Appeals for the Ninth Circuit that nothing in the headnote addresses quota or other restrictions:

> Headnote 3(a) applies solely to tariffs and duties * * *. [A]fter examining the common meanings of the words "duty" and "quota," we conclude that "duty" cannot be read to encompass "quotas" * * *. Consequently we hold that that Headnote 3(a) does not apply to quotas, and therefore, that it did not preempt the quota restrictions imposed [on the imported merchandise].

United States v. *Patel*, 762, F.2d 784, 790–91 (9th Cir. 1985). Plaintiff says that *Patel*, in which fraudulent violation of import laws was alleged, turned on very different facts than this case, and that the Ninth Circuit apparently overlooked headnote 6 of schedule 7, part 2, subpart E (setting a quota on timepieces imported from insular possessions), when the Court said that it "can find absolutely no reference to quotas in any part" of the TSUS. 762 F.2d at 791. But neither of these observations provide a reason why the *Patel* Court's interpretation of General Headnote 3(a) should not be followed.

The Court also disagrees with plaintiff's argument that the legislative history of General Headnote 3(a) indicates that Congress intended that provision to define the country of origin of merchandise imported from insular possessions for all purposes.

A tariff preference for goods from all insular possessions of the United States was first enacted as part of the Customs Simplification Act of 1954, Pub. L. 768, 68 Stat. 1136, 1139, § 401 (enacted as

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[5] At the time of the attempted entry, in 1984, General Headnote 3(a) provided, in part:

Rates of Duty

(a) *Products of Insular Possessions.*

(i) Except as provided in headnote 6 of schedule 7, part 2, subpart E, and except as provided in headnote 3 of schedule 7, part 7, subpart A, *articles imported from insular possessions of the United States which are outside the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedules, except that all such articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the customs territory of the United States, or of both, which do not contain foreign materials to the value of more than 50 percent of their total value* (or more than 70 percent of their total value with respect to watches and watch movements), coming to the customs territory of the United States directly from any such possession, and all articles previously imported into the customs territory of the United States with payment of all applicable duties and taxes imposed upon or by reason of importation which were shipped from the United States, without remission, refund, or drawback of such duties or taxes, directly to the possession from which they are being returned by direct shipment, *are exempt from duty* [emphasis added].

section 301 of the Tariff Act of 1930), which stated in pertinent part:

> There shall be levied, collected, and paid upon all articles coming into the United States from any of its insular possessions * * * the *rates of duty* which are required to be levied, collected, and paid upon like articles imported from foreign countries; *except that all articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the United States, or of both, which do not contain foreign materials to the value of more than 50 per centum of their total value* * * * shall be admitted *free of duty* upon compliance with such regulations as to proof of origin as may be prescribed by the Secretary of the Treasury [emphasis added].

According to its legislative history, this provision was intended to

> provide for the *duty status* of importations from the insular possessions of the United States. The new section would provide that all articles imported from an insular possession of the United States * * * shall be dutiable at the same rates as are importations from foreign countries, except those which (1) are entirely of native origin or (2) *are manufactured in such possession and do not contain over 50 percent of foreign materials* * * *.

S. Rep. No. 2326, 83rd Cong., 2d Sess. (1954) *reprinted in,* 1954 U.S. Code Cong. & Ad. News 3, 3900, 3905 (emphasis added).

General Headnote 3(a) was enacted as part of the Tariff Schedules of the United States in 1962, by the Tariff Classification Act of 1962, Public Law 87-456, 76 Stat. 72. The *Tariff Classification Study* published by the Tariff Commission stated that:

> General headnotes 3 and 4 prescribe the conditions obtaining with respect to the *"Rates of duty"* columns numbered 1 and 2 in the proposed revised schedules. In doing so, general headnote 3 covers the substance of the special treatment presently accorded to products of insular possession (under par. 301 of the Tariff Act of 1930, as amended) * * *.

Submitting Report, Vol. 1, p. 17 (emphasis added).[6]

In 1966, Congress considered the tariff status of products of insular possessions in enacting headnotes to Schedule 7 of the TSUS to establish quotas on importation of timepieces and a special country of origin rule for buttons from insular possessions. The legislative history of Pub. L. 89-805, providing for the timepiece quota, states, in part:

> Under paragraph (a) of general headnote 3 of the TSUS articles, *the growth or product of a U.S. insular possession* outside

[6] *The Tariff Classification Study* is considered an important source of legislative history of the Tariff Schedules. *United States v. Andrew Fisher Cycle Co.*, 57 CCPA 102, 106-07, C.A.D. 986, 426 F.2d 1308, 1311 (1970); *see* 2 R. Sturm, *Customs Law and Administration*, § 52.2, 10-13 (1985) (citing cases).

> the customs territory of the United States, *are free of duty when imported into the U.S. customs territory if they do not contain foreign materials to the value of more than 50 percent of their total value.*

S. Rep. 1679, 89th Cong., 2d Sess. (1966), *reprinted in*, 1966 U.S. Code Cong. & Ad. News 4389, 4390 (emphasis added). The legislative history of Pub. L. 89-809, providing for the country of origin rule for buttons, describes General Headnote 3(a) as providing an "advantage" for goods from insular possessions.

> This advantage consists of *duty-free treatment* for articles coming from the insular possessions *If they meet two simple tests.* First, the article arriving from the prossession must have a value at least double the value of the foreign materials contained in it. *Second, it must have been subjected to some manufacturing or processing operation in the possession.*

S. Rep. 1600, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 4398, 4401 (emphasis added).[7]

From the legislative history of General Headnote 3(a), the Court draws two conclusions. First, nothing in the legislative history of General Headnote 3(a) known to the Court indicates that the headnote was intended to regulate anything other than rate of duty. *See Patel, supra.* Second, the legislative history indicates that Congress intended that General Headnote 3(a) grant duty-free treatment to merchandise which (1) is a growth, product or manufacture of an insular possession and (2) satisfies a specified percentage of its value derived from the insular possession. Congress has never specified how merchandise is to be defined as a growth, product or manufacture of an insular possession.[8] Congress presumably left definition of these terms to the Executive branch.

Plaintiff points to the quotas Congress enacted on timepieces imported from insular possessions, apparently to argue that Congress has reserved for itself authority to enact quotas on merchandise which met the rule of origin stated in General Headnote 3(a). But the fact that Congress has enacted quotas with respect to one kind

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[7] Congress also amended General Headnote 3(a) in 1974 and 1983 to implement the Generalized System of Preferences and the Carribean Basin Initiative, respectively. The Trade Act of 1974, Pub. L. 98-618, 88 Stat. 1978, § 502; Caribbean Basin Economic Recovery Act, Pub. L. 98-67, 97 Stat. 392, § 214(a)(1)(B). Both enactments altered the foreign content permissible with respect to duty-free entry of goods from insular possessions. Neither enactment is accompanied by any indication that Congress created or approved any particular administrative test for "product" of an insular possession.

[8] *Amicus curiae* argues that General Headnote 3(a) establishes a single "value added" test, referring to legislative history of the Tariff Act of 1909, Ch. 6, 35 Stat. 11, § 5 (1909), and the Tariff Act of 1930, Ch. 497, 46 Stat. 590, § 301 (1930), which provided for duty-free treatment for imports from the Philippine Islands.

The two-prong test was established in the Customs Simplification Act of 1954, the first legislation to permit duty-free entry of imports from the CNMI. As Customs Ruling CLA-2 CO:R:CV:G 553239 PR, issued to plaintiff after promulgation of 19 C.F.R. § 12.130, recognizes, Customs had an established and uniform practice of defining "products" of insular possessions, a requirement that was additional to the value added test. In a previous ruling, Customs described that practice as follows:

> Whether an article is a "product" of an insular possession within the meaning of General Headnote 3(a), TSUS, depends upon whether substantial processing operations are performed in the insular possession. Customs has consistently ruled that Headnote 3(a) requires more than merely "some processing." Articles imported into the insular possession must undergo extensive operations to satisfy the requirement that the merchandise be the growth or production of the possession.

On August 2, 1985 Customs proposed a change in this established and uniform practice in order to conform the definition of product under General Headnote 3(a) with the country of origin rule of section 12.130(b). 50 Fed. Reg. 3193.

of merchandise hardly argues that it has not delegated to executive branch authority to adopt other country of origin rules for non duty purposes.

B. 19 C.F.R. § 12.130 and the CNMI

Plaintiff and *amicus curiae* argue at length that Customs had no authority to exclude products imported from the CNMI under 19 C.F.R. § 12.130 since (1) the source of executive power to regulate textile imports is section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 (1982),[9] (2) that statute grants the President authority to issue regulations governing importation of products of "countries", and (3) the CNMI is not a country, but an insular possession in commonwealth status with the United States.[10]

But, plaintiff's merchandise was excluded because it was determined to be a product of *Korea,* not the CNMI. The President has been delegated broad authority under section 204 to negotiate textile restraint agreements with other nations, and to order the promulgation of regulations to carry out such agreements. *See American Association of Exporters and Importers—Textile and Apparel Group* v. *United States,* 751 F.2d 1239 (Fed. Cir. 1985). Pursuant to this authority, the United States entered into an agreement with Korea limiting imports of textile products from that country into the United States, and the President ordered 19 C.F.R. § 12.130 promulgated to prevent the circumvention and frustration of such agreements. *See* Exec. Order No. 12475, 49 Fed. Reg. 19955 (May 11, 1984). Plaintiff does not question the President's authority to negotiate such an agreement with Korea, or to order the promulgation of section 12.130 to carry out such agreements. *See Mast Industries, Inc.* v. *Regan,* 8 CIT 214, 596 F. Supp. 1567 (1984); *American Association of Exporters and Importers—Textile and Apparel Group* v. *United States,* 751 F.2d 1239 (Fed. Cir. 1985).

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[9] Section 204 states in part:

> The President may, whenever he determines such action appropriate, negotiate with representatives of *foreign governments* in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out any such agreement. *In addition, if a multilateral agreement has been or shall be concluded under the authority of this section among countries accounting for a significant part of world trade in the articles with respect to which the agreement was concluded, the President may also issue, in order to carry out such an agreement, regulations governing the entry or withdrawal from warehouse of the same articles which are the products of countries not parties to the agreement* [emphasis added].

[10] Since 1947 the United States has administered the Northern Mariana Islands as part of the Trust Territory of the Pacific Islands under a United Nations Trusteeship Agreement. Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. Under the Trusteeship Agreement, Art. 3, the United States, as Administering Authority has:

> full powers of administration, legislation, and jurisdiction over the Territory subject to the provisions of this Agreement, and may apply to the Trust Territory, subject to any modifications which the Administering Authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

Article 8, § 4, of the Trusteeship Agreement gave the United States power to negotiate and conclude treaties and agreements with other nations on behalf of the CNMI.

The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, Pub. L. 94-241, 90 Stat. 263, (1976) printed at 48 U.S.C. § 1681, note (1982), was approved by act of Congress on March 24, 1976. Article 1, section 101 of the Covenant, provides: "The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the 'Commonwealth of the Northern Mariana Islands', in political union with and under the sovereignty of the United States of America."

Plaintiff contends that Congress has limited its delegation of authority to the President under section 204 to define products of "countries" for textile restraint purposes to excluding from such restraints products subject to duty-free treatment under General Headnote 3(a). But the Court finds nothing in the legislative history of General Headnote 3(a) or section 204 which requires such an interpretation of these statutes. General Headnote 3(a) provides only for duty-free treatment for products of insular possessions. It is not impermissible for section 12.130(b), defining products for purposes of quantitative restraints on textiles, to affect products imported from insular possessions.

In effect, the country of origin of the merchandise was Korea for textile restraint purposes, and may have been the CNMI for duty and marking purposes.[11] This situation may be awkward, but there is no violation of General Headnote 3(a).

II. The Declaratory Judgment

Plaintiff asks for a declaratory judgment in several paragraphs in its complaint.[12] Plaintiff seems to request that the Court declare *ultra vires* and void (1) section 12.130(b) on its face and as applied (a) to plaintiff's merchandise; (b) to future shipments of plaintiff's merchandise; and (c) to "textile articles from" the CNMI; and (2) the notice of the Chairman of the Committee for the Implementation of Textile Agreements, limiting to 70,000 dozen the number of sweaters that may be imported from the CNMI without application of section 12.130 during the period November 1, 1984 to October 31, 1985.

Plaintiff seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982).[13] The Customs Court Act of 1980, § 301, 28

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[11] Since the merchandise was not entered, it was not assessed a rate of duty.

[12] Plaintiff's complaint does not set forth separate causes of action. Plaintiff requests declaratory relief in the following numbered paragraphs:

14. * * *. Plaintiff seeks a declaratory judgment that 19 CFR § 12.130, as applied to the imported merchandise and to future importations of textile articles from the Commonwealth of the Northern Mariana Islands, is an *ultra vires* Executive Act, contrary to statute, and void.

27. By Notice published at 50 Fed. Reg. 8650-51, March 4, 1985, the Chairman of the Committee for the Implementation of Textile Agreements, purports to permit a quantity of sweaters, not to exceed 70,000 dozen during the period November 1, 1984 through October 31, 1985, to enter the United States without application of 19 CFR 12.130, upon certification of the Government of the Commonwealth of the Northern Mariana Islands, pursuant to section 204, Agricultural Act of 1956, as amended. The provision is termed an "arrangement" and not an agreement.

28. Any arrangement or agreement propounded by the Executive Departments of the United States and the Commonwealth of the Northern Mariana Islands cannot be premised upon section 204, Agricultural Act of 1956, as amended, 7 U.S.C. 1854. Any such arrangement or agreement does not conform to said section and exceeds the power delegated thereby to the Executive by the Congress of the United States. Judgment is sought declaring the law in the premises.

37. 19 CFR 12.130 in so far as it purports to limit the importation of products of the Northern Mariana Islands by criteria not enunciated by the Congress of the United States in General Headnote 3(a), TSUS, in the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, and in the legislation passed by the Congress of the United States in furtherance thereof, is a regulation beyond the power of the Executive to adopt. Judgment is sought declaring any such criteria contrary to law and void.

42. The determination of the country of origin of the imported merchandise upon the basis of 19 CFR 12.130 is contrary to law, since 19 CFR 12.130 is without statutory basis as applied to the insular possessions of the United States, and particularly to the Commonwealth of the Northern Mariana Islands. Judgment is sought declaring said regulation, as amended, adopted, and published on March 5, 1985 at 50 Fed. Reg. 8723-25, contrary to law and unenforceable in these respects.

[13] 28 U.S.C. § 2201 (1982) provides that "[i]n the case of actual controversy within its jurisdiction * * * any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declaration * * *."

U.S.C. § 2643(c)(1) (1982), creating the Court of International Trade, specifically granted the Court authority to "order any * * * form of relief that is appropriate in a civil action, including * * * declaratory judgments.[14] Although the Court has considered its jurisdiction to issue declaratory judgments under 28 U.S.C. § 1581(h) (1982),[15] *see 718 Fifth Avenue Corp.* v. *United States*, 7 CIT 195 (1984), apparently there has been no judicial opinion discussing the Court's authority to issue declaratory judgments under 28 U.S.C. § 2643(c)(1) or 28 U.S.C. § 2201.

Analyzing the Declaratory Judgment Act, the Supreme Court has been clear that "[t]he requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit * * *. This court is without power to give advisory opinions * * *. It has long been its considered practice not to decide abstract, hypothetical or contingent questions." *Alabama Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945). The Court therefore will examine each issue with respect to which plaintiff requests declaratory judgment to determine whether it presents "a real, substantial controversy between parties having adverse legal interests, [and is] a dispute definite and concrete, not hypothetical or abstract." *Babbit* v. *United Farm Workers National Union*, 442 U.S. 289, 297-98 (1979).

Plaintiff concedes that section 12.130(b) validly regulates products of "countries". The Court has decided that plaintiff's merchandise was lawfully excluded pursuant to section 12.130(b) as a product of Korea. *See* pages 4-15, *supra*. Thus the Court has already held section 12.130(b) valid as applied to plaintiff's merchandise, and, by extension, future shipments of similar merchandise.

Plaintiff also challenges reference in section 12.130(b) to "products * * * of insular possessions" and application of the regulation to "products" of the CNMI.

An action under 19 U.S.C. § 1581(i) may be brought "by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5." 28 U.S.C. § 2631(i) (1982). But plaintiff has not alleged that it is adversely affected or aggrieved by the regulation of products of insular possessions, since plaintiff's merchandise is a product of Korea and not the product of an insular possession. The Court may not issue a declaratory judgment "advising what the law would be on a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 241 (1937).

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[14] The Customs Court lacked power to grant equitable relief, and declaratory judgments sound in equity. *Alberta Gas Chemicals, Inc.* v. *Blumenthal*, 82 Cust. Ct. 77, 88, C.D. 4792, 467 F. Supp. 1245, 1254 (1979).

[15] 19 U.S.C. § 1581(h) provides that the Court

> shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

Plaintiff also lacks standing, on the present record, to challenge the directive of the Chairman of the Committee for the Implementation of Textile Agreements (CITA) to Customs, which permits 70,000 dozen sweaters to be imported from the CNMI without application of section 12.130 during the period November 1, 1984 to October 31, 1985.[16] Nothing in plaintiff's complaint, or in its briefs on the pending motions, alleged any facts to indicate that plaintiff was or would be adversely affected or aggrieved by the CITA directive.[17]

The Court holds that section 12.130(b) is valid as applied to plaintiff's merchandise, and that plaintiff lacks standing to claim that the regulation is invalid as applied to products of the CNMI or to challenge the CITA directive excepting 70,000 dozen sweaters imported from the CNMI.

III. Conclusion

The Court holds that General Headnote 3(a) of the TSUS regulates only duty paid on imports from insular possessions and does not define the country of origin of merchandise imported from insular possessions for all purposes; that plaintiff's merchandise was lawfully excluded pursuant to section 12.130(b) as a product of Korea; and that plaintiff lacks standing to challenge (1) section 12.130 as applied to products of insular possessions and (2) the CITA directive.

Defendant's motion for summary judgment is granted. So ordered.

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[16] Plaintiff challenges the directive on two grounds. First, it says that the Executive, and his delegee CITA, have no authority under section 204, or any other law, to impose quotas on goods imported from insular possessions. Second, plaintiff says that under the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, imports from the CNMI are "subject to the same treatment as imports from Guam", article 603(c), and that since the number of sweaters that may be imported from Guam, without application of section 12,130 during the period is 160,000, the directive limiting CNMI imports is contrary to law.

[17] The Court could consider a motion under Rule 59 of the Rules of this Court if plaintiff shows it is adversely affected or aggrieved by the CITA directive.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				ITEM NO. AND RATE	ITEM NO. AND RATE		
C86/36	DiCarlo, J. March 14, 1986	C.R. Anthony Co.	84-5-00657	Item 700.95 12.5%	Item 700.35 8.5%	Agreed statement of facts	Seattle Athletic footwear
C86/37	DiCarlo, J. March 14, 1986	Import Leather, Inc.	80-10-01828	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/38	DiCarlo, J. March 14, 1986	Matsushita Electric of Puerto Rico, Inc.	82-3-00434	Item 661.30 9.5% for ovens Item 674.35 7.5%	Item 683.95 5% Item 674.10 4.5% Item 678.50 5% Item 664.10 5%	Agreed statement of facts	San Juan Ovens, die casting machine, etc.
C86/39	Re, C.J. March 17, 1986	Federal Transistor Co.	81-11-01521	Item 678.50 5% and Item 720.14 37.5¢ each + 16%	Item 678.50 5%	Agreed statement of facts	Los Angeles Solid-state digital AM/FM/TV band timekeeping radio/8 track player combinations with LED displays
C86/40	Re, C.J. March 17, 1986	Industrias La Famosa, Inc.	84-7-01051	Item 182.98 10%	Item 155.75 Free of duty	Agreed statement of facts	San Juan Cream of Coconut, product of an eligible beneficiary country
C86/41	DiCarlo, J. March 17, 1986	Alfa-Laval Inc.	83-3-00328	Item 661.35 4.7% or 4.5%	Item 870.40 Free of duty	Agreed statement of facts	Detroit Bulk milk coolers and farm tanks

C86/42	DiCarlo, J March 17, 1986	Hollywood Accessories	84-6-00755	Item 389.62 16¢ per lb + 13% for ratchet tie-downs Item 389.70 8.6% for rubber tie-downs	Item A657.25 Free of duty for ratchet tie-downs Item A774.55 Free of duty for rubber tie-downs	Agreed statement of facts	Los Angeles Ratchet tie-downs and rubber tie-downs
C86/43	DiCarlo, J March 17, 1986	Import Leather, Inc.	80-10-01835	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/44	DiCarlo, J March 19, 1986	Swift Industries, Inc.	78-9-01605	Not stated	Item 709.80 15%	Judgment on the pleadings	San Francisco Stereo, 81B, etc.

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/16	Re, C.J. March 17, 1986	Puma USA, Inc.	83-3-00392	Transaction value	Invoiced price paid to Centrotextil of Yugoslavia plus additions for packing and assists	Agreed statement of facts	Los Angeles Basketball shoes
V86/17	Re, C.J. March 17, 1986	Puma USA, Inc.	83-3-00393	Transaction value	Invoiced price paid to Centrotextil of Yugoslavia plus additions for packing and assists	Agreed statement of facts	Los Angeles Basketball shoes
V86/18	Re, C.J. March 17, 1986	Puma USA, Inc.	83-8-01172	Transaction value	Invoiced price paid to Centrotextil of Yugoslavia plus additions for packing and assists	Agreed statement of facts	Los Angeles Basketball shoes
V86/19	DiCarlo, J. March 17, 1986	De Laval Separator Co.	82-2-00222	Export value	Invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Buffalo Not stated

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U.S. Customs Service

Treasury Decisions

19 CFR Part 175

(T.D. 86-73)

Decision on Domestic Interested Party Petition Concerning Tariff Treatment of Hook and Eye Tabs Incorporated in Brassieres

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final decision.

SUMMARY: By a previous Federal Register notice, the public was advised that Customs had received a petition submitted on behalf of several domestic interested parties with respect to the tariff treatment of hook and eye tabs incorporated in imported brassieres. The metal hooks and eyes are manufactured and attached to continuous textile strips in the Philippines, imported into the U.S. duty-free under the Generalized System of Preferences and further processed into individual hook and eye tabs which are then exported and assembled abroad into finished brassieres. The petitioners contended that when the finished brassieres are imported, Customs is incorrectly excluding the value of the hook and eye tabs, and that no allowances should be made for the value of the tabs in the duty assessed on the brassieres because the processing in the U.S. is not sufficient to transform the strips into products of the U.S.

After further review of the matter, and consideration of the comment received in response to the notice, Customs agrees with the petitioners that these operations are not sufficient to transform the imported hook and eye tabs into domestic products. Accordingly, when the finished brassieres are imported into the U.S., the value of the hook and eye tabs will not be excluded from the dutiable value of the brassieres into which they were assembled.

EFFECTIVE DATE: May 8, 1986.

FOR FURTHER INFORMATION CONTACT: Earl Martin, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), and Part 175, Customs Regulations (19 CFR Part 175), a domestic interested party petition was filed with Customs concerning the tariff treatment of hook and eye tabs incorporated in imported brassieres. The petitioners are manufacturers and producers of metal hook and eye components which are sewn by machine onto textile strips. These strips are placed on reels and then fed into sealing machines which sever the strips into individual tab units. After heat-sealing, these tab units are ready for incorporation into brassieres.

The imported merchandise is produced using nearly identical methods. However, unlike the domestically-produced merchandise which is produced in one location, the U.S., the imported merchandise is completed in two locations. The textile strips with the hooks and eyes attached are manufactured and produced in the Philippines. These strips are then imported into the U.S. where they are currently classified under the dutiable provision for "Hooks and eyes," in item 745.60, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202). However, these strips are eligible for duty-free treatment under the Generalized System of Preferences (GSP) provided for in Title 5 of the Trade Act of 1974, as amended (19 U.S.C. 2461 et seq.). The GSP provides that when an eligible article is imported into the customs territory of the U.S. directly from a country, territory, or association of countries listed in General Headnote 3(c)(i), TSUS, it shall receive duty-free treatment, unless excluded. These strips of uncut hook and eye tabs are being imported from the Philippines which appears on the GSP list of designated beneficiary developing countries whose articles receive duty-free treatment from the U.S. Accordingly, no duty is paid on these articles when they are imported.

Once in the U.S., these strips of hook and eye tabs are then cut into individual tab units, heat-sealed, then exported and assembled abroad into finished brassieres. The finished brassieres are then imported into the U.S. under the provisions for "Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting * * *," in item 807.00, TSUS. The duty on these articles is based on the full value of the imported article, less the cost or value of any fabricated components which are products of the U.S. In Customs Ruling #053121 M, dated November 7, 1977, Customs determined that cutting and heat-sealing imported hook and eye

strips in the U.S. into individual hook and eye tab units substantially transforms the strips into products of the U.S. Since these completed tabs are considered to be products of the U.S. for purposes of item 807.00, TSUS, their value is excluded from the dutiable value of the imported brassieres.

The petitioners contended that this previous Customs ruling is erroneous. It is their view that hook and eye strips of foreign origin that are imported into the U.S. and merely cut and heat-sealed into individual tabs are not substantially transformed into products of the U.S. Accordingly, they claimed that the cost or value of the tabs should not be excluded from the dutiable value of the brassieres imported under item 807.00, TSUS.

Pursuant to § 175.21(a), Customs Regulations (19 CFR 175.21 (a)), before making a determination on this matter, Customs published a notice in the Federal Register on September 26, 1985 (50 FR 39067), inviting written comments from interested parties on the classification issue. In response, only one comment was received. The commenter agreed with the petitioners. Accordingly, after consideration of the petitioners' views and those of the commenter, and after further review of the matter, Customs has determined that hook and eye strips of foreign origin that are imported into the U.S. and merely cut and heat-sealed into individual tabs are not substantially transformed into products of the U.S. Therefore, after the effective date of this decision, the cost or value of the tabs will not be excluded from the dutiable value of the brassieres imported under item 807.00, TSUS, and Customs Ruling #053121 M, dated November 7, 1977, will be rescinded.

AUTHORITY

This notice is published in accordance with § 516(b), Tariff Act of 1930, as amended (19 U.S.C. 1516(b)), and § 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: March 26, 1986.

DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, April 8, 1986 (51 FR 12014)]

(T.D. 86-74)

Tuna Fish—Tariff Rate Quota

The tariff-rate quota for the Calendar Year 1986, on tuna classifiable under item 112.30, Tariff Schedules of the United States (TSUS).

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1986.

SUMMARY: Each year the tariff-rate quota for tuna fish described in item 112.30, TSUS, is based on the United States pack of canned tuna during the preceding calendar year.

EFFECTIVE DATE: The 1986 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1986.

FOR FURTHER INFORMATION CONTACT: Karen L. Cooper, Acting Quota Program Manager, Admissibility Requirements Section, Commercial Compliance Division, Office of Commercial Operations, U.S. Customs Service, Washington, D.C. 20229 (202-566-8592).

It has now been determined that 81,092,100 pounds of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1986, at the rate of 6 percent ad valorem under item 112.30, TSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under item 112.34, TSUS.

(QUO-2-CO:C:C:A)

Dated: April 4, 1986.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, April 11, 1986 (51 FR 12585)]

(T.D. 86-75)

Recordation of Trade Name: "CRYOMEC, INC."

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On September 25, 1985, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CRYOMEC, INC." was published in the Federal Register (50 FR 38939). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments, submitted in opposition to the recordation and received not later than November 25, 1985.

Stremikon Corporation, a Michigan corporation, commented in opposition to recordation of the trade name, citing concern that "CRYOMEC, INC." is confusingly similar to Stremikon Corporation's "CRYO-MED" trademark registered on the Principal Register of the United States Patent and Trademark Office (Reg. No. 1,068,060) used for refrigerator installations and parts thereof. Cryomec, Inc. is the owner of the registered and recorded "CRYOMEC IN DESIGN" service mark (Reg. No. 1,228,721).

We find that the two marks lawfully co-exist. Therefore, genuine articles bearing the "CRYO-MED" trademark shall not be seized or detained as confusingly similar to "CRYOMEC, INC."

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "CRYOMEC, INC." is recorded as the trade name used by Cryomec, Inc., a corporation organized under the laws of the State of California, located at 1265 North Kraemer Boulevard, Anaheim, California 92806. The trade name is used in connection with the following goods, manufactured in the United States: pumps, particularly reciprocating and centrifugal pumps for cryogenic liquids, cryogenic vaporizers, and conversion systems for converting cryogenic liquids to a gas, and related equipment, including heat exchangers.

EFFECTIVE DATE: April 11, 1986.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: April 8, 1986.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, April 11, 1986 (51 FR 12586)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

Proposed Consolidation of New Orleans, Gramercy, and Baton Rouge, Louisiana, Customs Ports for Marine Purposes

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed limited consolidation of ports.

SUMMARY: This document proposes to consolidate the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, for marine purposes only. This change, if adopted, would enable Customs to obtain more efficient use of its personnel, facilities, and resources. It would eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. Moreover, it would simplify vessel entry and clearance procedures and reduce expenses and paperwork for all parties involved thereby enabling Customs to provide better and more economical service to carriers, importers, and the public.

DATE: Comments must be received on or before June 9, 1986.

ADDRESS: Written comments (preferably in triplicate) may be addressed to, and inspected at, the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Richard C. Coleman, Office of Inspection (202-566-8157). Legal Aspects: Donald H. Reusch, Carriers, Drawback and Bonds Division (202-566-5732), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

The Customs Service field organization currently consists of seven geographical regions further divided into districts, with ports of entry within each district. Customs ports of entry are locations

(seaports, airports, or land border ports) where Customs officers or employees are assigned to accept entries of merchandise, collect duties, clear passengers, vehicles, vessels, and aircraft, examine baggage, and enforce the Customs and related laws.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs is proposing to consolidate, for marine purposes only, the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, located in the New Orleans, Louisiana, Customs district in the South Central Region.

Inasmuch as these three ports are located within approximately 60 miles of one another on the Mississippi River and perform similar services, it was estimated that the proposed consolidation would significantly reduce expenses without impairing Customs ability to provide services to area businesses or to the general public.

Under this proposal, the laws and regulations administered and enforced by Customs relating to the entry of merchandise would continue to apply at the ports of New Orleans, Gramercy, and Baton Rouge, with each of these ports retaining its port code as well as its current geographical limits. However, the three ports would be considered to be one port for the purposes of the navigation laws. All of the requirements prescribed by the navigation laws administered and enforced by Customs, such as reporting the arrival and making formal entry of vessels arriving at the consolidated marine port from a foreign or another U.S. port (depending upon the vessel's nationality); and obtaining a permit to proceed between the consolidated port and other U.S. ports, would have to be complied with, as is now the case in existing consolidated ports.

It is anticipated that the proposed consolidation also will result in reducing penalties incurred under the navigation laws if carriers fail to enter and properly clear merchandise being shipped in a residue cargo movement within the consolidated marine port (i.e., the ports of New Orleans, Gramercy, and Baton Rouge), and will reduce paperwork for carriers, importers, and Customs, because of the reduction of penalty cases.

If this proposal is adopted, there would be no change in the current geographical limits of each port. However, it will be necessary to amend the list of Customs regions, districts, and ports of entry set forth in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), to reflect the consolidation of these ports for the purposes of the navigation laws.

Executive Order 12291

Because this proposal related to the organization of Customs, it is not a regulation or rule subject to E.O. 12291.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this proposal because it will not have a significant economic impact on a substantial number of small entities.

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although the proposal may have a limited effect upon some small entities in the affected areas, it is not expected to be significant because changes in the Customs field organization in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

LISTS OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

PROPOSED AMENDMENT TO THE REGULATIONS

If the proposed consolidation of the ports of New Orleans, Baton Rouge, and Gramercy, Louisiana, for the purposes of the navigation laws, is adopted, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), will be amended as follows:

In the South Central Region—New Orleans La., under the column headed "Name and headquarters", the following phrase would be added under the listing "New Orleans, La."

> "(The ports of New Orleans, Baton Rouge, and Gramercy, consolidated for purposes of the navigation laws. See T.D. 86- ——
> 51 FR ——, ——— 1986.)"

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This change is proposed under 19 U.S.C. 66 and 1624 as well as the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: March 14, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 10, 1986 (51 FR 12339)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-676)

MAST INDUSTRIES, INC., APPELLEE *v.* UNITED STATES, APPELLANT

Veronica A. Perry, Civil Division, Department of Justice, of New York, New York, argued for appellant. With her on the brief were *Richard K. Willard*, Assistant Attorney General, *David Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Michael P. Maxwell, Greenfield, Desiderio, Lebowitz & Silverman, of New York, New York, argued for appellee. With him on the brief was *Steven P. Florsheim*.

Appealed from: U.S. Court of International Trade.

Judge DICARLO.

(Appeal No. 86-676)

MAST INDUSTRIES, INC., APPELLEE *v.* UNITED STATES, APPELLANT

(Decided April 1, 1986)

Before BALDWIN, NIES, and ARCHER, *Circuit Judges*.

BALDWIN, *Circuit Judge*.

This appeal is from a decision of the United States Court of International Trade holding that a sleepshirt was designed, manufactured, marketed, and used as nightwear, and an order directing the U.S. Customs Service to permit entry of the merchandise under Item 384.5226 of the Tariff Schedules of the United States.

Appellant's arguments are adequately treated in the lower court's opinion No. 85-114, dated October 28, 1985. We affirm on the basis of that opinion.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-34)

HERAEUS-AMERSIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-4-00525

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Judgment for defendant.]

(Decided March 26, 1986)

Fitch, King and Caffentzis (*Richard C. King* and *Peter Fitch*) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Barbara Epstein*) for the defendant.

CARMAN, *Judge:* This case involves the proper tariff classification of "bell jars," otherwise described by plaintiff as "large, tubular articles, made of fused silica," with "[o]ne end * * * closed, in approximately hemispherical shape, and the other * * * open." The United States Customs Service (Customs) classified the merchandise under item 548.05, Tariff Schedules of the United States (TSUS), as articles of glass, other than tubes or tubing, not specially provided for. Plaintiff claims that the merchandise is more specifically classified under item 548.01, TSUS, as glass tubes.

Following are the relevant tariff provisions:

	Schedule 5, Part 3, Subpart D:	
	Articles not specially provided for, of glass:	
	Tubes and tubing with ends processed:	
[Claimed under:]		
548.01	Containing over 95 percent silica by weight.....	7% ad val.[1] 6.7% ad val. 6.4% ad val.

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*	*	*	* * * * *
[Classified under:]			
548.05	Other		12.5% ad val.
			11.8% ad val.
			11.0% ad val.

[1] As modified by T.D. 68-9, the rate of duty depends upon the year of entry. Plaintiff's merchandise was exported from West Germany and entered at the port of Newark from 1979 through 1981.

Upon a trial and submission of post-trial briefs, the Court concludes that the plaintiff has not overcome the presumption that the government's classification is correct by showing that the merchandise is more specifically described as tubes. *See* 28 U.S.C. § 2639(a)(1) (1982).

DISCUSSION

At trial, plaintiff offered into evidence a sample of the imported merchandise. It is cylindrical, white, and the texture of its exterior surface is sandy. The interior surface is smooth and glossy. One end is closed, in approximately hemispherical shape, and the other is open. The outside diameter of the sample is 11 inches. Its wall thickness is ⅜ inch and it is 20 inches high. The parties have stipulated, however, that the subject merchandise of this case ranges in sizes up to 36 inches in diameter and up to 94 inches high. Typical sizes are 18 to 36 inches in diameter, 24 to 94 inches high, and with ⅜ to ¾ inch wall thicknesses. All of the imported merchandise is similar in appearance to the exhibit, except for size.

The parties also stipulated that the merchandise is invoiced as Rotosil tubes with one end hemispherically closed, or as bell jars, and that the imported merchandise is not "tubing."

Plaintiff bases its claimed classification on the contention that the imported articles are commonly known as tubes. Plaintiff relies on various dictionary definitions of the word "tube" and concludes simply that "what is a 'tube' is not determined by size, material, or use, but by the shape of the article." Plaintiff's Brief 9. A sampling of one such dictionary definition, which is fairly representative, follows:

> 1. A long hollow cylindrical body, as of wood, metal, rubber, or glass, generally used for the conveyance of something through it, but often as a receptacle for holding something; a pipe.

Funk & Wagnalls New Standard Dictionary of the English Language (1942).

Plaintiff quotes the decision in *Terumo-America, Inc.* v. *United States*, 2 CIT 121, 132 (1981) (glass rods used in the manufacture of thermometers classified as tubing), which states, "The tariff schedules do not define tubes, and the *Tariff Classification Study, Explanatory and Background Materials* (1960) fails to shed light on

this question." From this, plaintiff surmises that the visual appearance of the articles and the testimony of its witness are determinative of the correct classification of the merchandise. The witness, Mr. Allan C. Kreutzer, vice president of marketing and sales for the plaintiff company, testified that the imported articles are known as tubes. Plaintiff fails, however, to cite and deal with the compelling body of relevant case law, which clearly shows not only that an article is not classifiable as a tube merely because it is called a tube, *see United States* v. *The A.S. Aloe Co.*, 20 CCPA 319, 322, T.D. 46111 (1932),[2] but also that the shape of the article as a tube is not controlling for customs classification purposes. *See United States* v. *Kelvin & Wilfrid O. White Co.*, 24 CCPA 327, 331, T.D. 48768 (1937). Where an article "has a function other than that performed by a tube, as that term is ordinarily understood," it is not properly classified as a tube. *United States* v. *E.H. Sargent & Co.*, 20 CCPA 172, 176, T.D. 45774 (1932). Plaintiff's statement that the use of the imported articles is "immaterial as to whether or not they are tubes," Plaintiff's Brief 6, is patently incorrect for customs classification purposes.

In the case at bar, the evidence at trial establishes that plaintiff's Rotosil articles are used for purposes not ordinarily associated with tubes. As Mr. Kreutzer testified,

> [T]he first use is as bell jars * * * in the semiconductor industry * * * for the manufacture of polycrystalline silicon by the Siemens process. This process uses the decomposition of the gas tri-chloro-silane. In this process a long, very thin, rod in the form of a hairpin of pure silicon is attached to a reactor plate, usually made of silver, and the tube or bell jar is placed over this rod and sealed against the reactor plate. The trichloro-silane and hydrogen are introduced via gas ducts in the reactor plate, and an electrical current passed through the silicon hairpin. The combination of these two chemicals and the electrical current causes a decomposition reaction, into pure silicon, which deposits on the hairpin, and hydrochloric acid gas, which is exhausted from the bell jar.
>
> After this process is complete, the pure silicon material is removed, and broken up into pieces. This material is then placed in other Rotosil or other brand of fused silica tubes or crucibles such as the imported articles, with the open end up. This polycrystalline silicon is then melted, and by dipping down a single pure crystal seed, a single pure crystal of silicon several inches in diameter and several feet long is pulled from the molten mass. This process is called the Czochralski process. Rotosil crucibles can also be used in other melting processes, including precious metals in the refining or casting operations, or melting any other material which is corrosive at high temperature.

[2] In contrast, an article may warrant classification as a tube even though it is not commercially referred to as a tube. *See, e.g., Winkler-Koch Engineering Co.* v. *United States*, 16 Cust. Ct. 42, 47, C.D. 982 (1946) (oil well casing classified as iron or steel tubes not specially provided for).

> After the single crystal which has been drawn from the crucible is further processed, it is sliced into wafers which, after substantial additional processing, become the micro-chips of electronics. In one of the steps of this processing, called epitaxy, the tubes are normally used closed end down, and in this orientation are called epitaxial reactors. In this process wafers sawn from the single crystal and further processed are loaded into graphite susceptors and covered with the tube. The end of the tube is sealed against a plate, and gases introduced into the tube through the plate sealing the open end. Epitaxy coats the wafers with pure silicon.

Transcript 114–16.

It is clear that the purposes of plaintiff's merchandise go well beyond those oridinarily associated with tubes, such as conveying gases or liquids or serving as mere receptacles.[3] In each of the following cases, the court classified, on the basis of use, tubelike articles of glass under provisions other than that for tubes.

In *E.H. Sargent & Co.*, the Court of Customs and Patent Appeals reversed the lower court and found that graduated Bunsen tubes, Roehrig tubes with projecting faucets, and absorption tubes open at both ends and having between these ends a succession of globular formations connected by small necks, were properly classifiable as scientific glass articles under paragraph 218(a), Tariff Act of 1930. The court did not elaborate on the function of each article, but indicated that their scientific purposes could not be accomplished by the use of mere tubes. 20 CCPA at 176.

The court found that a centrifuge sedimentation tube constructed for use in centrifugal machines and used to make urinary analyses is "a chemical article and more than a tube." *The A.S. Aloe Co.*, 20 CCPA at 323.

Finally, in *Kelvin & Wilfrid O. White Co.*, the court found that glass sounding tubes used to record the depths of ocean water also are more than tubes. The interior of each tube was coated with a chemical that changed color when coming in contact with salt water. The court observed:

> [W]hen scientific tubes or tubing are made into different completed articles which perform particular chemical or scientific purposes, they cease to be the tubes or tubing for which Congress made provision in subdivision (b) [paragraph 218, Tariff Act of 1930]. When the new article performs a function not performed by tubes or tubing, as those terms are commonly understood, the merchandise loses its character as tubes or tubing.

24 CCPA at 331.[4]

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[3] The uses of tubes are not necessarily limited to conveying or holding something, but must nevertheless be uses that are ordinarily associated with tubes. In *Ball v. United States*, 8 Ct. Cust. Appls. 143, 146, T.D. 37271 (1917), the court found that "[t]he uses of steel tubes as material are so common and well known that in the absence of commercial designation we can not say the articles here are not steel tubes within the common understanding of that term." *Id.*

As Mr. Kreutzer's testimony indicates, the merchandise in the case at bar is designed to perform very special industrial functions—namely, to serve as bell jars for the manufacture of polycrystalline silicon by the Siemans process, as crucibles for the melting of silicon in the Czochralski process or for the melting of precious metals, and as epitaxial reactors for the coating of silicon wafers. Transcript 115–16. Further, Heraeus-Amersil manufactures articles to the particular specifications of each customer depending on the intended use. *See* Transcript 139–40. Importantly, the tubular shape of the articles is not nearly so important as the material from which the articles are made. *See id.* at 113. As Defendant's Exhibit A, a brochure of Heraeus Quarzschmelze, describes plaintiff's Rotosil bell jars:

> The inner surfaces of these bell jars are always fireglazed and very densely fused to an almost glassy finish, thus providing the best conditions for a clean and troublefree operation. The walls are otherwise opaque and therefore act as thermal insulators—a very desirable effect which contributes toward lower running costs. After a lining of the bell jars with an additional layer of pure transparent quartz glass was found to improve the purity of the deposited silicon significantly, the demand has increasingly shifted to bell jars fitted with the additional inner layer. The best in this respect are bell jars with an inner layer of synthetic quartz glass * * *.

It is clear that the articles are designed as "more than" conveyers of liquids or gases, or as mere receptacles. *See E. Green & Son* v. *United States*, 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971) (application of "more than" doctrine must be determined in each case on its own facts).

In discussing plaintiff's imported merchandise, plaintiff's witness Kreutzer discussed generally all of the similar merchandise manufactured by plaintiff, referring to the merchandise as tubes or tubing, sometimes qualified by the phrase "with one end closed," and otherwise called "bell jars, crucibles, furnace or diffusion tubes, furnace muffles, or reactors." Transcript 113, 137. Mr. Kreutzer also discussed similar merchandise manufactured by plaintiff in 1962 to 1963 referred to as cylindrical pipes with closed ends, cylindrical shape opaque muffles, or cylindrical pots. *Id.* at 117. But as plaintiff has developed the capability of manufacturing larger "tubes," *id.* at 116, and "their use in the semiconductor industry has grown, they have also acquired other names, depending upon the particular use to which the customer will apply them." *Id.* at 117. Mr. Kreutzer concluded, "The one term which properly

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*The issue in *Sargent, Aloe* and *Kelvin* was whether the merchandise was classifiable as tubes or tubing under paragraph 218(b), Tariff Act of 1930. With the enactment of the TSUS, items 548.01 and 548.03 continued the existing rate treatment for tubes and tubing previously dutiable under paragraph 218(b). *See Tariff Classification Study, 5th Supplemental Report* 38, 114 (1963).

describes them, no matter in what orientation, or for what purpose used, is tubes with one end closed." *Id.*[5]

The shape of the articles or that they are called tubes, however, is not controlling. The major functions of the articles are not those of tubes. Their primary functions are as bell jars, epitaxial reactors and crucibles for the manufacture of silicon chips in the semiconductor industry. *Cf. E. Green & Son* v. *United States,* 59 CCPA at 35, 450 F.2d at 1399 (primary function of finned tubes to heat or cool water flowing through them warranted classification as manufactures of iron rather than as iron pipe or tubes). Although the tariff provision for tubes is *eo nomine,* use in this case, as in the other cited cases dealing with the classification of tubelike articles, is of paramount importance and cannot be ignored in determining the identity of the imported articles for customs classifications purposes. *See United States* v. *Quon Quon Co.,* 46 CCPA 70, 73, C.A.D. 699 (1959) (woven rattancore classified according to its use as parts of furniture notwithstanding the *eo nomine* tariff provision for "baskets").

CONCLUSION

Because plaintiff's imported merchandise is specifically designed and manufactured to perform functions not commonly understood to be those performed by tubes, plaintiff has not met its burden of proving that Customs' classification is incorrect by showing that the merchandise is more specifically provided for under item 548.01, TSUS, as glass tubes with ends processed. The Court accordingly sustains Customs' classification of the imported merchandise under item 548.05, TSUS, as other glass articles not specially provided for.

(Slip Op. 86-35)

EHRENREICH PHOTO-OPTICAL INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 76-5-01308

Before BERNARD NEWMAN, *Senior Judge.*

PHOTOGRAPHIC PRINTERS

Plaintiff challenges the classification by Customs of imported photographic enlarging printers as "enlargers" under item 722.18, TSUS, claiming that the merchandise should properly have been classified as "[e]quipment specially designed for photofinishing * * * not specially provided for" under item 722.94, TSUS. The print-

[5] It is noteworthy, nevertheless, that plaintiff in its catalogues and purchase orders distinguishes the subject imported merchandise from its tubing and refers to the imported articles by the names denoting the intended functions, i.e., Rotosil bell jars or crucibles. *See* Plaintiff's Exhibit 3, at 16, Plaintiff's Exhibit 4 at 26, and Defendant's Exhibit C. at 26 (price lists); Defendant's Collective Exhibit D *passim* (purchase orders).

ers are automated high speed machines designed to optically produce color photographic enlargements, called "prints", of the image on a photographic negative.

Held: Plaintiff failed to establish that the printers, which have the same basic features and function as prototype hand-operated enlargers, but are more automated and faster than the latter, do not fall within the common meaning of the term "enlargers"; also, plaintiff failed to prove its claim that there was a commercial designation for the term "enlarger" that excluded photographic printers.

While plaintiff showed that the printers are photofinishing equipment within the purview of item 722.94, they are specially provided for under the *eo nomine* provision covering enlargers in item 722.18, and are properly dutiable under that provision pursuant to General Interpretative Rule 10(c), TSUS.

In applying General Interpretative Rule 10(c), TSUS, an *eo nomine* provision is regarded as more specific than a use provision qualified by a "not specially provided for" clause. *United States* v. *E. Besler & Co.*, 64 CCPA 121, C.A.D. 1193, 557 F.2d 270 (1977).

[Judgment for defendant.]

(Decided March 26, 1986)

Serko & Simon (Joel K. Simon and *George S. Locker, Esqs.*, of counsel), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch; and *Judith M. Barzilay, Esq.*, for the defendant.

BERNARD NEWMAN, *Senior Judge:*

INTRODUCTION

This action presents for determination the proper classification, and hence rate of duty, for certain photographic enlarging printers imported by plaintiff from the United Kingdom and entered through the port of New York during the period of June 1973 through September 1975.[1] In liquidating the entries, Customs classified the imports as photographic enlargers under item 722.18 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9, and assessed duty at the rate of 7.5 percent ad valorem.[2] Relying on *United States* v. *E. Besler & Co.*, 64 CCPA 121, C.A.D. 1193, 557 F.2d (1977), defendant proposes as an alternative classification that the merchandise is dutiable under the provision for certain cameras in item 722.16, TSUS, as modified by T.D. 68-9, at the rate of 7.5 percent ad valorem. Plaintiff claims that the imports are properly dutiable under the provision in item 722.94, TSUS, as modified by T.D. 68-9, for equipment specially designed for photofinishing, not specially provided for, at the rate of 5 percent ad valorem.

The court finds that the merchandise was properly classified by Customs under item 722.18.

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[1] Specifically, the imports comprise four models of Durst printers: ACS M 5/8 Miniprinter; ACS 78 MK2 Type O; M 6/12; and M 5/8 Type O. There are no material differences between these models for tariff classification purposes (Tr. 27).

[2] At the trial, plaintiff abandoned its claims with regard to entry No. K157732, which was one of the entries covered by the summons and complaint (Tr. 16). Plaintiff also abandoned the action respecting "various and assorted parts" covered by entry No. K232375. *Id.*

STATUTES INVOLVED

19 U.S.C. § 1202, Tariff Schedules of the United States:

Classified under:		
Schedule 7, Part 2, Subpart F:		
Photographic cameras (other than motion-picture cameras), photographic enlargers, and combination camera-enlargers:		
* * * * * * *		
722.18	Other enlargers and camera-enlargers	7.5% ad val.
Defendant's Proposed Alternative Classification:		
Schedule 7, Part 2, Subpart F:		
Photographic cameras (other than motion-picture cameras), photographic enlargers, and combination camera-enlargers:		
* * * * * * *		
Other cameras:		
* * * * * * *		
Other than fixed-focus		
* * * * * * *		
722.16	Valued over $10 each	7.5% ad val.
Claimed under:		
Schedule 7, Part 2, Subpart F:		
Equipment specially designed for photofinishing (still picture):		
* * * * * * *		
722.94	Other, not specially provided for	5% ad val.

FACTS

The record in this case comprises the testimony of three witnesses on behalf of plaintiff and three witnesses for defendant. Additionally, each party submitted various exhibits; the official entry papers were received without marking (Tr. 19).[3]

The pertinent facts are:

The merchandise in controversy consists of Durst printers, which are automated machines designed to optically produce color photo-

[3] At trial and in its reply brief, plaintiff alluded to defendant's affirmative response to plaintiff's request for an admission that the imports are other than enlargers (Tr. 3-4, 110-111). The court reminded counsel of an order of March 6, 1985 denying defendant's motion to withdraw its admission (Tr. 5, 109-110). However, at trial plaintiff did not offer defendant's admission into evidence, but rather submitted testimony and other evidence on the issue of whether the imports are enlargers, and did not object to defendant's evidence on that issue. Since defendant's admission was neither offered nor received in evidence, the admission is not part of the record in this case. *Avant* v. *Polaroid Corp.*, 441 F. Supp. 898 (D.C. Mass 1977), *aff'd*, 572 F.2d 889 (1st Cir. 1978), *cert. den.* 439 U.S. 837 (1978) (Rule 36 admissions not introduced into evidence by plaintiff would not be considered by the court.). *Cf. S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 82 Cust. Ct. 197, 204, C.D. 4802 (1979) ("* * * to be considered by the court, answers to interrogatories must be introduced into evidence and cannot merely be judicially noticed."). Accordingly, the court cannot agree with plaintiff's contention that defendant's admission is conclusive of the issue of whether Customs' classification was correct.

graphic enlargements, called "prints", of the image on a photographic negative at high speed. Following is the basic process by which the imports print photographic enlargements: Under darkroom conditions, the operator of a printer loads it with photosensitive positive paper on which exposures will be made. The printers have a built-in paper transport mechanism that holds the photosensitive paper. A photographic color film negative is placed in the negative carrier of the printer. The operator then presses an "exposure" button to activate the machine. Durst printers have a light source, that when activated during printing, emits light through the photographic negative and then through a lens onto the positive paper.

The high speed printing process is automated and is not viewed by the operator. The end product produced by the imports is called a "print", which may be as large as 11 x 14 inches in size. Such print consists of the photographic positive containing a latent image which is not visible in normal room light, and must be finished by chemical processing to produce a viewable image in the form of what is ordinarily regarded as a "photograph".

Discussion

Defendant contends that based upon their primary design, construction and function, Durst printers are encompassed by the common meaning of the term "enlarger", and are also included within the dictionary definition of "camera" as articulated by the Court of Customs and Patent Appeals in *Besler, supra.* Respecting plaintiff's claim, defendant argues that the imports are not classifiable under item 722.94 because they do not finish the photo; and even assuming that the printers are photofinishing equipment, by virtue of General Interpretative Rule 10(c) they are more specifically provided for, either as cameras or enlargers.

Relying on the principle of "commercial designation", plaintiff insists that Durst printers are not known or regarded in the photographic industry as enlargers or cameras, but rather as "printers". Plaintiff also argues that the imports are not designed nor do they function as enlargers within the common or commercial meaning of that term, but are "more than" enlargers. In support of its claim under item 722.94, TSUS, plaintiff asserts that Durst printers are known and used as photofinishing equipment.

Common Meaning

Resolution of the classification issue in this case requires a determination of the meaning of the *eo nomine* provision for "enlargers" as that term is used in item 722.18, TSUS. Fundamentally, in the absence of a special commercial designation, the language of a tariff provision is to be construed in accordance with its common meaning. The common meaning of a tariff term is a matter of law to be determined by the court; and in making such determination,

the court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. The testimony of witnesses respecting common meaning may properly be considered by the court, but such testimony is advisory only and has no binding effect on the court. *United States* v. *Corning Glass Works,* 66 CCPA 25, C.A.D. 1216, 586 F.2d 822 (1978); *United States* v. *E. Besler & Company,* 64 CCPA at 124; and *United States* v. *National Carloading Corp.,* 48 CCPA 70, C.A.D. 767 (1961).

In support of its position that the printers fall within the common meaning of the term "enlarger", defendant cites:

Webster's Third New International Dictionary (1963), p. 754:

> One that enlarges, *specif.:* an optical projector used to produce a photographic enlargement.

In addition to the foregoing lexicographic authority, the court has consulted:

McGraw-Hill Dictionary of Scientific and Technical Terms (3d ed. 1984), p. 546:

> enlarger [OPTICS] An optical projector used to project an enlarged image of a photograph's negative onto photosensitized film or paper. Also known as a photoenlarger.

and

McGraw-Hill Encyclopedia of Science & Technology (5th ed. 1982), Volume 10, p. 212:

> Contact and projection printers. Negatives provide the primary records of photography in the black-and-white field and to an increasing extent in color. In many cases, such as the document reproduction field, they may be more useful than the positives. In general, however, positive prints are required, and such prints are made from negatives in contact printers and projection printers (enlargers).
>
> * * * * * * *
>
> *Projection printers (enlargers).* These are optical projectors consisting of a lamp house and light source, a holder for a negative, a condenser or diffusing sheet, a projection lens designed to give optimum quality at relatively low magnifications, means for focusing for the desired magnification, sometimes automatically coupled to ensure good focus at all magnifications (autofocus enlargers), a support for the optical components, and a board or easel to carry the sensitive paper * * *. Projection printers may expose individual paper sheets or rolls of paper from single negatives or rolls of negatives.

Defendant insists that the component features and function of Durst printers coincide completely with the common understanding of the term "enlarger". Thus, defendant points out that the printers have a light source, a negative holder or carrier, a method of diffusing light, a lens, a means for focusing (or prefocusing), a sup-

port for the optical components and an easel which serves to hold or carry the photosensitive paper. Significantly, four of the witnesses who testified at the trial agreed that Durst printers fall within *Webster's* definition, *supra* (Tr. 88, 126, 227-28, 273-74). Consequently, the court is persuaded that Durst printers are, by design and function, photographic enlargers within the common meaning of that term, as contended by defendant.

In essence, plaintiff's position is that the provision for enlargers in item 722.18, TSUS, is limited to certain prototype hand-operated machines, which are more flexible in operation for certain specific uses than plaintiff's automated high speed printers. While it is true that the imports are automated machines rather than prototype hand-operated machines, this difference does not affect their classification. It is fundamental that an *eo nomine* designation without limitation or legislative intent, judicial decision or administrative practice includes all forms of the article. *National Carloading Corp., supra; Nootka Packing Co.* v. *United States,* 22 CCPA 464, T.D. 47464 (1935). On that score, the evidence of record clearly demonstrates that the imports possess the same basic components and function as hand-operated enlargers and are essentially "automated high-speed enlargers" (Tr. 129, 279-80, 302). Accordingly, the imports fall within the *eo nomine* provision for enlargers in item 722.18.

Plaintiff also seeks to exclude these imports from the common meaning of "enlarger" under the "more than" doctrine. That doctrine was succinctly articulated in *Robert Bosch Corp.* v. *United States,* 63 Cust. Ct. 96, 103, C.D. 3881 (1969):

> The principle is well settled that where an article is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute * * *. *By contrast where the difference is in the nature of improvement or amplification, and the essential character is preserved or only incidentally altered, the applicable rule is * * * that an unlimited eo nomine statutory designation includes all forms of the article in the absence of a contrary legislative intent or commercial designation.* [Citations omitted; emphasis added.]

And as observed in *United States* v. *Texas Instruments,* 67 CCPA 57, 63, C.A.D. 1243, 620 F.2d, 269, 271-272 (1980):

> Only the most general of rules can be ascertained from the previous decisions dealing with the "more than" doctrine, and it appears that each case must in the first analysis be determined on its own facts. *E. Green & Son (New York), Inc.* v. *United States,* 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971) * * *.

In *Green, supra,* the Appellate Court further observed, 59 CCPA at 34:

> * * * In order to determine if an article is more than that provided for in a particular tariff provision, it is necessary to ascertain the common meaning of the tariff provision and compare it with the merchandise in issue.

See also Ozen Sound Devices v. *United States,* 67 CCPA 67, C.A.D. 1246, 620 F.2d 880 (1980); *The Englishtown Corporation* v. *United States,* 64 CCPA 84, C.A.D. 1187, 553 F.2d 1258 (1977).

Plaintiff's "more than" argument is predicated on various differences pointed out by its witnesses between prototype hand-operated enlargers and the automated Durst printers. Notwithstanding these differences, the court must observe the well settled rule that merchandise is to be classified on the basis of its primary design, construction and function. *See e.g. Asea, Inc.* v. *United States,* 7 CIT 128, Slip Op. 84-28, 587 F. Supp. 1072 (March 29, 1984), *aff'd* 3 CAFC ——, 748, F.2d 676 (1984); *United States* v. *Oxford International Corp.,* 62 CCPA 102, C.A.D. 1154, 517 F.2d 1374 (1975); *Trans-Atlantic Company* v. *United States,* 60 CCPA 100, C.A.D. 1088, 471 F.2d 1397 (1973).

The record is replete with testimony demonstrating that Durst printers have the same primary design, construction and function as prototype enlargers:

An enlarger's primary function is to produce photographic enlargements referred to as "prints"; a Durst printer has the same primary function and its end product is also referred to as a "print." An enlarger and a Durst printer, in addition to performing the same function, are utilized at the same point in the process of producing photographs from negatives. An enlarger enlarges the image on a photographic negative by projecting a light through a photographic lens onto photosensitive positive paper; a printer operates in the same manner and in fact uses the same paper as that used in an enlarger. In a Durst printer, the negative is placed between the light source and the lens, as it is in an enlarger. The lens in a Durst printer and in an enlarger is located between the negative and positive paper. A Durst printer and an enlarger have a negative carrier and also an easel or similar device that holds the photosensitive paper. A Durst printer and an enlarger have a mechanism for holding the elements at an exact designated distance from each other.

In an enlarger, the printing process takes place in the dark; in a Durst printer, the printer process also takes place in the dark, *viz.,* within an enclosed box.[4] If the printing process in either an enlarger or a Durst printer were exposed to light (other than from the machine itself) during operation, the image on the print would be totally exposed and the print ruined. The end product produced by

[4] As previously noted, Durst printers are loaded with photosensitive paper under darkroom conditions.

an enlarger contains a latent image that is not visible until after the print undergoes chemical processing to produce a viewable photograph; the same is true of prints produced by a Durst printer.

Plaintiff seeks to differentiate the imports from enlargers, for Customs classification purposes, on the basis of what essentially amounts to a trade-off between the automated and relatively high-speed printing characteristics of the imports[5] and the flexibility characteristic of traditional enlargers in controlling and manipulating the appearance of the prints, *e.g.* dodging, burning in and cropping.[6] On the basis of their *primary* design, construction and function, however, the imports are nothing more or less than automated high-speed photographic enlargers (Tr. 129, 302), as claimed by defendant. The facts that a traditional or prototype hand-operated enlarger is not used for high production printing, has controls to move the head and bellows, uses a blended light in a single exposure for each print rather than a triple exposure utilizing different colored lights, is used under darkroom conditions, requires a skilled operator and may produce special lighting effects, do not exclude the imports from the common meaning of the term "enlarger" (Tr. 324–25).

The further fact that Durst printer have a built-in paper transport ("roll easel")[7] does not make them more than enlargers since enlargers, by definition, customarily posses an easel or similar device for holding or carrying the photosensitive paper (Tr. 130). *See McGraw-Hill Encyclopedia of Science & Technology, supra.* Plainly, the *built-in* easel of the Durst printer is an integral part of the machine (Tr. 229), and is subordinate and incidental to its function of producing enlargements or prints. The court is far from persuaded that the built-in easel of Durst printers makes them combination articles, as contended by plaintiff, or that the easel gives the printers a use that is not possessed by enlargers. *Cf. Simon Omega, Inc.* v. *United States,* 83 Cust. Ct. 14, C.D. 4815 (1979) (phototypesetting machines capable of photographic enlargement incidental to their typesetting use, held more than simply "enlargers" within the purview of item 722.18, TSUS).

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[5] The speed of the subject printers ranges from approximately 200 to 500 prints per hour (Tr. 30).

[6] "Dodging" is a technique whereby light is "held back" from a certain portion of a print during exposure, while the remainder of the print is being exposed (Tr. 147). "Burning in" is a technique whereby light is concentrated on a particular portion of a print while being "held back" from the rest of the print. Both dodging and burning in are specialized methods of manipulating the appearance of the final print (Tr. 148).

"Cropping" is a technique whereby a print is overmagnified so that a print smaller than the overmagnification can be produced. It is a method of eliminating undesired portions of the original print (Tr. 100–01). The record shows that cropping can be accomplished with some Durst printers, *viz.* the M 6/12 automatic cropping printer (Tr. 22–23) and ACS ¶8 MK2 cropping printer (Tr. 24), which is the high speed version of the Durst Miniprinter (Tr. 25). As in the case of a prototype enlarger, these Durst cropping printers are used for cropping with the aid of an operator (Tr. 92–93).

[7] A "roll easel" is a means of automatically moving the photosensitive paper (Tr. 186–87). It is noted that Durst printers have a built-in easel rather than an accessory easel, which is a separate piece of equipment that can be moved around from one enlarger to another (Tr. 187–88).

Commercial Designation

Plaintiff's main thrust is that in the photographic industry the term enlarger does not encompass "printers". Therefore, the court now considers plaintiff's argument that the tariff provision for photographic enlargers in item 722.18 must be construed in accordance with a "commercial designation"—a special interpretation commonly placed upon it by the particular industry involved—rather than common meaning.

Implicit in plaintiff's reliance upon the doctrine of "commercial designation" is the premise that the trade understanding of the tariff term in issue differs from its common meaning. Stated otherwise, the doctrine has no application where the commercial and common meanings are the same. *Stephen Rug Mills* v. *United States,* 32 CCPA 110, C.A.D. 293 (1944); *Draeger Shipping Co.* v. *United States,* 15 Ct. Cust. Appls. 190, T.D. 42234 (1927). Hence, as pointed out in *Excelsior Import Associates, Inc.* v. *United States,* 66 CCPA 1, 2, C A.D. 1212, 583 F.2d 513, 514, (1978):

> * * * The well-established rule respecting trade sense is that "before the plain understanding of a term can be deviated from it must be shown by plenary proof to have a different import in trade and commerce." *United States* v. *Wells Fargo & Co.,* 1 Ct. Cust. Appls. 158, 161, T.D. 31211 (1911). The Government relied on the plain understanding of the term "ornamented" articles. Thus, appellant had the burden of proving that "ornamented" textile articles, as used in the TSUS, had a *commercial designation or trade sense different from the common meaning or plain understanding of that phrase* * * *. [Emphasis added.]

In *Wells Fargo,* cited in *Excelsior,* the court further expounded upon commercial designation (1 Ct. Cust. Appls. at 161-62):

> It is a rule of statutory interpretation, confined not alone to the customs laws, but running through the universal scope of law, the "words and phrases are assumed to be used in their natural signification" and shall be so construed, the sole exception in customs adjudication being that commercial designation shall obtain over the common and accepted understanding of words where such is duly proven * * *
>
> * * * * * * *

The legitimate corollary of this often-pronounced rule of interpretation is that no meaning shall be given a word or phrase used in customs laws other than its ordinary or accepted meaning *except upon plenary proof that this extraordinary meaning is fully and completely understood and accepted throughout the United States by all of those dealing wholesale in that class of goods.*

> The rule is based upon the sound principle that customs laws are drawn in view of the lay understanding (first) of the trade subject thereto, and (secondly) for the information of merchants and dealers who are not lawyers, and perchance may

> not be skilled in the finesse of the English language and who, with a common lay understanding, will be completely informed by the plain words of the statute as drawn by Congress what duties are levied and what penalties they may expect for a violation of the law. [Emphasis added.]

While it is basic that tariff terms presumably carry the meaning given them in trade and commerce (*Ameliotex, Inc.* v. *United States,* 65 CCPA 22, C.A.D. 1200, 565 F.2d 674 (1977); *Esco Manufacturing Co., aka J. Hofert Co.* v. *United States,* 63 CCPA 71, C.A.D. 1167, 530 F.2d 949 (1976)), it is also well settled by a long line of decisions that the language of commerce is presumptively that language in common use. See *e.g., Rosenblad Corp.* v. *United States,* 49 CCPA 81, C.A.D. 800 (1962); *United States* v. *C.J. Tower & Sons of Buffalo, N.Y.,* 48 CCPA 87, C.A.D. 770 (1961); *Floral Arts Studio* v. *United States,* 46 CCPA 21, C.A.D. 690 (1958); *United States* v. *The Specialty House, Inc.,* 42 CCPA 136, C.A.D. 585 (1955); *United States* v. *E. Dillingham, Inc.,* 41 CCPA 221, C.A.D. 555 (1954); *C.J. Tower & Sons* v. United States, 41 CCPA 195, C.A.C. 550 (1954); *Hummel Chemical Co.* v. *United States,* 29 CCPA 178, C.A.D. 189 (1941); and *United States* v. *M.J. Brandenstein & Co.,* 17 CCPA 480, T.D. 43941 (1930).

Since plaintiff maintains that a special commercial meaning of the term "enlarger" excludes printers, plaintiff necessarily assumed the burden of proof on that issue. *United States* v. *Simon Saw & Steel Co.,* 51 CCPA 33, 38 C.A.D. 834 (1964); *The Specialty House, Inc.,* 42 CCPA at 141. Proof of commercial designation is a question of fact to be established in each case. *Tower & Sons* v. *United States,* 11 Ct. Cust. Appls. 261, T.D. 39080 (1922); *Florsheim Shoe Co., Division of Interco, Inc.* v. *United States,* 71 Cust. Ct. 187, C.D. 4495 (1973); *Daniel Green Shoe Co.* v. *United States (Transworld Shoe Corp., Party in Interest),* 58 Cust. Ct. 7, C.D. 2868, 262 F. Supp. 375 (1967). Commercial designation requires proof of the meaning of a term in the trade at the time of the enactment of the statute. *R.J. Saunders & Co., Inc.* v. *United States,* 49 CCPA 87, 89, C.A.D. 801 (1962); *The Hy-Glow Co.* v. *United States,* 58 Cust. Ct. 481, 486, C.D. 3023 (1967).

Consequently, plaintiff had the burden of establishing that, as used in the photographic industry at the time of the enactment of the Tariff Schedules, the term "enlarger" had a meaning which was general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country). *Moscahlades Bros., Inc.* v. *United States,* 42 CCPA 78, 82, C.A.D. 575 (1954); *United States* v. *M. & D. Miller, Inc.,* 41 CCPA 226, 235, C.A.D. 556 (1954); *Nylos Trading Co.* v. *United States* 37 CCPA 71, 73, C.A.D. 422 (1949); *Stephen Rug Mills,* 32 CCPA at 116. Thus, the doctrine of commercial designation "was intended to apply to cases where the trade designation is so universal and well understood that the Congress, and all the trade, are supposed to have been

fully acquainted with the practice at the time the law was enacted". *Jas. Akeroyd & Co.* v. *United States*, 15 Ct. Cust. Appls. 440, 443, T.D. 42641 (1928). *See also United States* v. *Fung Chong Co.*, 34 CCPA 40, 42, C.A.D. 342 (1946); *Heads & Threads, Division of MSL Industries, Inc.* v. *United States*, 60 Cust. Ct. 308, C.D. 3374, 282 F. Supp. 484 (1968).

After careful review of the evidence of record and the legal principles applicable to commercial designation, the court finds that plaintiff failed to adduce any general, definitive and uniform trade understanding for the term "enlarger" that is at variance with the common meaning of the term.

In support of its argument that the imports are not enlargers as that term is commercially understood, plaintiff asserts that they are not called "enlargers" in the photographic trade. But on that score, it should first be pointed out that in plaintiff's own advertising literature and instruction manuals the imports are referred to as "enlarging printers" (plaintiff's exhibits 3 and 7 and defendant's exhibit B, C and D), and they are promoted in the trade as designed to produce "enlargements" or "high quality enlargements" (plaintiff's exhibit 2 and defendant's exhibits A, B and H). Moreover, Durst printers, while not "called" enlargers are "considered" by the professional photographic industry to be enlargers (Tr. 82-83). In any event, even though merchandise is commercially known by a specific name (*viz.*, "printers"), which name differs from a generic tariff description (*viz.*, "enlargers"), is not sufficient to exclude the merchandise from classification under the later designation. *See S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 82 Cust. Ct. 197, 210, C.D. 4802 (1979), and cases cited; *Heads & Threads, supra.*

Plaintiff's Claim Under Item 722.94

Having concluded that the imports are described by the provision in item 722.18 for enlargers, under which they were classified by Customs, the court must consider whether the imports are also described by the provision claimed by plaintiff, *viz.*, item 722.94 covering photofinishing equipment.

Plaintiff's position if that the printers are described by item 722.94 because they are used as photofinishing equipment. The record substantiates that contention. Defendant, however, urges a highly restrictive interpretation of the provision for photofinishing equipment. According to defendant, the printers are not used as photofinishing equipment because the end product of the printer is a latent image contained on unprocessed photographic paper, which must undergo a chemical "finishing" process. This latter process, defendant insists, is photofinishing, and only the devices used to accomplish it are classifiable as photofinishing equipment. Stated otherwise, defendant's position is that only articles or devices which make the latent image visible, or are used in devices

that make the latent image visible, qualify for tariff classification as photofinishing equipment.

The tariff provision for photofinishing equipment is obviously a use provision. Indeed, the record establishes that the production of an enlarged latent image on photosensitive paper from a negative, which is the basic function of enlargers (including Durst printers), is essentially the initial step in "finishing" a photograph. Since this initial step is part of the photofinishing process, the printers by use are photofinishing equipment, as described in item 722.94. Defendant's interpretation, which limits the provision for photofinishing equipment to only those articles involved in the chemical "finishing" process, is unduly restrictive. This is confirmed in 3 *Summaries of Trade and Tariff Information* (1968), Schedule 7, p. 45,[8] wherein the United States Tariff Commission stated:

> Item 722.94 covers miscellaneous photofinishing equipment ranging from small print tongs (for handling prints) and film clips, to a complete film-processing machine.

Relative Specificity

Defendant posits that even assuming Durst printers fall within the provision for photofinishing equipment, they are nevertheless precluded from classification under item 722.94 by the doctrine of relative specificity. The court agrees.

General Interpretative Rule 10(c), TSUS, provides that an imported article which is described in two or more provisions of the tariff schedules is classifiable in the provision that most specifically describes it. This rule has been interpreted to mean that merchandise is classifiable under the tariff provision which is more restrictive and more difficult to satisfy. *Ozen Sound Devices, supra; Arthur J. Humphreys* v. *United States*, 56 CCPA 67, C.A.D. 956, 407 F.2d 417 (1969); *United States* v. *Simon Saw & Steel Co., supra.*

When the competing provisions are an *eo nomine* provision, such as item 722.18 for enlargers, and a use provision with a "not specially provided for" clause, such as item 722.94, the *eo nomine* provision prevails under Rule 10(c). In *Besler,* the Appellate Court stated (64 CCPA at 125):

> Appellees' claimed classification under item 722.94, TSUS, is merely a "not specially provided for" provision for all equipment which is specially designed for still picture photofinishing. It is not a specific *eo nomine* provision, as is the camera provision of item 722.16, TSUS. Absent a clearly shown contrary legislative intent, which is not present in the case at bar, a "not specially provided for" clause in a use provision ex-

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[8] The *Summaries of Trade and Tariff Information* have been frequently referred to as an aid in determining the scope of tariff provisions. *See e.g.: Pistorino & Co., Inc.* v. *United States*, 66 CCPA 95, C.A.D. 1227, 599 F.2d 444 (1979); *American Bristle & Hair Drawing Co. et al* v. *United States*, 59 CCPA 104, C.A.D. 1048, 458 F.2d 524 (1972); *Tanross Supply Co., Inc.* v. *United States* 58 CCPA 26, 31, C.A.D. 1000, 433 F.2d 1332 91970). See also *Lyons Export & Import, Inc.* v. *United States*, 59 CCPA 142, 144, C.A.D. 1056, 461 F.2d 830 (1972); *The Englishtown Corporation* v. *United States*, 64 CCPA 84, C.A.D. 1187, 553 F.2d 1258 (1977).

cludes articles enumerated elsewhere by a description or *eo nomine* designation (citations omitted).

Here, plaintiff has not shown a contrary legislative intent to the application of the doctrine of relative specificity. Therefore, pursuant to Rule 10(c), the court holds that the Durst printers are more specifically provided for under the *eo nomine* provision for enlargers in item 722.18, TSUS, than under the "basket" provision for photofinishing equipment in item 722.94, TSUS.

CONCLUSION

For the foregoing reasons, Customs' classification of the Durst printers as "enlargers" under item 722.18, TSUS, is sustained, and this action is dismissed.[9]

Judgment will be entered accordingly.

(Slip Op. 86-36)

HUFFY CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND TAIWAN TRANSPORTATION VEHICLE MANUFACTURERS ASSOCIATION, DEFENDANT-INTERVENOR

Consolidated Court No. 83-8-01180

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Plaintiffs' motion for judgment upon the agency record denied.]

(Decided March 27, 1986)

Collier, Shannon, Rill & Scott (Michael R. Kershow and *Lauren R. Howard* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Velta A. Melnbrencis* on the motion) for the defendant.

Plaia & Schaumberg, Chartered (Herbert C. Shelley, Joel D. Kaufman, and *George W. Thompson* on the motion) for the defendant-intervenor.

CARMAN, *Judge:* Before the Court is plaintiffs' Rule 56.1 motion for judgment upon the agency record challenging the final determination of the United States Department of Commerce, International Trade Administration (ITA) of sales at less than fair value in *Bicycles from Taiwan,* 48 Fed. Reg. 31,688 (1983). Defendant opposes the motion, as does defendant-intervenor Taiwan Transportation Vehicle Manufacturers Association. All parties have submitted comprehensive briefs and the record is quite extensive.

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[9] While in view of the disposition of this case, it is unnecessary to decide the merits of defendant's proposed alternative classification under the provision for cameras in item 722.16, TSUS, the record shows that the printers fall within *Webster's* broad generic definition of "camera" relied upon by the Appellate Court in *Besler* (Tr. 123, 226-27, 253, 272), which held that the *eo nomine* provision for cameras is more specific than the provision for photofinishing equipment in item 722.94. As with the term "enlarger", plaintiff failed to prove a general, definite and uniform commercial designation for the term "camera" that differs from the common meaning of such term.

The ITA investigated sixteen Taiwanese bicycle manufacturers and found that eleven of them either had no sales of *de minimis* sales at less than fair value. These eleven firms were thus excluded from the ITA's final determination. Plaintiffs argue that these eleven should not have been excluded, and that dumping margins should have been higher as to the remaining five. Plaintiffs claim that the ITA erred in four areas of its determination. Plaintiffis argue that: (1) the ITA improperly adjusted the United States price by adding a 4.71 percent import duty rebate; (2) the ITA improperly adjusted the United States price by adding a 4 percent harbor dues rebate; (3) the ITA should have conducted an investigation of below-cost sales in the home market; and (4) the ITA should have commenced a countervailing duty investigation based on information uncovered in the course of the antidumping investigation. For reasons given below, the agency determination is sustained.

I. *Adjustment to United States Price for 4.71 Percent Import Duty Rebate*

The Tariff Act of 1930 (Act), as amended, requires the assessment of an antidumping duty whenever it is determined that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and such sales injure or threaten injury to an industry in the United States. 19 U.S.C. § 1673 (1982). To determine whether merchandise is sold in the United States at less than fair value, the statute calls for a comparison between the price of the merchandise in the United States and its price in a foreign market (either the home market or a third country, or a constructed price). The statute provides that a duty be assessed based upon that comparison:

> [T]here shall be imposed upon such merchandise an antidumping duty * * * in an amount equal to the amount by which the foreign market value exceeds the United States price * * *.

19 U.S.C. § 1673.

The comparison of the two prices must take into account different circumstances of sale involved in the United States and the foreign market. The Act provides for adjustments to the prices to reflect these differences, ensuring that the final comparison is as free as possible from costs or benefits specific to each market.

Section 772 of the Act, Pub. L. No. 96-39, Title 1, § 101, 93 Stat. 181 (1979) (codified at 19 U.S.C. § 1677a (1982)), describes the method by which the ITA is to arrive at the United States price. The section first describes United States price as "the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate." 19 U.S.C. § 1677a(a). The section then provides for certain adjustments to the United States price. Relevant here is the adjustment for import duty rebates:

> The purchase price and the exporter's sale price shall be adjusted by being—
>
> (1) increased by—
>
> * * * * * * *
>
> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

19 U.S.C. § 1677a(d)(1)(B). Congress allowed this adjustment because purchasers in the home market presumably must pay the passed on cost of import duties when they buy the merchandise. If the duties are rebated when the merchandise is exported, presumably no similar cost is passed on to purchasers in the United States. By adding the amount of the rebate to United States price this adjustment accommodates the difference in cost to the two different purchasers.

In this case the ITA allowed an upward adjustment in United States price based upon an import duty rebate granted by Taiwan to bicycle producers. The import duty rebate was 4.71 percent of the "domestic value added;" that is, "the difference between the f.o.b. value of the finished bicycle and the c.i.f. value of the components imported directly by the bicycle manufacturers themselves." 48 Fed. Reg. at 31,689. The rebate's purpose was to refund, upon exportation, the import duties that domestic parts manufacturers paid on imported raw materials and passed on to bicycle manufacturers. To arrive at the 4.71 percent rebate, the Taiwanese authority first analyzed the amount of specific imported raw materials in an average bicycle. Referring to the duty rate record for those materials, it calculated the duty paid by Taiwanese parts producers, and presumably passed on to bicycle manufacturers, on an average bicycle. The Taiwanese authority then compared the amount of duty paid on the raw materials in an average bicycle to the domestic value of an average bicycle to arrive at the 4.71 percent rebate amount.

The Taiwanese program is essentially an allocation scheme in which the cost of import duties on raw materials is allocated to each bicycle, based upon that bicycle's domestic content. An allocation of import duties may give rise to an adjustment to United States priced provided import duties are actually paid and rebated, and there is a sufficient link between the cost to the manufacturer (import duties paid) and the claimed adjustment (rebate granted).

This court first established the two-part requirement of actual cost to the manufacturer and sufficient link between that cost and the claimed adjustment in *F.W. Myers & Co.* v. *United States,* 72 Cust. Ct. 219, C.D. 4544, 376 F. Supp. 860 (1974). In that case, this court sustained the ITA's denial of an adjustment to foreign market value for overhead costs under a provision for adjustments for "differences in circumstances of sale." 19 U.S.C. § 161(b)(2)

(1976) (repealed). The manufacturer sought an adjustment for overhead expenses relating to sales in the home market but not the United States market. The court first noted that the manufacturer could not lump overhead costs together with selling expenses in "a stewpot labeled 'differences in circumstances of sale.'" 72 Cust. Ct. at 233, 376 F. Supp. at 872. Instead, the court ruled, a manufacturer must show "that each claimed expense had a reasonably direct effect upon the sales in the market under consideration." *Id.*

The court found further that even had the manufacturers established a link between the alleged costs and the home market sales, it had failed to prove that the costs were actually incurred. The court stated that:

> a basic concept of all value determinations by the court is that they must be based upon proof of *actual* costs or prices—*not* estimates, approximations or averages. Thus, use of percentages in calculating expenses or profits will be rejected if they are not based upon *actual amounts* of expenses incurred or profits added.

Id. at 234, 376 F. Supp. at 873 (citations omitted).

This court again considered an adjustment to foreign market value for differences in circumstances of sale in *Brother Industries, Ltd.* v. *United States,* 3 CIT 125, 540 F. Supp. 1341 (1982), *aff'd sub nom. Smith-Corona Group* v. *United States,* 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied,* 104 S. Ct. 1274 (1984). The court there upheld an adjustment based upon an incentive rebate that the typewriter manufacturers gave to retailers in the foreign market but not the United States market. The manufacturers based the rebate amounts on total sales, which included merchandise other than the typewriters under investigation, and various models of the typewriters under investigation. Based on the percentage of sales of typewriters under investigation to total sales, and the percentage of each model to the total sales of typewriters, the ITA allocated a cost to the manufacturers for each typewriter sold. The court approved the ITA's method of allocating costs to arrive at the adjustment, stating:

> *F.W. Myers* teaching does not preclude the administering authority from allocating or apportioning *actual* costs among the various items to which they are attributable.

3 CIT at 149, 540 F. Supp. at 1363.

These cases involved adjustments to foreign market value for differences in circumstances of sale.[1] In *Roquette Freres* v. *United*

[1] 19 U.S.C. § 1677b(a)(4)(B) provides that:

> In determining foreign market value, if it is established * * * that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> * * * * * * *
>
> (B) other differences in circumstances of sales
>
> * * * * * * *
>
> then due allowance shall be made therefor.

States, 7 CIT 88, 583 F. Supp. 599 (1984), this court applied the same rule to a case specifically involving an adjustment to United States price based on import duty rebates. In that case, the European Economic Community (EEC) levied a duty on corn imports, and granted an "export restitution payment" on exported products containing corn. The ITA determined that this payment was not allowable as an adjustment under 19 U.S.C. § 1677a(d)(1)(B):

> The "import levy" and the "export restitution payments" are not directly linked to, or dependent upon, one another within the context of EC regulations. The exporters may receive these payments regardless o[f] whether or not they imported corn and paid the "import levy."

Sorbitol From France, 47 Fed. Reg. 6,459, 6,460 (1982). This court affirmed the ITA's determination in *Roquette Freres*, 7 CIT 88, 583 F. Supp. 599 (1984), agreeing that the rebates were not directly related to the firm's payment of import duties.

> Whenever a French manufacturer exports a product containing corn, the aforecited EC regulation provides for the payment of an export refund regardless of (1) whether or not the firm used imported corn, and (2) whether or not the firm paid any import levies.

7 CIT at 91, 583 F. Supp. at 602.

The court thus applied the rule for adjustments based on differences in circumstances of sale to adjustments for import duty rebates. As applied in this context, the rule is that the import duty must actually have been paid and rebated (or waived), and there must be a sufficient link between the payment and the rebate.

The ITA determined that both these conditions were satisfied by the Taiwanese rebate program. *See* 48 Fed. Reg. at 31,690. Although the Court will defer to the agency's expertise in these technical areas, the Court must still carefully review the agency's determination, under the appropriate standard, to ensure that it conforms to statutory requirements. *Rhone-Poulenc, S.A.* v. *United States*, 8 CIT 47, 592 F. Supp. 1318, 1334 (1984). This Court will uphold the ITA's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Plaintiffs contend that the ITA's final determination, based in part on an adjustment to United States price for import duty rebates, is unsupported by substantial evidence because there is no evidence in the record that domestic parts producers paid any import duties on raw materials, nor is there evidence that the 4.71 percent rebate is linked to actual payment of import duties.

The only evidence in the record that supports the ITA's conclusion that Taiwanese bicycle parts producers actually paid import duties and that the payment of those duties is directly linked to the 4.71 percent import duty rebate granted bicycle manufacturers

is the Taiwanese authority's general description of how it arrived at the rebate amount. *See* Record at 946–48. There is no further evidence showing actual payment by parts producers or import duties or amount of raw materials actually imported, nor is there further evidence showing the quantity of raw materials actually contained in an average bicycle. Thus the Court must determine whether the assertion of the Taiwanese authority that import duties were actually paid and that there is a direct link between their payment and the 4.71 percent rebate is sufficient to support the ITA's finding that those facts existed.

The "substantial evidence" standard of review has been well explicated by this court in prior decisions. *See, e.g., Carlisle Tire and Rubber Co.* v. *United States*, 9 CIT ——, 622 F. Supp. 1071 (1985). It is "essentially a limited review of the agency determination, insuring that agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole." *Alhambra Foundry* v. *United States*, Slip Op. 85–130, at 6 (December 30, 1985). While the Court might draw a different conclusion from the evidence in the record, the applicable standard of review does not permit the Court to substitute its judgment for that of the agency. The record contains a general description of the Taiwanese rebate program, provided by the Taiwanese authority. The ITA accepted this as evidence that import duties actually were paid by domestic parts producers and accurately allocated to export bicycles. The Court finds that the Taiwanese authority's description of the plan was sufficient evidence from which the ITA could reasonably draw this conclusion.

Plaintiffs further contend that the 4.71 percent import duty rebate is actually a countervailable subsidy and the Congress did not intend dumping margins to be decreased by adjustments based upon countervailable subsidies.[2] Plaintiffs note that Congress intended the antidumping and countervailing duty statutes to work together; for example, the antidumping statute provides an adjustment to United States price in the form of an addition for countervailing duties imposed. *See* 19 U.S.C. § 1677a(d)(1)(D) (1982). It would defeat the purpose of the countervailing duty law, plaintiffs argue, if we allow an addition to the United States price for a rebate program that constitutes a countervailable subsidy.

To support their argument, plaintiffs point out that 19 U.S.C. § 1677a(d)(1)(C) provides an adjustment for tax rebates only if the tax is one directly upon the merchandise, that is, a so-called "indirect" tax. The Court of Customs and Patent Appeals found that relief from "indirect" taxes does not amount to a countervailable subsidy, while relief from "direct" taxes—those imposed on the producer rather than the merchandise—does amount to a countervailable subsidy. *American Express Co.* v. *United States*, 60 CCPA 86,

[2] Plaintiffs make the same argument with regard to the harbor dues rebate.

C.A.D. 1087, 472 F.2d 1050 (1973). The legislative history of 19 U.S.C. § 1677a(d)(1)(C) indicates that Congress consciously intended that tax remissions that constituted countervailable subsidies should not be used to reduce dumping margins. *See, e.g.,* Hearings on H.R. 6767 Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. 135 (1973) (White House report).

Plaintiffs reason that if Congress did not intend such direct tax rebates to reduce dumping margins, it also must not have intended to reduce dumping margins by allowing an adjustment for import duty rebates that constitute countervailable subsidies. This reasoning is not persuasive. First, the distinction between direct and indirect taxes is more easily made than the distinction between an import duty rebate that is or is not a countervailable subsidy. More critically, however, Congress did make the distinction between subsidy and non-subsidy tax rebates is section 1677a(d)(1)(C) but made no such distinction regarding import duty rebates in section 1677a(d)(1)(B). The conclusion that must be drawn is *not* that Congress intended the same restriction to apply in the latter section, but rather that it *did not intend* it to apply.

Moreover, there are further reasons the court and the ITA should refrain from making a subsidy determination in the context of a dumping investigation. The determination of whether a countervailable subsidy exists is a complex one and Congress has provided a separate set of guidelines for the inquiry. In a dumping investigation the ITA is not seeking the same information or asking the same questions it would in a countervailing duty investigation. For this Court to disallow an adjustment to third country price because the import duty rebate is allegedly a countervailable subsidy would be to bypass the countervailing duty statute and essentially penalize the Taiwanese exporters without allowing them an opportunity at the agency level to have a full hearing on whether the rebates are a subsidy.[3]

II. *Harbor Dues Rebate*

Taiwan assesses a four percent *ad valorem* amount on all dutiable imports, termed "harbor dues." These dues are assessed on bicycle parts directly imported by bicycle manufacturers. Upon the export of completed bicycles containing imported parts, these dues are rebated. The ITA allowed an adjustment to United States price for this rebate under 19 U.S.C. § 1677a(d)(1)(B).

Plaintiffs contend that the ITA should not have added the four percent harbor dues rebate to the United States price. Plaintiffs argue first that the harbor dues represent a tax and not an import duty and that therefore the ITA should have conducted an investigation as required in section 1677a(d)(1)(C).[4] That section allows an

[3] Plaintiffs also contend that while no adjustment should be made to United States price based on the import duty rebate, such an adjustment should be made to third country price. Because the Court finds that the adjustment to United States price was proper, it need not address this contention.

[4] 19 U.S.C. § 1677a(d)(1)(C) (1982), provides:

Continued

adjustment to United States price for rebates of indirect taxes, but only if the ITA finds that the cost of the tax is actually passed on in the home market.

In its determination, the ITA stated:

> Whether the [harbor dues] assessment is considered a "tax" or "duty" is immaterial to the outcome of this investigation. If we treat the assessment as a tax, we would add the rebate to the United States price only to the extent that the tax is reflected in home market price. In this case, harbor dues would be included in the home market price.

48 Fed. Reg. at 31,690. The government continues this theme in its brief, in which it suggests that tax assessments are always passed on in the home market price and therefore their rebate always constitutes a proper adjustment to United States price. If this were true, then the statute's requirement that these rebates create an adjustment only to the extent the cost of the tax is passed on would be meaningless. Statutes should be interpreted in such a way that their parts are harmonized and no part is rendered meaningless. *See Beaver Products Co.* v. *United States*, 17 CCPA 434, 437, T.D. 43878 (1930). Congress included a special requirement in section 1677a(d)(1)(C) that it did not put in section 1677a(d)(1)(B). We must conclude that Congress recognized that not all taxes are passed on to the home market, and therefore required some showing that such a tax is passed on before its rebate could be the source of an adjustment.[5] To support an adjustment for a tax rebate there must be substantial evidence in the record to support the conclusion that the tax was passed on to the home market.

It is therefore material whether the harbor dues assessment in this case is a tax or an import duty. Plaintiffs contend that it is a tax because its ultimate purpose is to finance harbor services, which the government provides. In its determination, the ITA found that the ultimate purpose for which the assessments were used was not relevant to the issue of whether they were taxes or import duties. The ITA found that the dues assessment was an import duty because (1) it was "assessed in conjunction with other duties and administered in the same manner" and (2) it was not levied on duty-free merchandise.

The purchase price and the exporter's sales price shall be adjusted by being—
(1) increased by—

* * * * * * *

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation * * *

[5] The House report on the amendment creating the adjustment supports this conclusion:

[A]n adjustment for such [indirect] tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased.

H.R. Rep. No. 571, 93d Cong., 1st Sess. 69 (1973).

Generally, this court will defer to agency findings in areas where the agency has a particular expertise. In this case, the ITA determined that the harbor dues assessment was an import duty rather than a tax. The ITA provided objective criteria to support its determination. Such objective criteria are important in developing the law and providing guidance to future petitioners.[6] The Court finds that the ITA's determination that the harbor dues are an import duty is supported by substantial evidence on the record. Congress apparently did not intend rebates that are countervailable subsidies to reduce dumping margins; nevertheless, under section 1677a(d)(1)(B) an adjustment must be allowed unless a countervailing duty assessment is made under the appropriate statute and procedures.

III. *Failure To Conduct an Investigation of Below Cost Sales in the Home Market.*

The ITA declined to conduct an investigation of below cost sales in the home market because:

> Petitioners have not provided a credible basis for suspecting that substantial quantities of bicycles sold in the home market or to third countries have been made at prices which are less than the cost of production.

48 Fed. Reg. at 31,691.[7] This determination is not in accordance with the statutory requirement and places a higher burden upon the petitioner than the statute mandates. Section 773(b) of the Tariff Act of 1930 provides:

> *Whenever the administering authority has reasonable grounds to believe or suspect that sales* in the home market of the country of exportation, or, as appropriate, to countries other than the United States, *have been made* at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production—
>
> (1) have been made over an extended period of time and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,
>
> such sales shall be disregarded in the determination of foreign market value.

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[6] In a previous determination, the ITA concluded that this same assessment was a tax rather than an import duty and applied section 1677a(d)(1)(C). *Motorcycle Batteries from Taiwan*, 47 Fed. Reg. 9,264, 9,265 (1982). That determination is not now before the Court, nor does it necessarily establish a settled law with respect to this particular assessment. The Court notes, however, the importance of consistency in ITA determinations.

[7] Defendant in its brief also maintains that the petitioner's request for the investigation was untimely, although the agency made no such finding in its determination. Because of the Court's disposition of this issue, it does not decide whether a request for such an investigation is untimely if it is made, as here, within 62 days of the date on which the final determination is statutorily due. The Court notes, however, that in *Connors Steel Co. v. United States*, 2 CIT 242, 527 F. Supp. 350 (1981), *modified*, 3 CIT 79, 566 F. Supp. 1521 (1982), this court found that 51 days were sufficient.

19 U.S.C. § 1677b(b) (emphasis added). The statute requires only a showing that sales have been made at below cost, not substantial sales. It is for the agency to investigate and determine whether substantial sales were made.

In reviewing the record, however, the Court concludes that even if the appropriate statutory standard is applied, plaintiffs failed to present to the ITA sufficient evidence to create reasonable grounds to believe or suspect that sales were being made at below cost in the home market. Plaintiffs alleged that certain of the manufacturers sold bicycles in the United States at a significantly higher price than in the home market. Plaintiffs further alleged that a comparison of this information with the overall operating performance of each manufacturer indicates that the manufacturers would have had to sell the bicycles in the foreign market at less than the cost of production. Essentially, plaintiffs' argument is that when financial statements reveal an operating loss, the conclusion must be that merchandise is being sold at less than the cost of production. Operating losses, however, may be caused by a variety of factors which do not relate to that year's cost of production. For example, bad management or large capital investment that is not amortized could result in the showing of a loss or very small profit. Operating losses are not necessarily tied to actual sales, and may be realized if there are no sales at all. Moreover, as the ITA noted in its determination, "financial statements often reflect accounting adjustments which can distort operating performance significantly." 47 Fed. Reg. at 31,691.

IV. *Failure To Conduct a Countervailing Duty Investigation*

Plaintiff contends that during the course of its antidumping investigation, the ITA uncovered evidence of the existence of countervailable subsidies. Plaintiff argues that 19 U.S.C. § 1677d (1982) requires the ITA to investigate the potential subsidies in such a case. In its brief, however, plaintiff relies on only a portion of the statute. The statute provides in full:

> If, in the course of an investigation under this subtitle, the administering authority discovers a practice which appears to be a subsidy, *but was not included in the matters alleged in a countervailing duty petition*, then the administering authority—
>
> (1) shall include the practice in the investigation if it appears to be a subsidy with respect to the merchandise which is the subject of the investigation, or
>
> (2) shall transfer the information concerning the practice (other than confidential information) to the library maintained under section 1677f(a)(1) of this title, if the practice appears to be a subsidy with respect to any other merchandise.

19 U.S.C. § 1677d (1982) (emphasis added). Read as a whole, the statute appears to contemplate an investigation of one type of sub-

sidy in which the agency uncovers another type of subsidy.[8] The Court therefore finds that the ITA properly rejected plaintiffs' request that it conduct a countervailing duty investigation.

CONCLUSION

The final determination of the ITA regarding bicycles from Taiwan is affirmed because it is supported by substantial evidence in the record and is in accordance with law.

(Slip Op. 86-37)

BRITISH STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS AND ALLEGHENY LUDLUM STEEL CORP., ET AL., DEFENDANTS-INTERVENORS

Court No. 83-7-01032

Before BERNARD NEWMAN, *Senior Judge.*

REVIEW OF INTERNATIONAL TRADE ADMINISTRATION'S RESULTS OF REMAND PROCEEDINGS ON AGENCY RECORD PURSUANT TO RULE 56.1—STAINLESS STEEL PLATE FROM THE UNITED KINGDOM

Plaintiffs challenge the Results of Remand of the Department of Commerce, International Trade Administration (ITA), which determined that the British government's equity infusions into British Steel Corporation in fiscal year (FY) 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i) and therefore constituted countervailable subsidies. According to plaintiffs, ITA's "reasonable investor" criterion for applying the term "commercial considerations" is irrelevant. Additionally, plaintiffs contest the revised valuation methodologies ITA utilized on remand allocating the benefits of the equity infusions over a 15-year period, representing the average useful life of capital assets in domestic integrated steel mills. Plaintiffs contend that in valuing the subsidies ITA should have applied generally accepted accounting principles, which would require that the benefits of the equity infusions be recognized ("expensed") solely in the year of receipt; and that the loan forgiveness must be amortized at the existing fixed interest rate over the remaining term of the loan.

HELD: The court affirms ITA's determination that the British government's equity infusions in FY 1977/78 were made "on terms inconsistent with commercial considerations" predicated on the "reasonable investor" test.

However, the court finds that ITA's revised valuation methodologies are unsupported by substantial evidence and contrary to law because they fail to reflect the commercial and competitive benefit of the subsidies to the recipient, which Congress intended to be the measure of the value of countervailable subsidies. But, the court rejects plaintiffs' contention that the benefits of the equity infusions must be expensed in the year of receipt in accordance with generally accepted accounting principles. The court agrees with plaintiffs' contention respecting the loan forgiveness.

The action is remanded to ITA for reconsideration of its valuation methodologies and recalculation of the benefits of the British government's equity infusions.

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[8] The legislative history of this provision supports this interpretation:

> Under section 775 of the Tariff Act of 1930, as added by section 101 of the bill, if, in the course of a countervailing duty investigation under Title VII of the Tariff Act * * * the administering authority discovers a practice which appears to be a subsidy but was not included in the matters alleged in the countervailing duty petition, then it must include the practice in the ongoing investigation * * *

S. Rep. 249, 96th Cong., 1st Sess. 97, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 483.

[ITA's Results of Remand affirmed in part; remanded in part.]

(Decided March 31, 1986)

Steptoe & Johnson (*Richard O. Cunningham, Charlene Barshefsky, William L. Martin II* and *Neil R. Ellis, Esqs.*, of counsel) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, and *Sheila N. Ziff, Esq.*, for defendants.

Collier, Shannon, Rill & Scott (*David A. Hartquist* and *Paul C. Rosenthal, Esqs.*, of counsel) for defendants-intervenors.

BERNARD NEWMAN, *Senior Judge:*

INTRODUCTION

The central issue presented, having significant international trade implications for foreign governments that make "equity infusions" in state-owned enterprises in poor financial health, is: Under what circumstances are such companies "uncreditworthy" thereby making the government's investments commercially unreasonable and hence countervailable subsidies under 19 U.S.C. § 1677(5)(B)(i). On this vital aspect of the case, the present opinion is a sequel to the court's previous decision, *British Steel Corporation* v. *United States*, 9 CIT ——, Slip Op. 85-26, 605 F. Supp. 286 (March 8, 1985), remanding the action to the United States Department of Commerce, International Trade Administration (ITA) for further proceedings, discussed below. Of transcendent importance in this case are the methodologies used by ITA on remand in valuing the alleged subsidies.

This court's decision of March 8, 1985 sustained ITA's final affirmative countervailing duty determination regarding stainless steel plate from the United Kingdom, 48 Fed. Reg. 19048, April 27, 1983 (Final), finding that the British government's equity investments in British Steel Corporation (BSC) from fiscal year (FY) 1978/79 to FY 1981/82 constituted countervailable subsidies within the meaning of 19 U.S.C. § 1671. However, pursuant to the Government's request (and over plaintiff's opposition), this action was remanded to ITA for: (1) redetermination of whether the equity infusions during FY 1977/78 [1] constituted countervailable subsidies; (2) supplementation of the administrative record with all information obtained and/or utilized by ITA in making its determination relative to the creditworthiness of BSC in FY 1977/78; (3) revaluation and recalculation of the subsidies affected by ITA's new methodologies described in the "Subsidies Appendix" to the Final Affirmative Countervailing Duty Determinations and Countervailing Duty Order in *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina*, 49 Fed. Reg. 18006, 18016 (April 26, 1984) (Final).

On September 9, 1985 ITA transmitted to this court its Results of Remand Proceedings ("Remand Results"), in which ITA deter-

[1] BSC's FY ends on March 31st. Thus, FY 1977/78 encompasses the period April 1, 1977 through March 31, 1978.

mined: (1) equity infusions by the British government in FY 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i), and consequently, constituted countervailable subsidies; and (2) the benefits from the equity infusions during FYs 1977/78 to 1981/82 should, irrespective of the actual use of the funds, be amortized over a fifteen year period, representing the average useful life of renewable physical assets in the domestic steel industry.[2]

Oral argument was heard pursuant to plaintiffs' motion on March 11, 1986; at the conclusion, the court reserved decision.

Presently before the court is plaintiffs' motion under Rule 56.1 for judgment on the agency record in connection with the foregoing Remand Results. Seeking reversal and further remand, plaintiffs contend that the following aspects of ITA's Remand Results are unsupported by substantial evidence and otherwise not in accordance with law: (1) ITA's finding that the British government's equity infusions in BSC during FY 1977/78 were inconsistent with commercial considerations; (2) ITA's fifteen-year allocation period for amortizing the benefits associated with subsidy funds used for certain purposes other than acquisition of long-lived assets; and (3) ITA's methodology for calculating the benefits associated with the British government's loan forgiveness to BSC.

Defendants and intervenors have responded seeking affirmance of the Remand Results.

The Commercial Reasonableness of the British Government's Equity Infusions in BSC in FY 1977/78

Initially, the court addresses ITA's reevaluation of the commercial reasonableness of the British government's equity infusions in BSC in FY 1977/78.

Section 771(5) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5), embraces any subsidy "bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise" including: "[t]he provision of capital, loans or loan guarantees *on terms inconsistent with commercial considerations*" (emphasis added). In Slip Op. 85–26, this court construed the "commercial considerations" test concluding that an investment is consistent with commercial considerations if a reasonable investor could expect a reasonable rate of return on his investment within a reasonable period of time. Slip Op. 85–26 at 16. In its earlier decision, this court reviewed the financial history of BSC and found that for FYs 1978/79 through 1981/82, "given BSC's deteriorating financial condition and precarious situation, no private sector investor expecting a reasonable return on his investment within a reasonable time would have given any consideration whatever to investing in BSC during the period of its restructuring." *Id.* at 16. On remand,

[2] The Remand Results have not been published in the Federal Register.

ITA applied the same "reasonable investor" criterion in determining whether the British government's equity infusions in FY 1977/78—the year at issue in the present review—were "inconsistent with commercial considerations" within the meaning of the statute.

In reevaluating the commercial reasonableness of the equity infusions by the British government during FY 1977/78, ITA reviewed BSC's financial history, commencing with its establishment in 1967. The review covered such fundamental indicia of financial condition as net income of BSC, net income before interest and taxes, cash flow from operations, coverage of interest expenses, return on equity, return on sales and current assets and liabilities.

ITA also considered such additional pertinent factors as the substantial cost of forming BSC, leading to unfavorable financial results for the first few years of the company's existence; the enormous social costs borne by BSC because of the British government's policy decisions, such as keeping high-cost plants open to preserve jobs; BSC's massive losses; the extremely bleak prospects of the company expressed by its own chairman in BSC's 1976–77 annual report; and the dismal outlook for the world steel market in general.

Based on its analysis of the foregoing factors, ITA reached the following conclusion:

> After considering the results for fiscal years 1975–76 and 1976–77 and the outlook for the world steel market in general, a reasonable investor in 1977 would not have considered British Steel with its large losses, poor return on equity, and other signs of structural problems, to be a reasonable commercial investment.

Record on remand, document 1 at 7.

The court finds substantial evidence in the record of the bleak financial condition of BSC in FY 1977/78 and the precariousness of any expectation of future profitability. If ITA's application of the statutory expression "commercial considerations" is reasonable and not in conflict with the expressed intent of Congress, such interpretation is entitled to the traditional deference courts pay to agency interpretation. *Board of Governors, FRS* v. *Dimension Financial Corp.*, —— U.S. ——, 106 S. Ct. 681, 686 (1986); *United States* v. *Riverside Bayview Homes*, —— U.S. ——, 106 S. Ct. 455, 461 (1985); *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U.S. ——, 105 S. Ct. 1102, 1108 (1985); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. ——, 104 S. Ct. 2778, 2881–83 (1984) and *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). *See also American Lamb Company* v. *United States*, 4 CAFC ——, —— F.2d —— (Appeal No. 86–560, decided February 28, 1986); *Smith Corona Group, Consumer Products Division, SCM Corp.* v. *United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1274 (1984); and *Consumer Products*

Division, SCM Corp. v. *Silver Reed America*, 753 F.2d 1033, 1039 (Fed. Cir. 1985). Furthermore, it is a cardinal principle that "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judical proceeding". *Chevron, U.S.A., Inc.*, 104 S. Ct. at 2782 n. 11. *See also Chemical Manufacturers Association*, 105 S. Ct. at 1108; and *Consumer Products Division*, 753 F.2d at 1039.

Plaintiffs argue that ITA's "reasonable investor" test is irrelevant to the commercial reasonableness of the British government's equity infusions and contrary to law. According to plaintiffs, the British government, unlike an outside investor, could not simply abandon BSC and incur no further losses if it decided to close the firm, and therefore the steps the British government took as the sole investor in the corporation were reasonably taken to minimize its prospective losses. In short, plaintiffs contend that the overall operating results and financial ratios of a loss-incurring company are irrelevant to the issue of whether the British government's equity infusions were inconsistent with commercial considerations within the purview of the statute.

The nub of the dispute between the parties concerns the interpretation of the term "commercial considerations"—specifically, whether the statutory indicium of a subsidy prescribed by section 1677(5)(B)(i) permits ITA to assess the British government's equity infusions in BSC in FY 1977/78 from the standpoint of the reasonable outside investor, as claimed by defendants and intervenor. In essence, ITA considered whether a reasonable investor seeking to make a sound investment would have invested in BSC during the period in question given BSC's history, financial status and the outlook for the steel industry in general at that point in time. As stated by ITA (record on remand, document 1 at 23–24):

> When determining whether an equity investment is consistent with commercial considerations, the Department first looks for the value of the stock as determined by the market place. To the extent that a government procures stock at a market price, there is no subsidy. If a government pays a premium price for the shares, its investment is inconsistent with commercial considerations. When a firm's shares are not traded publicly, there is no market-determined price. Therefore, the Department must rely on information available to it that would be available to an investor at the time of the investment as a means of determining the commercial reasonableness of investments in the company.
>
> Such an investor will study the company's financial statements to assess the company's current health and past performance. To get an idea of what events and decisions underlie these financial results, as well as to understand management's views of the company's goals and future prospects, an investor

> will also examine carefully the other information contained in the company's annual reports. Then, to evaluate the company's prospects in a wider context, an investor will consider any available independent studies and forecasts of the industry in general.

In connection with the instant litigation, BSC commissioned an economic analysis by Dr. Joseph W. McAnneny of Economists, Incorporated (record on remand, document 7 (non-confidential version)).[3] Predicated on his analysis, Dr. McAnneny submitted the following arguments concerning ITA's methodology:

First, based on application of ITA's reasonable investor test to six integrated U.S. steel producers with unfavorable operating results in 1981-84, McAnneny would expect to find that none of these companies were able to attract capital. Yet, during the period 1981-84, all the producers raised debt and equity capital in significant amounts.

Second, ITA has created a *per se* rule—that continued investment in a failing company for any reason is inconsistent with commercial considerations—which rule conflicts with observed market behavior where frequently corporations reorganize around their profitable assets, rather than terminate all productive facilities.

Finally, ITA's reasonable investor test focuses primarily on recent and current financial performance to the exclusion of other relevant data, and neglects to consider possible remedies that a firm might take to reposition itself in a market or reduce operating costs and restore profitability.

In view of the foregoing shortcomings of ITA's test, as perceived by McAnneny, he proposes an alternative standard for determining whether investment in a loss-incurring corporation is inconsistent with commercial considerations. Specifically, McAnneny proposes application of two tests:

(1) The corporation should continue to operate (and the investor should continue to cover operating losses) for facilities where revenues exceed the variable costs of production and make some contribution to coverage of fixed expenses. Predicated on this test, plaintiffs maintain that the term "commercial considerations" permits ITA to assess the commercial reasonableness of equity infusions from the standpoint of the interest of the British government and BSC's management in minimizing its losses. Plaintiffs also posit that U.S. investors and lenders "customarily" inject funds in failing companies to minimize their losses, irrespective of any expectation of future profits.

(2) The investor should undertake all new investment schemes (or fund to completion existing investment schemes) where the discounted cash flows from the investment exceed the cost of the in-

[3] J. McAnneny, Calculation of Subsidies Under the Countervailing Duty Law: An Economic Analysis (July 8, 1985).

vestment (*viz.*, the net present value or "NPV" of specific projects or ventures are greater than zero).

Based on the application of the foregoing tests, McAnneny argues that investments by the British government in FY 1977/78 in BSC were consistent with "commercial considerations".

Capital-Raising Experiences of Six U.S. Steel Companies

As underpinning for their argument that BSC was creditworthy in FY 1977/78, plaintiffs heavily rely upon McAnneny's study of the capital-raising experiences of the six largest integrated U.S. steel companies during the three-year period 1982–84. In his study, McAnneny found that the three-year operating results of the six companies were as poor as or worse than those of BSC in the two years prior to FY 1977/78. Despite their unfavorable operating results, McAnneny found that each of the U.S. companies attracted significant amounts of debt and equity capital. Plaintiffs contend that under ITA's test, none of these companies should have been able to attract debt or equity capital, and consequently ITA erroneously determined that for FY 1977/78 investment in BSC was not commercially reasonable.

Defendants challenge the validity of McAnneny's conclusions on the grounds that: (1) he used a different time period, 1982–84, for his comparison of the returns on equity of the United States steel producers with those of BSC in FY 1977/78, thus failing to consider the different economic climate, different market and different investor expectations in the two time periods; (2) market and investor expectations would depend, in part, on the financial history of the domestic companies, as well as the prevailing economic conditions, which were not considered by McAnneny; and (3) McAnneny erroneously assumed that ITA looked only at BSC's performance for the two preceding FYs, 1975/76 and 1976/77, when in fact, ITA considered BSC's financial history for FYs 1973/74 to 1977/78. In short, defendants insist that the fact the U.S. companies raised debt capital in 1982–84 is irrelevant to the question of BSC's ability to obtain private investment in the different market prevailing in 1977–78; and that it is "sheer speculation to assert that, under ITA's test, the domestic companies would not have been considered commercially reasonable investments" (defendant's memorandum at 24).

The court agrees with defendants' position. The capital-raising ability of the United State firms having different financial histories and future prospects than BSC during the economic climate of 1982–84 does not refute ITA's finding that equity infusions by the British government in BSC in FY 1977/78 were inconsistent with commercial considerations.

"Variable Costs" Test

Plaintiffs further proffer McAnneny's "variable costs" test, *viz.*, that although a firm may show an overall loss, it should continue to operate so long as it can earn at least enough to cover its variable costs. The theory is that having covered variable costs, additional revenue can defray some of the fixed costs (costs that continue to exist even if production ceases, like rent). If a firm whose revenues did exceed its variable costs were to cease production, it would be foregoing revenue that could have helped to defray fixed costs. Accordingly, even though a firm may not be earning enough to cover its total costs (fixed plus variable, it would be economically rational to continue operations so that the overall loss would be minimized by the additional revenues. McAnneny maintains that equity funds used to help cover BSC's operating losses are not subsidies if BSC was covering its variable costs at the time.

As aptly pointed out by defendants, the variable cost test may be a useful analytical tool for the owner-manager as a means of deciding whether (and for how long) to continue operating a loss-incurring company, but the test is inapposite to investment decisions by private investors. Simply put, it would be unrealistic to expect a private sector investor to supply operating funds to a loss-incurring firm merely to permit the firm to continue operations to minimize its losses. Thus, while it may be perfectly rational for an owner to sustain loss-minimizing operations, it would not be commercially reasonable for an investor to provide funds for that purpose without adequate assurance of the future profitability of the enterprise and a return on his investment within a reasonable time. The record supports no such assurances for BSC in FY 1977/78. Under these circumstances, ITA properly rejected application of the variable costs test.

The court stresses here that equity infusions in loss-incurring companies do not *per se* confer a subsidy, and defendants have not so argued in this case. Defendants agree with plaintiffs that the sole fact a company has been incurring losses is not dispositive of whether investments are consistent with commercial considerations. On that score, defendants point out ITA found that equity investments in BSC in years prior to FY 1977/78 were consistent with commercial considerations despite the fact that the company was sustaining substantial losses.

Although not germane to the variable costs analysis, it should also be mentioned that McAnneny attempts to justify the British government's equity infusions in BSC on the theory that it is likely that "opportunity costs" in some form would have been incurred by BSC (*i.e.*, BSC's income would have fallen) had the British government failed to make its equity infusions in FY 1977/78. Again, such rationale may be applicable to the British government and BSC, who concededly had no option but to continue operation of BSC.

Nonetheless, avoidance of such opportunity costs by equity infusions are irrelevant to a reasonable investor analysis.

Net Present Value Test

Dr. McAnneny also urges that the Net Present Value (NPV) test be utilized in determining the commercial reasonableness of the British government's investments in BSC. Hence, McAnneny observes that under standard principles of economic analysis, the commercial reasonableness of capital expenditures by BCS on new projects must properly be judged against an evaluation of the NPV of each project. Thus, projects whose discounted cash flows show a positive NPV are commercially justified; projects whose cash flow show a negative NPV are not. According to plaintiffs, NPV analysis focuses upon whether investment in a new project is commercially worthwhile (positive), and it is irrelevant whether a capital project (or some combination of projects) returns the corporation to overall profitability. In support of NPV analysis, plaintiffs make reference to "concrete market examples" of private companies that had suffered heavy losses in successive years and nevertheless continued to make new capital investments.

Defendants, however, correctly observe that NPV analysis is largely predicated upon long-term earnings and interest-rate assumptions, which at best would be tenuous; and that BSC furnished analyses only of individual projects without any evaluation of those projects in terms of their effects upon BSC's overall operations and income-producing prospects.

While unquestionably NVP analyses were of importance to BSC's management, they were relevant to an outside investor only to the extent that the analyses showed how the investments in the individual projects would affect the overall operations and future profitability of BSC. Stated differently, from the investor's point of view, an investment would not be commercially reasonable if *overall* the company may still constantly lose money and never provide a reasonable return no matter how justifiable a company's decision respecting individual projects analyzed on the basis of NPV.

As stated by ITA in its remand results (record on remand, document 1 at 24-26):

> The plaintiff suggests that a better way of measuring the commercial reasonableness of investment in a company is to examine the company's decision on specific levels of production, capital expansion, and closing of plants. The Department agrees that a profit-maximizing company should use the types of analyses suggested by the plaintiff when making its managerial decisions on these issues, i.e., managers will attempt to set production at a level where marginal revenue equals marginal cost and will select among capital projects by comparing the net present values of alternative projects. However, while the Department does not take issue with the plaintiff on the eco-

> nomic validity of such tests, the Department believes tests of individual project decisions present too limited an appraisal of a company's overall condition to be the bases of the Department's methodology for evaluating purchases of equity. Such purchases relate to a company's operations as a whole, not just individual activities. Analyses of individual investment (disinvestment) projects, while laudable, are often meaningless in the context of a debate over the wisdom of equity purchases in a corporation. An individual project may be expected to be highly profitable, and indeed prove to be highly profitable once completed, yet the overall losses of the rest of the corporate investments may more than offset the new source of profitability. To the extent the Department should examine individual project appraisals, it should only do so if the respondent offering the appraisal also supplies contemporary analyses of the relevance of the project to the overall health of the corporation. For example, if a company is losing a billion dollars annually on all its investments and a new project provides a positive net return of $200 million, the company overall would still be losing $800 million annually and is, therefore, probably a bad equity investment.

Continuing, ITA commented (*Id.* at 26):

> British steel, in the several project analyses submitted in response to the draft results of the remand, has not provided any information as to the effect of these projects on the corporation's overall prospects for profitability. The Department's broader approach, which does not limit itself to an analysis of individual management decision but instead looks at the overall performance of the company in the context both of the company's views of its prospects and independent industry forecasts, gives a better picture of the overall condition of a company and the reasonableness of investment in it.

Another serious problem stressed in the Remand Results is that ITA

> might legitimately find a company that loses money year after year, and yet that same company can show it has never started a project without a thorough analysis that indicates the project will be profitable. An examination of the parts does not necessarily reflect the reality of the whole. [*Id.* at 27.]

The court holds that ITA properly declined to judge the commercial reasonableness of investment in BSC in FY 1977/78 on the basis of an economic analysis focused simply on the NPV of individual projects.

In sum, the court finds ITA's determination that the British government's investments in BSC in FY 1977/78 were inconsistent with commercial considerations, predicated upon its reasonable investor test, is supported by substantial evidence and otherwise in accordance with law.

ITA's Methodology for Valuing the Benefits From Equity Infusions

We now turn to the difficult issues concerning ITA's revised methodologies for valuing the benefits of the British government's equity infusions.

In its final determination in 1983, ITA calculated the value of the alleged subsidy benefits to BSC in accordance with the principles announced in *Certain Steel Products From Belgium*, 47 Fed. Reg. 39304, 39316 (1982) (Final) (Appendix 2). However, in its Remand Results, ITA followed the revised methodology announced in the 1984 proceedings involving steel imports from Mexico and Argentina ("revised methodology"). *Certain Carbon Steel Products From Mexico*, 49 Fed. Reg. 5142, 5148 (1984) (Preliminary); *Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina*, 49 Fed. Reg. 18006, 18016 (1984) (Final). Under the revised methodology, ITA allocated the subsidies arising from the British government's equity infusions over 15 years, irrespective of the use to which the funds were put. Such allocation period subsumed a stream of benefits lasting the average useful life of integrated steel-producing assets, as determined by the United States Internal Revenue Service.

ITA's allocation method is explained (record on remand, document 2 at 40):

> To allocate these benefits over time, the Department has considered various allocation periods including a variety of fixed time periods and the average life of long-term debt for a company or country, but has concluded that there are no economic or financial rules that dictate the choice of any one particular allocation period. Therefore, the Department has chosen a standard period—the average useful life of a company's renewable physical assets as determined by the U.S. Internal Revenue Service. The Department has openly stated that its choice is arbitrary in the sense that there are several viable options from which it could choose. However, within the context of the countervailing duty law, which dictates a period reflecting the commercial and competitive benefit of the subsidy, the Department believes its choice is reasonable. In addition to reasonableness, this standard offers predictability in the outcome of Department proceedings and, more importantly, eliminates inconsistent results between companies and countries.

Plaintiffs vigorously object to the use of the 15-year amortization period respecting subsidy funds that were not used to acquire long-lived assets,[4] but rather were used for other purposes. Specifically, plaintiffs argue that based on generally accepted accounting principles (GAAP):

[4] There is no dispute that only a portion of the subsidy funds provided by the British government during FYs 1977/78 through 1981/82 were used for the acquisition of capital assets.

(1) The benefit of funds used to purchase assets prematurely retired must be expensed in the year of retirement.

(2) The benefit of funds used to cover operating losses must be expensed in the year of receipt.

(3) The benefit of funds used to cover redundancy and closure costs must be fully recognized in the year the decision is made to close the facility.

It is plaintiffs' position that ITA's across-the-board application of a 15-year amortization period for valuation of these "non-capital" subsidies is arbitrary, unsupported by substantial evidence of record, contravenes GAAP, and fails to reflect the commercial and competitive benefit of the equity infusions.[5]

Preliminary to discussion of the merits of the parties' contentions, it must be recognized that judicial deference should be accorded agency construction of a statute that it is charged with enforcing, particularly with respect to the broad discretion of the agency to apply reasonable methodologies in implementing the law. *American Lamb Co., supra; Consumer Products Division, SCM Corp.*, 753 F.2d at 1039; *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984); *Smith-Corona Group, Consumer Products Division, SCM Corp.*, 713 F.2d at 1571; *Carlisle Tire & Rubber Co., Division of Carlisle Corp.* v. *United States*, 9 CIT ——, Slip Op. 85–110, 622 F. Supp. 1071 (October 24, 1985); and *Bingham & Taylor, Division, Virginia Industries, Inc., et al.* v. *United States*, 10 CIT ——, Slip Op. 86–14 (February 14, 1986) (judicial deference inapplicable where agency interpretation is contrary to statute and Congressional intent). Further, it should be stressed that ITA's methodology need not be the most reasonable in order to be upheld by this court, nor need it be the methodology that this Court would have selected had it been the decision maker. *Asahi Chemical Industry Co.* v. *United States*, 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982).

In a recent decision, *Alhambra Foundry* v. *United States*, 9 CIT ——, Slip Op. 85–130 (December 30, 1985), the court, while recognizing that ITA in its discretion may choose one methodology or another in calculating the benefits of bounties or grants, pointed up that "any methodology employed must reasonably accurately reflect factual information in the administrative record" (Slip Op. at 9). Moreover, the Federal Circuit recently cautioned that the administering authority's discretion is not "unbounded". *Freeport Minerals Company* v. *United States*, Appeal No. 84–1591, decided November 7, 1985, Slip Op. at 4 (citing *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 166–68 (1962). And of course, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress". *Board of Governors*, 106 S. Ct. at 686.

[5] Plaintiffs do not challenge the 15-year allocation period as applied to subsidy funds used to acquire long-lived assets.

Challenged here is ITA's methodology of allocating the benefits of the British government's equity infusion over 15 years, across the board irrespective of the use of the funds, representing the average useful life of capital assets in the integrated steel mills in the United States.

The legislative history of the Trade Agreements Act of 1979 shows that Congress recognized the concept of allocating the benefits of subsidies over a number of years, in conformity with the commercial and competitive benefit of the subsidy to the recipient:

> There is a special problem in determining the gross subsidy with respect to a product in the case of nonrecurring subsidy grants or loans, such as those which aid an enterprise in acquiring capital equipment or a plant. Reasonable methods of allocating the value of such subsidies over the production or exportation of the products benefiting from the subsidy must be used. *In particular, a reasonable period based on the commercial and competitive benefit to the recipient as a result of the subsidy must be used.* For example, allocating a subsidy in equal increments over the anticipated 20-year useful life of capital equipment purchased with the aid of the subsidy would not be reasonable if the capital equipment gave the recipient of the subsidy an immediate significant competitive benefit compared to what would be the situation without the capital equipment and compared to the competitive benefit the equipment would likely provide in the later stages of its useful life.

S. Rep. No. 249, 96th Cong., 1st Sess., at 85–86, 1979 U.S. Code & Ad. News at 472–473 (emphasis added).

Significantly, the Senate's report states that in allocating the benefit of the subsidy "a reasonable period based on the commercial and competitive benefit to the recipient as a result of the subsidy must be used". In the present case, ITA failed to adequately explain why a 15-year allocation period is reasonable based on the commercial and competitive benefit of the subsidies in question to BSC.

After careful review of ITA's methodology for allocating the benefits of the equity infusions, the court is constrained to conclude that linking the commercial and competitive benefit of the subsidies at issue to the 15-year average useful life of capital assets in the U.S. steel industry, while administratively convenient, is unreasonable and not in accord with Congressional intent that the benefits be allocated over a period of time reflecting *the commercial and competitive benefit of the subsidy to the recipient.*

The court recognizes that each of the valuation methodologies ITA considered has certain financial and economic "pitfalls" and an inherent element of arbitrariness. But the court fails to perceive any basis whatever in the legislative history of the Trade Agreements Act of 1979, logic or the facts of record for allocating the commercial and competitive benefit of the subsidies at issue over a

period linked to the average useful life of capital assets in the integrated U.S. steel mills.

ITA itself has conceded that the life of capital assets does not necessarily relate to the economic benefits of subsidy funds.

> [W]e recognize first that physical assets are often a *fairly small part of the cost of doing business,* and second that even in highly capital intensive industries the benefit of funds received * * * *has no particular relationship to the life of the machinery.*

Subsidies Appendix to *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina,* 49 Fed. Reg. 18006, 18018 (April 26, 1984) (Final) (emphasis added).

In the foregoing decision, ITA further candidly explained:

> We originally chose the average useful life of the assets because we believed the benefits of a grant somehow had a life approximating the life of the assets * * * *We now consider this belief wrong; the life of the benefits is not observable.*

Id. at 18021 (emphasis added).

Again, in *Certain Carbon Steel Products from Mexico,* 49 Fed. Reg. 5142, 5150 (Feb. 10, 1984) (Preliminary) ITA frankly stated:

> The "life" of the countervailable benefit is indefinitely diffused around the time that the cash benefit arises. Therefore, *the average life of equipment is arguably no more accurate a measure than simply choosing a number.* [Emphasis added.]

Fundamentally, "an arbitrary allocation of [the] benefit" cannot be sustained. *Michelin Tire Corp.* v. *United States,* 6 CIT 320, Slip Op. 83-136 (December 22, 1983), *vacated,* Slip Op. 85-11 (January 28, 1985).

As previously noted, plaintiffs maintain that the subsidies in dispute must be allocated in accordance with GAAP. Interestingly, a portion of the legislative history of the 1979 Act cited by plaintiffs indicates that Congress intended "relating the value of a subsidy *for acquiring assets* to their anticipated useful life, based on generally accepted accounting principles". H.R. Rep. No. 317, 96th Cong., 1st Sess. 75 (1979) (emphasis added). Hence, it is clear that Congress intended that GAAP should be used where the funds provide an enterprise with capital equipment or a plant. But, there is nothing in the legislative history of the 1979 Act suggesting that Congress expected that the value of a subsidy *not* used for acquiring assets be related to either the useful life of capital assets or to GAAP. Rather, in H.R. Rep. No. 317, *supra,* at 75, Congress stated that "[valuation] methods should include relating the benefit of the commercial advantage *"to the recipient"* (emphasis added). The subsidies at issue here—funds used by BSC to cover its operating costs (or defray operating losses), redundancy and closure funds and funds used to purchase assets prematurely taken out of use in the course of restructuring—obviously aid in keeping the recipient firm

in business and making it more efficient and competitive. Undoubtedly, therefore, the commercial and competitive benefit of these subsidies continue beyond the year of receipt and into subsequent accounting periods. *See* Slip Op. 85-26 at 22-23.[6] While plaintiffs are correct in asserting that *Michelin Tire Corp.* v. *United States*, 4 CIT 252 (1982), *vacated*, 9 CIT ——, Slip Op. 85-11 (January 28, 1985), suggested reliance on GAAP under certain circumstances, the *Michelin* court subsequently, upon further consideration of the matter, admonished against the use of valuation techniques that do not provide "a basic correspondence of the subsidy to the benefit." *Michelin Tire Corp., supra*, Slip Op. 83-136 at 3. "Expensing" the "non-capital" subsidies at issue in accordance with GAAP would not provide a correspondence of the subsidies to their benefit, and consequently GAAP should not be applied under the circumstances of this case.

Although previously rejected by ITA, with some justification,[7] intervenors nonetheless suggest that the benefit of the subsidies in question should be allocated on the basis that they relieve BSC of the necessity for issuing long term debt on a commercial basis. Intervenors' hypothesis is that the commercial and competitive benefit of the subsidies is not the specific uses to which the funds were put, "but rather in being able to avoid the alternative commercial cost of obtaining the funds. BSC thus gains a commercial and competitive advantage over nonsubsidized firms who must pay a commercial financing cost to get funds to carry out exactly the same purposes" (memorandum at 21).

Intervenors' proposal—for allocation of the subsidies in question on the hypothesis that long-term debt financing by BSC was the most likely commercial alternative to the government's equity infusions—comports with the following observations in *Michelin Tire Corp., supra*, Slip Op. 83-136, regarding the benefits of a subsidy:

> The benefits which must be withdrawn by payment of duty in the case of a subsidy are the benefits which result as a direct consequence of the subsidy. For a business, the direct consequences of receiving a gift of money normally are the elimination of the necessity of looking elsewhere for those funds and paying the price required by the alternative source of funds. The normal alternative sources of funding for business enterprises are two—the sale of shares in the business, carrying with it the obligation to share the profits, or the incurring of debt, carrying with it the obligation to repay the creditor with interest.

See also: Paul W. Jameson, *The Administration Of The U.S. Countervailing Duty Laws With Regard To Domestic Subsidies: Where*

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[6] In its prior decision, Slip Op. 85-26, at p. 23, this court expressly rejected plaintiffs' contention that capital assets confer no further benefit after they are prematurely retired, and that consequently ITA must recognize in full (expense) the undepreciated cost of the asset in the year that it is taken out of use in conformance with GAAP.

[7] *See* Fed. Reg. at 18018.

It's Been, Where It Is, Where It May Go, 12 Syracuse Journal of International Law and Commerce, 59, 110 (1985), in which the author observes:

> Despite possible objections that a company may raise money through equity issues or long-term loans, it is usually preferable to allocate the value of a grant over the life of long-term debt rather than allocate the grant over the average lifetime of assets. One cardinal principle of the countervailing duty law is that the subsidy is the money received, rather than whatever is purchased with that money. When coupled with the principle that the value of the subsidy is its value to the recipient, it is apparent that it is more consistent to view a grant as a substitute for a long-term loan rather than something somehow tied to a company's assets If one were to compare the grant to a long-term loan that a company would have to raise as an alternative (even to use a hypothetical long-term loan for a company that has none), and state that the amount of the subsidy is the difference between what the recipient of the grant must pay on the grant (nothing) and what the recipient would have been required to pay on a loan (principal plus interest), the result would be a subsidy that could very well be larger than the amount of the grant but would not violate GATT.

In summary, while the court need not at this juncture pass upon the merits of intervenor's suggested allocation technique, based upon long-term debt financing, the court ineludably concludes that ITA's 15-year allocation methodology, which links the commercial and competitive benefit of the equity infusions to the average useful life of capital assets in integrated U.S. steel mills, is neither supported by the record nor Congressional intent. Accordingly, the court finds that ITA's methodology is unreasonable and therefore not in accordance with law. Consequently, this action must be remanded to ITA for further consideration of other "viable options" that may more reasonably reflect the benefit of the subsidies in question.

British Government's Forgiveness of Indebtedness

In 1981, the British government forgave £509 million in long-term indebtedness owed by BSC to the National Loans Fund. In its Remand Results, ITA treated the loan forgiveness as an additional equity investment amortizable over 15 years.[8] For purposes of such amortization, ITA utilized an interest rate of 17.11 percent, representing the 1981 United Kingdom domestic corporate bond rate plus a risk premium. The weighted average interest rate on BSC's existing loans in 1981 was 11.57 percent.[9]

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[8] As disclosed in BSC's annual report, the £509 million in loans forgiven in 1981 represents funds received by the corporation from 1967 through 1978. A similar loan forgiveness in 1971-72 occurred during the period in which ITA considered the British government's equity infusions to be consistent with commercial considerations and thus not to confer a countervailable benefit.

[9] The interest rate on BSC's loans ranged from 6.75 percent to 16.75 percent, with a weighted average rate for all of the loans of 11.57 percent.

Plaintiffs contend that ITA's methodology for calculating the benefit of the loan forgiveness, predicated upon 1981 interest rates and a 15-year amortization period, is arbitrary and fails to reflect the commercial and competitive benefit to BSC of the interest and principal payments forgiven. On that score, plaintiffs urge that inasmuch as the interest rates on the existing loans were fixed, absent the British government's forgiveness BSC would have *continued* to pay 11.57 percent—not a rate based on what new capital would have cost BSC in 1981, *viz.*, 17.11 percent. Plaintiffs also challenge ITA's 15-year allocation period as arbitrary since the remaining life of the loans in question was substantially shorter than 15 years and ITA inexplicably refused to use the repayment schedules associated with the forgiven loans.

The court fails to perceive any reasonable basis for ITA's action in valuing the benefit of the loan forgiveness on the basis of what it would have cost BSC to obtain new financing in 1981. BSC was incurring an average fixed interest rate of only 11.57 percent on the forgiven loans, and BSC would have been required to continue paying only that rate if the loans had not been forgiven. In evaluating the subsidy arising from the loan forgiveness, the commercial and competitive benefit to BSC is the actual financial burden that was removed by the loan forgiveness. Absent the loan forgiveness, BSC undoubtedly would have continued to pay 11.57 percent interest on its existing loans, and most assuredly BSC would not have refinanced its debt at a cost of 17.11 percent, which refinancing is implicit in ITA's methodology.

ITA's apparent predicate that but for the loan forgiveness by the British government, BSC would have relieved itself of its existing loans by new borrowing at the then current rate of 17.11 percent is, in the words of the United States Supreme Court, "economically senseless".[10] *Matsushita Electric Industrial Co. Ltd.* v. *Zenith Radio Corp.*, Appeal No. 83-2004, decided March 26, 1986. As previously emphasized, the commercial and competitive benefit of the subsidy to the recipient is the measure of the value of the subsidy. In the case of debt forgiveness, the commercial and competitive benefit to the recipient firm is debt extinguishment. Thus, it is logical that such subsidy should be measured by the actual interest and principal repayment obligations over the remaining life of the existing loans, rather than in accordance with hypothetical refinancing at a higher rate of interest than the firm is paying on its existing loans for an arbitrary period of years.[11]

---

[10] The obvious unreasonableness of ITA's loan forgiveness methodology may be illustrated by the following hypothetical case: In 1965 a British company borrows money from the government at an interest rate of 9 percent, to be repaid in 1982. In 1980 the government forgives the loan. The prevailing interest rate for corporate bonds in Great Britain in 1980 is 15 percent. Following the methodology applied to BSC in the present case, ITA would amortize the unpaid principal of the loan forgiven at 15 percent (plus a risk premium) over a period of 15 years.

[11] As pointed up by plaintiffs, ITA offered no explanation in the Remand Results for its refusal to calculate the benefits associated with the 1981 debt forgiveness based on the actual interest rate BSC was incurring, nor for its use of a 1981 interest rate for loans to BSC during the period 1967-77, nor of its choice of a 15-year

Continued

The short of the matter is ITA's methodology for valuing the benefits associated with the British government's 1981 loan forgiveness is contrary to law and unsupported by substantial evidence. Therefore, this action is remanded to ITA for revaluation of the benefits of the 1981 debt forgiveness consistent with the foregoing opinion.

CONCLUSION

The Remand Results are affirmed insofar as ITA determined that the equity infusions by the British government in FY 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i), and therefore constitute countervailable subsidies.

ITA's valuation methodology in this case is unsupported by substantial evidence and otherwise is not in accordance with law because it fails to reflect the commercial and competitive benefit of the subsidies in question to the recipient.

It is, therefore, Ordered:

(1) The Remand Results are affirmed insofar as ITA determined that the equity infusions by the British government in FY 1977/78 were made "on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i), and therefore constitute countervailable subsidies;

(2) This action is remanded to ITA for reconsideration of its revised valuation methodologies and recalculation of the benefits of the British government's equity infusions consistent with this opinion; and

(3) ITA shall report the results of its recalculations and redeterminations to this court within 60 days after the date of entry of this order.

---

amortization period. Plaintiffs have advised the court that the interest differential between 17.11 percent and 11.57 percent based on a 1981 balance of £509 million results in an overvaluation of the loan forgiveness benefit of nearly £29 million.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/45	DiCarlo, J. March 26, 1986	Alfa-Laval Inc	80-10-01697	Item 661.35 4.8%	Item 870.40 Free of duty	Agreed statement of facts	Detroit Bulk milk coolers or farm tanks
C86/46	DiCarlo, J. March 26, 1986	Pony Sports & Leisure, Inc	84-3-00369	Item 700.95 12.5%	Item 700.35 8.5%	Agreed statement of facts	Los Angeles Athletic footwear
C86/47	Carman J. March 28, 1986	Mattel, Inc.	81-4-00856	Item 737.22 17.5%, 16.8% or 16.1% for base stands and leg holders assessed with duty as entireties with dolls with which they were imported	Item A774.60 or A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders
C86/48	Carman J. March 28, 1986	Mattel, Inc.	82-5-00740	Item 737.22 17.5% or 16.1% for base stands and leg holders assessed with duty as entireties with dolls with which they were imported	Item 774.60 8.5% Item A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders

C86/49	DiCarlo, J March 28, 1986	Oxford Industries, Inc	79-4-00617	Item 380.04, 380.81, 380.84, 380.94, 382.78, or 382.81 Various rates	Item 807.00 allowance made for cost or value of components which underwent a button-holing operation abroad	Judgment on the pleadings	Nogales Wearing apparel
C86/50	DiCarlo, J March 28, 1986	Woods Manufacturing Co	79-6-01038	Item 380.04, 380.81, 380.84, 380.94, 382.78, or 382.81 Various rates	Item 807.00 allowance made for cost or value of components which underwent a buttonholing operation abroad	Judgment on the pleadings	Nogales Wearing apparel
C86/51	Carman, J April 1, 1986	Mattel, Inc	82-5-00741	Item 737.22 16.8% for base stands and leg holders assessed with duty as entireties with dolls with which imported	Item A774.55 Free of duty	Mattel, Inc v U.S., Slip Op 84-133	New York Base stands and leg holders
C86/52	Carman, J April 1, 1986	Mattel, Inc	83-8-01140	Item 737.24 15.4% or 14.8% for base stands and leg holders which were assessed with duty as entireties with dolls with which imported	Item A774.55 Free of duty	Mattel, Inc v U.S., Slip Op 84-133	New York Base stands and leg holders

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/53	Carman, J April 1, 1986	Mattel, Inc.	83-10-01517	Item 737.24 15.4% or 14.8% for base stands and leg holders which were assessed with duty as entireties with dolls with which imported	Item A774.55 Free of duty	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders
C86/54	Carman, J April 1, 1986	Mattel, Inc.	84-10-01449	Item 737.22 16.8% or 16.1% for base stands and leg holders assessed with duty as entireties with dolls with which imported	Item 774.55 Free of duty except for merchandise imported from the Republic of China (Taiwan) in the period April 1 to Dec. 31 1981, which is dutiable at 7.7%	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders

C86/55	Carman, J. April 1, 1986	Mattel, Inc.	85-3-00328	Item 737.22 16.8% or 17.5% Item 737.24 14.8%	Items A774.55 or A774.60 Free of duty, except for merchandise imported from the Republic of China (Taiwan) in Sept. 1979 which is dutiable at 8.5%	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/20	DiCarlo, J March 26, 1986	Papier Cascades (Cabano) Inc	82-10-01356, etc	Transaction value	Invoiced value, less total costs incurred for transportation, less brokerage fees, less customs duties	Agreed statement of facts	Champlain Various products exported from Canada
V86/21	DiCarlo, J March 26, 1986	Beer Precast Concrete, Ltd	80-10-01589, etc	Export value	Equal to $303.37/ton, net, packed	Agreed statement of facts	Buffalo/Niagara Falls Prefabricated concrete construction materials

April 16, 1986

NOTICE OF PROPOSED RULE CHANGES

The Committee on Rules and Practice of the United States Court of International Trade is considering several proposed amendments to the Rules of the Court.

The proposed amendments pertain to Rules 3, 4, 47, 48, 60, 62 and 75.

The Committee invites comment on the proposed amendments, along with suggestions for additional changes in the Rules.

Those who wish to present their views should submit an original and one copy of a written statement to the Committee, in care of Joseph E. Lombardi, Clerk of Court, by the close of business on Friday, May 16, 1986. Each statement shall be typewritten and not more than 10 double-spaced pages in length. It also should bear an indication whether the views contained therein are solely those of the author or are submitted on behalf of a particular organization.

Copies of the proposed amendments may be obtained by writing the Clerk of Court or by calling 212-264-2800.

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

Procedural Handbook
Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10007.

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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Vol. 20 APRIL 30, 1986 No. 17

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T 17.6/3-4:

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Administrative Programs, Public Services and Information Materials Division, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 86-76)

Customs Regulations Amendment Relating to the Customs Field Organization; Davenport, Iowa, and Rock Island and Moline, Illinois

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This notice changes the field organization of the Customs Service by establishing a new port of entry on a 2-year trial basis, at Davenport, Iowa, and Rock Island and Moline, Illinois. This change is being made as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

EFFECTIVE DATE: May 16, 1986.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

Customs ports of entry are places (seaports, airports, or land border ports) designated by the Secretary of the Treasury where Customs officers or employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of Customs and related laws.

The Quad-City Development Group filed an application with Customs requesting the establishment of a new Customs port of entry at Davenport, Iowa, and Rock Island and Moline, Illinois. A review of that application confirmed that the proposed port met the minimum Customs criteria for establishing ports of entry. These standards, published as T.D. 82-37 in the Federal Register on March 9, 1982 (47 FR 10137), list 2,500 consumption entries per year as the

minimum, potential Customs workload for establishment of a port of entry. The Davenport-Rock Island-Moline port committed itself to 3738 consumption entries per year in its application, approximately 150 percent of the 2,500 minimum required.

A notice proposing the establishment of the Davenport-Rock Island-Moline port of entry was published in the Federal Register on October 17, 1985 (50 FR 42035). In that notice, Customs stated that it was not certain if the major importers in the proposed port area would choose to incur the extra expense of importing their merchandise by in-bond shipments to the proposed port area, rather than to continue the simple and less expensive clearance of the merchandise at the first port of arrival at the U.S.-Canadian border or elsewhere. Therefore, the notice indicated that the port, if established, would be done so on a 2-year trial basis. Customs believes that a 2-year period will provide sufficient time for the port to establish itself and attract business. At the end of the 2-year period, the practicality of maintaining a port of entry at Davenport-Rock Island-Moline will be reevaluated in light of the actual Customs workload. The notice solicited public comment on the matter.

By T.D. 86-14, published in the Federal Register on February 5, 1986 (51 FR 4559), the criteria used in evaluating applications to establish ports of entry and stations were revised. The revisions reflect the increased minimum value for commercial entries, delete references to informal entries, and require a commitment by any applicant that is attempting to qualify for port or station status by satisfying the cargo workload standard (2,500 consumption entries), to make optimal use of electronic data transfer capability to permit intergration with Customs Automated Commercial System (ACS). Future port and station applicants must comply with T.D. 86-14, as well as with the applicable criteria in T.D. 82-37.

Discussion of Comments

All of the comments received in response to the notice favored establishment of the port. The commenters cited the benefits that such a port would provide to the region's growing international trade business as well as the over-all positive effect on the area's economic and employment outlook.

After analysis of the comments and further review of the matter, Customs is establishing, on a 2-year trial basis, a port of entry at Davenport, Iowa, and Rock Island and Moline, Illinois.

Changes in the Customs Field Organization

The Secretary of the Treasury is advised by the Commissioner of Customs in matters affecting the establishment, abolishment, or other change in ports of entry. Customs ports of entry are established under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and dele-

gated to the Secretary of the Treausury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101-5 (47 FR 2449).

Customs has determined that it is in the public interest to establish, on a 2-year trial basis, a port of entry at Davenport, Iowa, and Rock Island and Moline, Illinois. The limits of the port of entry of Davenport-Rock Island-Moline are as follows:

In Rock Island County, Illinois, the Townships of Andalusia, Blackhawk, Rock Island, South Rock Island, Moline, South Moline, Coal Valley, Hampton, Zuma, and Coe; in Henry County, Illinois, the Townships of Colona, Hanna, and Edford; and in Scott County, Iowa, the Townships of Buffalo, Blue Grass, Hickory Grove, Sheridan, Lincoln, LeClaire, Pleasant Valley, Bettendorf, and that area of the City of Davenport enclosed within the present limits of these townships.

List of Subjects In 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

To reflect this change, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by adding, "Davenport, Iowa, and Rock Island and Moline, Ill., including the territory described in T.D. 86 - 76." directly below, "CHICAGO, ILL., including territory described in T.D. 71-121." in the column headed, "Ports of entry" in the Chicago, Illinois district.

Executive Order 12291

Because this will not result in a "major rule" as defined in § 1(b) of E.O. 12291, the regulatory impact analysis and review prescribed by § 3 of that E.O. is not required.

Regulatory Flexibility Act

Pursuant to the provisions of § 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, the regulation is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Customs routinely establishes and expands Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this amendment may have a limited effect upon some small entities in the area affected, it is not expected to be significant because estab-

lishing and expanding port limits at Customs ports of entry in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 3, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 16, 1986 (51 FR 12843)]

(T.D. 86-77)

Quarterly Rates of Exchange

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 USC 372(c)), for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: April 1, 1986 through June 30, 1986.

Country	Name of currency	U.S. dollars
Australia	Dollar	.72200
Austria	Schilling	.060827
Belgium	Franc	.020877
Brazil	Cruziero	.72254
Canada	Dollar	.718236
China, P.R.	Renminbi Yuan	.309713
Denmark	Krone	.115714
Finland	Markka	.190767
France	Franc	.139130
Germany	Deutsche Mark	.426803
Hong Kong	Dollar	.128008
India	Rupee	.080451
Iran	Rial	N/A

Country	Name of currency	U.S. dollars
Ireland	Pound	1.3000
Italy	Lira	.000627
Japan	Yen	.005613
Malaysia	Dollar	.384098
Mexico	Peso	N/A
Netherlands	Guilder	.378831
New Zealand	Dollar	.54200
Norway	Krone	.137155
Philippines	Peso	N/A
Portugal	Escudo	.006585
Republic of South Africa	Rand	.46750
Singapore	Dollar	.459559
Spain	Peseta	.006833
Sri-Lanka	Rupee	.036163
Sweden	Krona	.135740
Switzerland	Franc	.512295
Thailand	Baht (tical)	.037793
United Kingdom	Pound	1.4710
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-78)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 3, 1986	$0.007215
March 4, 1986	.007257
March 5, 1986	.007225
March 6, 1986	.007117
March 7, 1986	.007148
Israel shekel:	
March 3-7, 1986	N/A

South Korea won:	
March 3–4, 1986	.001128
March 5, 1986	.001129
March 6, 1986	.001128
March 7, 1986	.001127
Taiwan N.T. dollar:	
March 3, 1986	.025602
March 4, 1986	.025471
March 5, 1986	.025497
March 6, 1986	.025523
March 7, 1986	.025543

(LIQ-03-01 S:COM CIE)
Dated: March 7, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-79)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 10, 1986	.007037
March 11, 1986	.007092
March 12, 1986	.007077
March 13, 1986	.007003
March 14, 1986	.007092
Israel shekel:	
March 10–14, 1986	N/A
South Korea won:	
March 10, 1986	.001128
March 11–12, 1986	.001127
March 13, 1986	.001128
March 14, 1986	.001127
Taiwan N.T. dollar:	
March 10, 1986	.025556

March 11, 1986	N/A
March 12–13, 1986	.025543
March 14, 1986	.025556

(LIQ–03–01 S:COM CIE)

Dated: March 14, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–80)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations, (19 CFR 159, Subpart C).

Greece drachma:	
March 17, 1986	$0.007123
March 18, 1986	.007135
March 19, 1986	.007105
March 20, 1986	.007128
March 21, 1986	.007148
Israel shekel:	
March 17–21, 1986	N/A
South Korea won:	
March 17–18, 1986	.001128
March 19, 1986	.001129
March 20, 1986	.001128
March 21, 1986	.001129
Taiwan N.T. dollar:	
March 17, 1986	.025575
March 18, 1986	.025615
March 19, 1986	.025648
March 20, 1986	.025681
March 21, 1986	.025714

(LIQ–03–01 S:COM CIE)

Dated: March 21, 1986.

ANGELA, DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-81)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations, (19 CFR 159, Subpart C).

Greece drachma:	
March 24, 1986	$0.007027
March 25, 1986	.006920
March 26, 1986	.006911
March 27-28, 1986	.006920
Israel shekel:	
March 24-28, 1986	N/A
South Korea won:	
March 24, 1986	.001129
March 25-26, 1986	.001128
March 27-29, 1986	.001127
Taiwan N.T. dollar:	
March 24, 1986	.025740
March 25-28, 1986	.025760

(LIQ-03-01 S:COM CIE)

Dated: March 28, 1986.

ANGELA, DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-82)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certi-

fied buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations, (19 CFR 159, Subpart C).

Greece drachma:	
March 31, 1986	$0.006911
Israel shekel:	
March 31, 1986	N/A
South Korea won:	
March 31, 1986	.001127
Taiwan N.T. dollar:	
March 31, 1986	.025760

(LIQ-03-01 S:COM CIE)

Dated: March 31, 1986.

ANGELA, DEGAETANO,
Chief,
Customs Information Exchange.

T.D. 86-83

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
March 3, 1986	$0.064020
March 4, 1986	.064641
March 5, 1986	.062775
March 6, 1986	.063331
March 7, 1986	.063654
Belgium franc:	
March 3, 1986	.021930
March 4, 1986	.022173
March 5, 1986	.021580
March 6, 1986	.021744

March 7, 1986	.021829
Brazil cruzeiro:	
March 3–7, 1986	.072254
Denmark krone:	
March 3, 1986	.121677
March 4, 1986	.122926
March 5, 1986	.119261
March 6, 1986	.120496
March 7, 1986	.120729
Finland markka:	
March 3, 1986	.196271
March 4, 1986	.197941
March 5, 1986	.194742
March 6, 1986	.195695
March 7, 1986	.195848
France franc:	
March 3, 1986	.146391
March 4, 1986	.147645
March 5, 1986	.143575
March 6, 1986	.144928
March 7, 1986	.145243
Germany Deutsche mark:	
March 3, 1986	.450349
March 4, 1986	.454339
March 5, 1986	.441112
March 6, 1986	.445931
March 7, 1986	.446828
Ireland pound:	
March 3, 1986	1.3593
March 4, 1986	1.3720
March 5, 1986	1.3315
March 6, 1986	1.3468
March 7, 1986	1.3505
Italy lira:	
March 3, 1986	.000661
March 4, 1986	.000667
March 5, 1986	.000649
March 6–7, 1986	.000656
Japan yen:	
March 3, 1986	.005566
March 4, 1986	.005587
March 5, 1986	.005511
March 6, 1986	.005577
March 7, 1986	.005573
Netherlands guilder:	
March 3, 1986	.398724
March 4, 1986	.402253
March 5, 1986	.390701

March 6, 1986	.394089
March 7, 1986	.396040
Norway krone:	
March 3, 1986	.142592
March 4, 1986	.143575
March 6, 1986	.140331
March 7, 1986	.140351
Portugal escudo:	
March 3, 1986	.006757
March 4, 1986	.006803
March 5, 1986	.006757
March 6, 1986	.006725
March 7, 1986	.006761
Republic of South Africa rand:	
March 3, 1986	.50380
March 4, 1986	.50530
March 5, 1986	.50300
March 6, 1986	.50130
March 7, 1986	.50120
Spain peseta:	
March 3, 1986	.007126
March 4, 1986	.007186
March 5–6, 1986	.007065
March 7, 1986	.007097
Sweden krona:	
March 3, 1986	.139082
March 4, 1986	.139958
Switzerland franc:	
March 3, 1986	.531915
March 4, 1986	.534188
March 5, 1986	.521921
March 6, 1986	.526593
March 7, 1986	.527287

(LIO–03–01 S:COM CIE)

Dated: March 7, 1986.

ANGLEA DEGAETANO,
Chief,
Customs Information Exchange.

T.D. 86–84

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New

York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 371(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
March 10, 1986	$0.062422
March 11, 1986	.062893
March 12, 1986	.062383
March 13, 1986	.062150
March 14, 1986	.063091
Belgium franc:	
March 10, 1986	.21422
March 11, 1986	.21552
March 12, 1986	.21390
March 13, 1986	.21254
March 14, 1986	.21561
Brazil cruzado:	
March 10–14, 1986	.072254
Denmark krone:	
March 10, 1986	.118554
March 11, 1986	.119318
March 12, 1986	.118252
March 14, 1986	.119546
Finland markka:	
March 10, 1986	.193424
March 14, 1986	.195771
France franc:	
March 10, 1986	.142602
March 11, 1986	.143400
March 12, 1986	.142248
March 13, 1986	.141643
March 14, 1986	.143658
Germany deutsche mark:	
March 10, 1986	.438500
March 11, 1986	.431404
March 12, 1986	.437828
March 13, 1986	.435635
March 14, 1986	.431891
Ireland pound:	
March 10, 1986	1.3265
March 11, 1986	1.3345
March 12, 1986	1.3235
March 13, 1986	1.3160
March 14, 1986	1.3375

Italy lira:	
March 10, 1986	.000644
March 11, 1986	.000649
March 12, 1986	.000644
March 13, 1986	.000640
March 14, 1986	.000650
Japan yen:	
March 10, 1986	.005534
March 11, 1986	.005559
March 12, 1986	.005549
March 13, 1986	.005559
March 14, 1986	.005645
Netherlands guilder:	
March 10, 1986	.388425
March 11, 1986	.391236
March 12, 1986	.387898
March 13, 1986	.385877
March 14, 1986	.391466
New Zealand dollar:	
March 12, 1986	.52950
March 13, 1986	.52900
March 14, 1986	.52800
Norway krone:	
March 11, 1986	.139519
March 14, 1986	.140095
Portugal escudo:	
March 10, 1986	.006678
March 11, 1986	.006718
March 12, 1986	.006667
March 13, 1986	.006653
March 14, 1986	.006734
Republic of South Africa rand:	
March 10, 1986	.50250
March 11, 1986	.50400
March 12, 1986	.50300
March 13, 1986	.50200
March 14, 1986	.50050
Spain peseta:	
March 10, 1986	.006964
March 11, 1986	.007003
March 12, 1986	.006964
March 13, 1986	.006940
March 14, 1986	.007008
Switzerland franc:	
March 10, 1986	.516262
March 11, 1986	.520291
March 12-13, 1986	.517331

March 14, 1986	.524934

(LIQ-03-01 S:COM CIE)
Dated: March 14, 1986

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-85)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
March 17, 1986	$.063371
March 18, 1986	.063251
March 19, 1986	.062992
March 20, 1986	.063141
March 21, 1986	.063452
Belgium franc:	
March 17, 1986	.021720
March 18, 1986	.021725
March 19, 1986	.021594
March 20, 1986	.021654
March 21, 1986	.021758
Brazil cruzado:	
March 17-21, 1986	.072254
Denmark krone:	
March 17, 1986	.120084
March 18, 1986	.120228
March 19, 1986	.119868
March 20, 1986	.120084
March 21, 1986	.120642
Finland markka:	
March 17, 1986	.195618
March 18, 1986	.195695
March 19, 1986	.195503

March 20, 1986	.195848
March 21, 1986	.196870
France franc:	
March 17, 1986	.144613
March 18, 1986	.144561
March 19, 1986	.143616
March 20, 1986	.144165
March 21, 1986	.144949
Germany deutsche mark:	
March 17, 1986	.444444
March 18, 1986	.444840
March 19, 1986	.442184
March 20, 1986	.443164
March 21, 1986	.446030
Ireland pound:	
March 17, 1986	1.3440
March 18, 1986	1.3430
March 19, 1986	1.3372
March 20, 1986	1.3366
March 21, 1986	1.3460
Italy lira:	
March 17, 1986	.000654
March 18, 1986	.000653
March 19, 1986	.000649
March 20, 1986	.000651
March 21, 1986	.000654
Japan yen:	
March 17, 1986	.005691
March 18, 1986	.005714
March 19, 1986	.005647
March 20, 1986	.005670
March 21, 1986	.005688
Netherlands guilder:	
March 17, 1986	.393701
March 18, 1986	.394011
March 19, 1986	.391773
March 20, 1986	.392696
March 21, 1986	.395179
New Zealand dollar:	
March 17, 1986	.53100
March 18, 1986	.52900
March 19, 1986	.53050
March 20, 1986	.53350
March 21, 1986	.53600
Norway krone:	
March 17, 1986	.140805
March 18, 1986	.140647
March 19, 1986	.140056

151-378 O - 86 - 2

March 20, 1986	.140449
March 21, 1986	.140924
Portugal escudo:	
March 17, 1986	.006743
March 18, 1986	.006748
March 19, 1986	.006734
March 20, 1986	.006748
March 21, 1986	.006761
Republic of South Africa rand:	
March 17, 1986	.49850
March 18, 1986	.49950
March 19, 1986	.49100
March 20–21, 1986	.47900
Spain peseta:	
March 17, 1986	.007048
March 18, 1986	.007060
March 19, 1986	.007037
March 20, 1986	.007062
March 21, 1986	.007090
Sweden krona:	
March 17, 1986	.138793
March 18, 1986	.138793
March 20, 1986	.138744
March 21, 1986	.139373
Switzerland franc:	
March 17, 1986	.530504
March 18, 1986	.530926
March 19, 1986	.527704
March 20, 1986	.528123
March 21, 1986	.534045

(LIQ-03-01 S:COM CIE)
Dated: March 21, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-86)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the fol-

lowing countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
March 24, 1986	$0.71810
March 25, 1986	.72100
Austria schilling:	
March 24, 1986	.062247
March 26, 1986	.061087
March 27, 1986	.061237
March 28, 1986	.061050
Belgium franc:	
March 24, 1986	.021354
Brazil cruzado:	
March 24–28, 1986	.072254
Denmark krone:	
March 24, 1986	.118385
France franc:	
March 24, 1986	.142430
Germany deutsche mark:	
March 24, 1986	.437063
Ireland pound:	
March 24, 1986	1.3240
Italy lira:	
March 24, 1986	.000643
March 26–27, 1986	.000631
Japan yen:	
March 24, 1986	.005590
March 25, 1986	.005549
March 26, 1986	.005562
March 27, 1986	.005570
March 28, 1986	.005560
Malaysia dollar:	
March 24, 1986	.388802
March 25, 1986	.388350
March 26, 1986	.389105
March 27, 1986	.388802
March 28, 1986	.388651
Netherlands guilder:	
March 24, 1986	.387297
New Zealand dollar:	
March 24, 1986	.53300
March 25, 1986	.53400
March 26, 1986	.53300
March 27, 1986	.53450
March 28, 1986	.53300

Norway krone:	
March 24, 1986	.139082
Portugal escudo:	
March 24, 1986	.006671
Republic of South Africa rand:	
March 24, 1986	.47850
March 25, 1986	.46250
March 26, 1986	.46900
March 27–28, 1986	.47500
Spain peseta:	
March 24, 1986	.006966
Switzerland franc:	
March 24, 1986	.521241
March 27, 1986	.513611

(LIQ–03–01 S:COM CIE)

Dated: March 28, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–86)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c)), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzado:	
March 31, 1986	$0.072254
Japan yen:	
March 31, 1986	.005631
Malaysia dollar:	
March 31, 1986	.385060
New Zealand dollar:	
March 31, 1986	.53520
Republic of South Africa rand:	
March 31, 1986	.46500

Spain peseta:	
March 31, 1986	.006873

(LIQ-03-01 S:COM CIE)

Dated: March 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER OF CUSTOMS,
WASHINGTON, D.C., *April 15, 1986.*

The following are decisions of the United States Customs Service which are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 86-11)

This ruling holds, under the substitution drawback law (19 U.S.C. 1313(b)), that a successor is allowed to designate, as the basis for drawback on articles manufactured by the successor *after* the date of succession, merchandise used by the predecessor *prior* to the date of succession.

Date: October 2, 1985
DRA-1-09-CO:R:CD:D
218254 MM/GS

REGIONAL COMMISSIONER OF CUSTOMS,
Chicago, Illinois 60603

Re: Further Review of Protest Number 3901-5000476 (Chicago)—Drawback Successorship—19 U.S.C. 1313(b)—19 CFR 191.32(a)(3)

DEAR SIR: This is in reply to the application for further review, filed on April 2, 1985, of a decision by the Regional Liquidation Branch not to allow drawback with respect to entries 84-102057-9, 84-104212-0, 84-104213-3, 84-104214-6, 84-102949-9, 84-106059-7, 84-107411-4, 84-110912-8.

Issues: 1. Will a corporation be approved as the successor of a division of another company, assuming all other requirements of successorship are met?

2. For purposes of substitution drawback (19 U.S.C. 1313(b)) may a successor designate as the basis for drawback on articles manu-

factured by it after the date of succession merchandise used by the predecessor prior to the date of succession?

3. For purposes of substitution drawback may a successor designate as the basis for drawback on articles manufactured by it prior to the date of succession merchandise used by the predecessor prior to the date of succession?

Facts: On July 5, 1983, Customs approved a drawback proposal of Occidental Chemical Corporation, PVC Resins Division (abstracted as T.D. 84-2-L) in which proposal Occidental Chemical claimed to be the successor to Firestone Plastics Company, a division of Firestone Tire and Rubber Company, under the latter's contract of September 16, 1980 (abstracted as T.D. 81-91-J).

Based on T.D. 84-2-L, Occidental Chemical, PVC Resins Division, filed the eight drawback entries noted above on which it received accelerated drawback. However these entries were liquidated "no drawback" and the drawback was repaid by Occidental Petroleum on eight U.S. Customs bills dated March 1, 1985. In addition Occidental protested the liquidation of the eight entries and it is this protest we now consider.

Law and Analysis: Occidental Chemical Corporation, PVC Resins Division, is the drawback successor of Firestone Plastics Company, a division of Firestone Tire and Rubber Company, under T.D. 84-2-L. There was precedent permitting a corporation to be successor to a division of another corporation. See for example T.D. 75-71-R.

The next issue to be considered relates to the rights of a successor under substitution drawback. Successorship as a concept was introduced into drawback at least as early as February 4, 1920. See T.D. 38286-G. When substitution drawback was enacted the concept was extended to it (T.D. 52749-N).

The following excerpts are from a Memorandum of June 14, 1963, concerning Headquarters views (at that time) with regard to the passage of drawback rights under successorship.

> When one corporation succeeds another, for drawback purposes the successor takes over whatever drawback rights were held by the predecessor. In the case of operations under 313(a), the form of the drawback right is clearly defined in that it is either in imported merchandise which on the date of succession has not been used by the predecessor, or it is in an article manufactured by the predecessor with the use of imported merchandise. There is no question that if the successor in either case completes the necessary steps under the drawback procedure, he can recover the duties paid on the imported merchandise. In fact then the drawack right does pass from the predecessor to the successor in 313(a) cases.

In the case of operations under section 313(b), the drawback right is less clearly defined, but it is nonetheless present in imported merchandise. In this regard, the Customs Court in the case of *General Motors Corporation* v. *United States,* C.D. 1587, which involved operations under section 313(b), stated at page 97:

> Ordinarily, when merchandise is imported as to which the drawback statute may become applicable, an inchoate right, or a "right accruing," arises, and as the merchandise progresses by way of manufacture or production in the United States, use in certain ways etc., the inchoate or accruing right ripens, until upon exportation of the merchandise or article in accordance with the statute and regulations pertaining thereto, the inchoate or accruing right becomes an absolute right to receive payment, as drawback, of the amounts specified by the statute.

If the drawback right in imported merchandise passes to a successor corporation in the case of operations under section 313(a), it must also pass to the successor in operations under section 313(b), unless such passage is prohibited by the drawback law or regulations. I can find no such prohibition in either section 313(b) of the Tariff Act of 1930, or Part 22 of the Customs Regulations. Pursuing this one step further, if a manufacturer who operates under section 313(b) receives imported merchandise but, before using such merchandise, is succeeded by another corporation, the successor clearly can use the imported merchandise and subsequently designate it as the basis for drawback. If on the other hand, the predecessor used the imported merchandise before the date of succession, there can be no question that the predecessor had a right to designate such merchandise. This right too must pass to the successor for otherwise it is a fallacy to say that a successor takes over the drawback rights held by the predecessor.

The "right to designate" having passed to the successor, the question then arises as to what exportations the imported merchandise covered by the right may be designated against. The predecessor had the right to designate the merchandise against articles manufactured by it after the date of receipt of the imported merchandise. In effect, the date of receipt of the imported merchandise was the date on which the "right to designate" was created, and the predecessor held such right until the date of succession. When the right is transferred by succession, the successor stands in the place of the initial holder of the right and therefore would be able to designate the merchandise covered by the right against articles manufactured by it (the successor) on and after the date on which the right first inured to the successor that is, the date of succession.

There follows an excerpt from the sample format for a successorship statement which was furnished by Customs for preparation of the successorship statement from as early as 1954 until 1979 when it was eliminated for reasons unrelated to the successorship question.

> On (date), the (Old Corporation), was succeeded by (New Corporation), and on the said date (or on (date)) the said (New Corporation) became entitled to all of the drawback rights accrued and accruing to the (Old Corporation) by virtue of the provisions of T.D. ————.

This format was furnished until the regulations were amended (T.D. 79-65) to eliminate supplemental statements (including successorship) in favor of revised statements to modify existing contracts.

Elimination of the supplemental statement was for administrative purposes only. The intent was to enable Customs to have all information relating to a drawback rate for a product in a single drawback statement under its individual Treasury Decision number rather than a rate holder having different rates for different products under one Treasury Decision amended numerous times. There was no intent to change in any way the drawback rights to be transferred from a predecessor to a successor.

It is evident therefore that under direct identification drawback the successor obtains the right to identify for drawback any and all merchandise (or articles) its predecessor could identify. Under substitution drawback the successor receives the right to identify and/or designate any merchandise/articles its predecessor could identify and/or designate. Under substitution drawback the successor receives the right to designate merchandise used by the predecessor as the basis for drawback only on articles manufactured by it after the date of succession.

Denial of drawback in the current case however is based on a ruling made in Service Headquarters on May 8, 1974, which was highlighted in the drawback seminar held in June 1974 and the notes resulting from that seminar. The following was disclosed upon review of that ruling.

A Delaware corporation, with factories in several states, divided itself into several corporations. The factories became separate corporations. One such factory was located in Texas and became the Texas corporation. Prior to formation of the new company 90,000,000 pounds of merchandise had been received at the Texas factory. The physical inventory at the time of formation of the new company was 20,000,000 pounds.

Headquarters was asked the procedures to follow to transfer the drawback rights to the Texas corporation. The reply of November 2, 1973, stated that the Texas corporation was to be treated as a successor and in that capacity could designate the 20,000,000 pounds on hand in inventory. However, when inquiry was made further as to the 70,000,000 pounds that had been used the reply of May 8, 1974, was that the Texas corporation could not designate this material as it had been used by the Delaware corporation, even though it had been held that the Texas corporation was successor.

The May 8, 1974, ruling was inconsistent with the November 2, 1973, ruling as well as the policy of transferring drawback rights under a successorship at that time. There is nothing in the file to support this inconsistency or a change from that policy. When the Texas corporation succeeded the operations at the Texas factory,

all drawback rights accrued or accruing to the predecessor at that factory were transferred to the successor on the date of succession. The May 8, 1974, ruling was incorrect and the traditional perogatives of successorship are reaffirmed.

The substitution drawback law requires that the same legal person use in manufacturing both the designated and substituted merchandise. The current ruling fulfills this requirement, since a successor is considered legally to be a continuation of the predecessor in the domain covered by the successorship.

Holding: 1. A corporation will be approved as the successor of a division of another company, assuming all other requirements of successorship are met.

2. For purposes of substitution drawback (19 U.S.C. 1313(b)) a successor is allowed to designate as the basis for drawback on articles manufactured by it *after* the date of succession merchandise used by the predecessor prior to the date of succession.

3. For purposes of substitution drawback a successor is not allowed to designate as the basis for drawback on articles manufactured by it *prior* to the date of succession merchandise used by the predecessor prior to the date of succession.

You are directed to allow the protest.

Effect on Other Rulings: The unpublished ruling of May 8, 1974, and any other rulings inconsistent with the above policy are hereby revoked.

(C.S.D 86-12)

This ruling holds, pursuant to 19 U.S.C. 1526(e), that counterfeit trademark violations exist on imported articles which bear markings that are indentical to or substantially indistinguishable from registered trademarks (including the names of famous designers) even though the goods produced by the trademark owners are only remotely related to the imported goods. The U.S. Customs Service will not give away or sell goods bearing counterfeit markings as defined in 19 CFR 133.23a unless the offending marks are removed or obliterated. All such goods will be destroyed pursuant to 19 U.S.C. 1611.

Date: October 22, 1985
TMK-3 CO:R:E:E
727744 SO

Mr. EFRAIN PICON,
Assistant District Director, C&V,
U.S. Customs Service,
P.O. Box 2112,
San Juan, Puerto Rico 00903

Dear Mr. PICON: In your memo of November 28, 1984, you asked for advice as to when a trademark recorded for one class of mer-

chandise is protected in another class. Specific problems have been encountered in cases where articles have been imported bearing famous trademarks registered for other lines of merchandise. Examples include (1) men's trousers from the Dominican Republic, hosiery from Panama and men's billfolds from Taiwan, all bearing the "Yves Saint Laurent" trademark (recorded with Customs for perfume and other articles in Class 51); (2) shirts from Panama bearing the "Oscar de la Renta" trademark (recorded for perfumery), and; (3) footwear manufactured in South Korea and imported from Panama bearing the "Kangaroo" trademark (recorded for handbags in Class 18). You asked us to furnish guidelines for use in determining whether the marks in question are "strong" marks.

You also mentioned our trademark recordation for "SEIKO," which states that "SEIKO" is a "strong" mark, and that "strong" marks are protected not only for articles to which the trademark is applied by the trademark owner (in this case watches, clocks and parts thereof in Class 27), but also for other goods which might naturally come from the same trademark owner. Please note that the numbered Classes of merchandise referred to above have been established for purposes of organizing the work of the U.S. Patent and Trade Mark Office and are not legally significant for purposes of establishing Customs' trademark violations.

It is firmly established that the owner of a trademark which is "original, arbitrary, financial, or a strong mark," may exclude or prevent anyone from the use of that trademark, not only for the commodity he manufactures and sells, but for a wide variety of products. Where the mark itself is inherently unique or has been the subject of wide advertising, it is a "strong" trademark. The courts have pointed out such outstanding examples of this type of trademark as "Kodak." or "Aunt Jemima." In these cases, the trademark laws protect the senior user's interest in being able to enter a related field at some future time, with his good reputation intact.

This issue is discussed in the Konica case (C.S.D. 79-410), copy enclosed. In that case, the Konica trademark was found to be a strong mark entitled to protection against infringing importations of watches, even though the "Konica" trademark had been applied exclusively to cameras and camera accessories. While it is not apparent from reading the *Konica* decision, we note that the trademark protected by Customs (Konica) appears in stylized script form. Even though the mark on the inexpensive imported watches was in block letters (KONICA) there was, nevertheless, a "counterfeit" trademark violation.

Applying the above guidelines to the specific questions you raised, we note that the protected trademarks "Yves Saint Laurent," "Oscar de la Renta" and "Kangaroo" are unique or "strong marks." The first two are the names of famous designers of a variety of high quality articles. The unauthorized use of the designers'

names on poor quality items would strongly tend to confuse the public as to the source of those items. While the kangaroo is a creature of nature, its use as a trademark for handbags is unique and not descriptive of the handbags in any way. Through advertising, the "Kangaroo" trademark for handbags has become a "strong mark." Therefore, in our opinion, Customs cannot sanction the unauthorized use of the mark "Kangaroo" on footwear as simply being descriptive of the article. Certainly, the ordinary purchaser at retail would not expect to be buying footwear made of kangaroo hide because the shoes being purchased are marked "Kangaroo." Accordingly, we are of the opinion that the trousers, hosiery, billfolds, shirts and shoes in question, if imported bearing, marks identical with or substantially indistinguishable from the "strong" trademarks "Yves Saint Laurent," "Oscar de la Renta" and "Kangaroo," applied without the authorization of the trademark owners, would be "counterfeit" trademark violations.

Section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. 1526(e)) provides for the seizure and forfeiture of merchandise bearing a couterfeit mark (within the meaning of section 1127 of Title 15) imported in violation of the provision of section 1124 of Title 15. A "counterfeit" is a spurious mark which is identical with or substantially indistinguishable from, a registered mark (15 U.S.C. 1127; 19 CFR 133.23a(a)).

Section 42 of the Act of July 5, 1946 (commonly referred to as the Lanham Act, 60 Stat. 440, 15 U.S.C. 1124) prohibits the entry at any customhouse of the United States of articles of imported merchandise which shall copy or simulate a U.S. registered trademark, provided a copy of such trademark registration is filed with the Secretary of the Treasury and recorded in the manner provided by regulations (19 CFR 133.1-133.7). Infringement of federally registered trademarks is governed by the test of whether defendant's use is likely to cause confusion, or to cause mistake, or to decive.

When comparing conflicting marks to determine whether or not they are "counterfeit," we must first determine that the marks are "spurious." The term "spurious" refers to marks that are applied to goods without authorization of the trademark owner. Therefore, genuine trademarked articles could not fall within the definition of the term "counterfeit." It is also important to compare the accused mark with the protected mark as it appears on the trademark owner's merchandise, and that the comparison be made from the perspective of an average purchaser rather than an expert. If, upon examination of the marks as they appear on the imported merchandise, an average purchaser would find them to be "the spitting image of," or "substantially indistinguishable" from the trademark owners' merchandise, then a "counterfeit" trademark violation is established. See *Montres Rolex, S.A., Plaintiff-Appellee, against Dennis Snyder, Regional Commissioner, U.S. Customs Service et al.*, U.S. Court of Appeals for the Second Cricuit, 718 F.2d 524; 220

151-378 O - 86 - 3

U.S.P.Q. 10. This was an appeal from a judgment of the U.S. District Court for the Southern District of New York, Vincent L. Broderick, Judge, declaring imported gold watch bracelets to be counterfeits and therefore subject to forfeiture under 19 U.S.C. 1526(e), and directing defendant U.S. Customs Service to dispose of the merchandise.

The imported articles in question, bearing marks which are "counterfeits" of the Customs protected trademarks "Yves Saint Laurent," "Oscar de la Renta" and "Kangaroo," are subject to seizure and forfeiture. The owner of the trademark shall be notified of the seizure and the quantity of the articles seized. Unless the trademark owner, within 30 days of notification, provides written consent to the importation of the articles, exportation, entry after obliteration of the trademark, or other appropriate dispositon, the articles shall be disposed of (after removal or obliteration of the "counterfeit" marks) as follows: (19 CFR 133.23a)

(1) By delivery to federal, state or local government agencies which have a need for them, or

(2) By gift to charitable institutions which have a need for them, or

(3) By sale at public auction, after 1 year from forfeiture, after first determining that no federal, state of local government agency or charity has a need for them, or

(4) By destruction, if they are unsafe or a health hazard.

Please note that there is no preference stated in the law or regulations (19 U.S.C. 1526(e) and 19 CFR 133.52(c)) between options (1) and (2) above, and that option (3) cannot be used unless the district director is satisfied that no government agency or charitable institution needs the goods. While it would appear that 19 U.S.C. 1526(e) authorizes Customs to dispose of forfeited articles with the "counterfeit" marks still in place in cases where it is not "feasible" to remove or obliterate the marks, we are no longer interpreting the law in that manner. We note that the Trademark Counterfeiting Act of 1984 (Public Law 98-473, 18 U.S.C. 2320) imposes criminal sanctions for trafficking in counterfeit goods. If Customs were to sell or give away forfeited articles bearing counterfeit marks, Customs would be acting contrary to the intent of Congress in enacting the Trademark Counterfeiting Act of 1984.

Therefore, articles forfeited to the Government bearing "counterfeit" marks shall no longer be given away or sold pursuant to options (1), (2) or (3) above unless the counterfeit marks are removed or obliterated. In cases where removal or obliteration of the marks is not feasible (the articles would be defaced, or obliteration would be disproportionately expensive considering the value of the articles), the articles shall be destroyed (19 U.S.C. 1611). However, before destroying a shipment of articles which would be useful to a government agency or charity, you may invite the trademark

owner or a potential donee agency or charitable institution to assist in removing or obliterating the "counterfeit" marks.

Copies of this decision will be circulated to all Customs officers for their guidance.

(C.S.D. 86-13)

This ruling holds, pursuant to 19 U.S.C. 1466, that drilling vessels are not subject to vessel entrance and clearance requirements and vessel repair duties at the time they initially "attach" to the outer continental shelf at a point where there is no existing artificial island, installation or other device attached to the seabed for purposes of exploring, developing or producing resources therefrom.

Date: 22 October 1985
VES-3-15/VES-5/VES-13
CO:R:CD:C 107852 PH

JOHN W. MCCONNELL, Jr., Esq.,
Haight, Gardner, Poor & Havens,
Federal Bar Building,
1815 H Street NW., Suite 501,
Washington, D.C. 20006

Dear Mr. MCCONNELL: In your letter of August 14, 1985, you state that recently a client brought a semi-submersible drilling rig from Alaska by way of Peru to a location in the Gulf of Mexico where it was attached to the seabed of the outer continental shelf (OCS) for the purpose of exploring for resources. The owner of the drilling rig sought to make formal entry with the local Customs office but entry was refused on the basis of Legal Determination 3100-02 and a Notice to Steamship Companies/Brokers and Others Concerned issued by the District Director of Customs in New Orleans on September 20, 1984 (84-140 VES-5-07:V:NO:DD TEH).

On the basis of the 1978 Amendments to the Outer Continental Shelf Lands Act of 1953 (OCSLA), you state that you believe that entry should be made and seek a ruling as to when such entry should be made. You state that you believe that equipment purchased for and repairs made to the vessel outside the United States should be subject to duty.

The 1978 amendments to the OCSLA, among other things, changed section 4(1)(a) of the OCSLA (43 U.S.C. 1333(a)(1)) to provide, in part, that the laws of the United States are extended to "* * * the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom * * * to the same extent as if the outer Continential Shelf were an area of exclusive Federal jurisdiction lo-

cated within a State." Before the 1978 amendments, the corresponding part of section 4(a)(1) provided that the laws of the United States are extended to "* * * the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

The intent of this change was stated to be "technical and perfecting and * * * meant to restate and clarify and not change existing laws." (House Conf. Report No. 95-1474, p. 80 (1978 U.S.C.C.A.N. 1679)). It was also stated in this Report about this change that the conferees were informed—

> that the U.S. Customs Service has interpreted existing section 4(a)(1) to mean that foreign-built production platforms are not subject to import duties when they are brought into OCS waters and attached to the seabed. Specifically, the Customs Service has stated that such platforms are not actually being imported to the United States until they are placed on the shelf and need not pay customs duties. 1 The conferees reject this interpretation and believe it is contrary to the intent of Congress in enacting the 1953 act. Moreover, to make it explicit that this interpretation should not be continued to be given effect, the conferees state that one of the purposes of this change in 4(a)(1) is to make it clear that U.S. customs duties are to apply to a platform, built overseas, and brought into OCS waters for placement so that it can be used to develop and produce OCS minerals.
>
> Under section 4(a)(1) of the conference report, Federal laws and "civil and political jurisdiction of the United States" are applicable to the subsoil and seabed of the OCS, to all artificial islands and "all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon" to explore, develop, produce or transport OCS mineral resources. Thus customs laws apply—as within the "political and civil jurisdiction" of the United States—to platforms constructed outside the United States and brought into OCS waters—as being "installations and other devices * * * which may be erected thereon".
>
> The Customs Service indicates that once the platforms are in place, machinery, equipment and other items placed on the structure are subject to duties. Of course, the conferees believe this is, and continues to be, the law. [*Supra*, pp. 80, 81.]

In response to the foregoing legislative history, the Customs Service issued Customs Service Decision (C.S.D.) 79-1. This decision held that foreign-built drilling and production platforms which are not vessels are dutiable upon their attachment, whether temporary or permanent, to the seabed of the OCS. The C.S.D. emphasized that only drilling platforms which are not vessels are dutiable

upon attachment to the OCS. It did not make vessels, whether drilling vessels or otherwise, subject to duty (vessels other than yachts and pleasure vessels are not subject to duty under the Tariff Schedules (General Headnote 5(g)), Tariff Schedules of the United States)), nor did it make them subject to vessel entrance and clearance requirements upon initial attachment to the OCS at a point at which there is no existing artificial island or installation or other device attached to the seabed for the purpose of exploring for, developing, or producing resources therefrom.

It was the position of the Customs Service before the 1978 Amendments and remains the position of the Customs Service that drilling vessels are not subject to the vessel entrance and clearance requirements at the time they initially "attach" to the OCS, as stated in the note you referred to in the September 20, 1984, Notice from the District Director of Customs in New Orleans. Accordingly, we concur with the decision of Customs in New Orleans in declining to accept formal entry of your client's drilling rig on its initial attachment to the OCS.

Under 19 U.S.C. 1466, equipments purchased in a foreign country for, and repairs made in a foreign country to a vessel documented under the laws of the United States to engage in the foreign or coasting trade or intended to be employed in such trade are dutiable "on the first arrival of such vessel in any port of the United States." In view of the specific language in section 1466 attaching duties on the first arrival in any *port* of the United States, we conclude that drilling vessels are not subject to vessel repair duties on their initial attachment to the OCS at a point at which there is no existing artificial island or installation or other device attached to the seabed for the purpose of exploring for, developing, or producing resources therefrom.

(C.S.D. 86-14)

This ruling holds that T.D. 85-91, which amended vessel entrance and clearance regulations as they relate to lightering operations, will: (1) apply to service vessels transporting import or export cargo to and from vessels on the high seas; (2) does not affect Customs treatment of aircraft going to and from vessels on the high seas; (3) does not affect the transportation of

passengers to and from vessels on the high seas; and (4) is anticipated to have little effect on outer continental shelf operations (19 CFR 4.3, 4.9, 4.20, 4.60, 112.1(b) and 112.1(f), 19 U.S.C. 1565 and 43 U.S.C. 1333(a)(1)).

Date: November 19, 1985
File: VES-5-18-CO:R:CD:C
107842 PH

To: DARC, Inspection and Control, New Orleans, Louisiana
From: Director, Carriers, Drawback and Bonds Division
Subject: Entry and Clearance of Vessels—Treasury Decision 85-91

With your memorandum of August 1, 1985 (VES-5-V:O:IC JHG), you forwarded a memorandum dated July 24, 1985, from the Port Director at Pascagoula, Mississippi, concerning Treasury Decision 85-91. The Port Director states that he is concerned with the possible changes Treasury Decision 85-91 may effect to the Customs treatment of service vessels and helicopters which transport merchandise and passengers to and from very large crude carriers (VLCC's) outside United States territorial waters. He states that he assumes that service craft bringing merchandise from VLCC's which requires Customs entry would be subject to the vessel entrance and clearance requirements by virtue of the amendments to the Customs Regulations effected by the Treasury Decision. He states that this would pose additional burdens on the service vessel operators but would greatly enhance Customs control of transportation of passengers and merchandise to and from VLCC's. On the negative side of the ledger, he states that the changes would increase the volume of documents and time involved in processing these vessels, some of which perform two or more trips per day to and from VLCC's.

The Port Director also asks about the effect of Treasury Decision 85-91 in the context of Customs Service Decision 85-37. This C.S.D. held, pursuant to 19 U.S.C. 1565 and regulations thereunder, that bonded merchandise to be moved from one place within a port to another must be transported by a Customs licensed and bonded cartman or lighterman. The C.S.D. held that launch service operators, if performing these services, must be licensed and bonded as lightermen. Finally, the Port Director asks about the effect of Treasury Decision 85-91 on offshore drilling operations.

Treasury Decision 85-91 amended sections 4.3, 4.9, 4.20, and 4.60, Customs Regulations (19 CFR 4.3, 4.9, 4.20, and 4.60), to require a vessel to obtain clearance if it is bound for another vessel on the high seas to either: (1) transship export merchandise which it has transported from the United States to that vessel; or (2) receive import merchandise from that vessel and transport the merchandise to the United States. A vessel is required to make vessel entry if it is returning from another vessel on the high seas after either: (1) transporting export merchandise out of the United States and transshipping the merchandise to that vessel; or (2) transporting

import merchandise to the United States after receiving the merchandise from that vessel. Treasury Decision 85–91, as stated therein, was issued to clarify the applicability of the entrance and clearance requirements of the navigation laws to vessels engaged in the lightering of import and export cargo between the United States and vessels located on the high seas.

The Port Director is correct in his assumption that service vessels bringing import merchandise from a vessel on the high seas to a port of the United States would be subject to vessel entrance and clearance requirements. This is also true of service vessels carrying export merchandise from a port of the United States to a vessel on the high seas. Treasury Decision 85–91 does not affect the Customs treatment of helicopters transporting merchandise and/or passengers to and from vessels on the high seas. Customs treatment of helicopters and other aircraft is, of course, governed by Part 6 of the Customs Regulations under which aircraft coming into any area from any place outside the United States (e.g., a vessel on the high seas) shall be entered in such area if landing is made therein and if carrying passengers for hire or commercial cargo (section 6.3, Customs Regulations). Also, the Treasury Decision affects only vessels transporting export or import merchandise or cargo between the United States and a vessel on the high seas, it does not affect such transportation of passengers.

Operators of service vessels which transport merchandise or cargo between the United States and a vessel on the high seas are *not* required to be licensed and bonded as lightermen. Customs Service Decision 85–37 was only concerned with the movement by service vessels of bonded merchandise between places *within* a port (see definition of "cartman" and "lighterman" in section 112.1(b) and (f), referred to in the C.S.D.). A vessel on the high seas is, of course, not within a port.

We anticipate that Treasury Decision 85–91 will have little, if any, effect on drilling operations on the United States outer continental shelf (OCS). Drilling vessels or platforms, artificial islands, and other devices or installations which are attached to the seabed of the OCS for the purpose of exploring for, developing, or producing resources therefrom are treated as if they were located within the United States for purposes of United States law (section 4(a)(1), Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)(1))). Customs and navigation laws, including the coastwise laws, laws on entrance and clearance of vessels, and provisions of dutiability of merchandise are applicable to such vessels, islands, and devices or installations (see Treasury Decision 54281, and subsequent rulings on this subject published in the Customs Bulletin as Customs Service Decisions).

Because a drilling vessel, artificial island, or other device or installation attached to the OCS for any of the requisite purposes is treated as if it were a point within the United States, a service

vessel carrying merchandise or passengers between the United States mainland and such a vessel, island, or device or installation should be treated as though it is carrying merchandise between points in the United States. Such transportation, or transportation between drilling vessels, artificial islands, or other devices or installations attached to the OCS for any of the requisite purposes, is limited to coastwise-qualified vessels (i.e., United States-built, owned, and properly documented vessels). Imported merchandise transported from a drilling vessel, artificial island, or other device or installation attached to the OCS for any of the requisite purposes to a point in the United States or another such drilling vessel, artificial island, or other device or installation attached to the OCS has already been subject to entry and duty under the Tariff Schedules and is not treated as import cargo. Merchandise sent foreign from a drilling vessel, artificial island, or other device or installation attached to the OCS for any of the requisite purposes is, of course, treated as export cargo.

We appreciate your effort, and that of the Port Director, in considering this matter and in raising these very appropriate questions about it. Enclosed, for your information, are copies of a recent memorandum and letter also considering the effects of Treasury Decision 85–91.

(C.S.D. 86–15)

This ruling holds that imported merchandise, initially transported under a special permit for immediate delivery to an importer's premises, and is thereafter entered for transportation and exportation and exported, is not eligible for drawback under the substitution same condition drawback law, 19 U.S.C. 1313(j)(3).

Date: December 3, 1985
DRA–1–09–CO:R:CD:D
218407 RB

Issues: (1) Is imported merchandise eligible for drawback under the substitution same condition drawback law, 19 U.S.C. 1313(j)(3), when it is initially transported under a special permit for immediate delivery to the importer's premises, and is thereafter entered for transportation and exportation, and exported?

(2) Is perishable merchandise, such as fresh fruits and vegetables, eligible for drawback under the same condition drawback law, 19 U.S.C. 1313(j)(1) or (3)?

Facts: Fresh fruits and vegetables are imported at various times, and initially shipped under a special permit for immediate delivery to the importer's premises for examination and sorting, as authorized under 19 U.S.C. 1448(b) and 19 CFR 142.21(b). As a result, part of each shipment is entered for consumption, duty-paid, and the

balance is entered for transportation and exportation, and exported. The exported merchandise is made the subject of claims for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3), and other imported merchandise entered for consumption, duty-paid, 2 or 3 days prior to the date of exportation is randomly designated as a basis for drawback.

Law and Analysis: (1) It has been observed that "[t]he express provisions relating to drawback under 19 U.S.C. 1313 fundamentally do not apply to imported merchandise until 'after its release from the custody of the Government. It is also acknowledged in this regard that same condition drawback, subsection (j), 'would apply to (imported) articles entered, or withdrawn from warehouse, for consumption' " (citations omitted) (Headquarters letter dated October 24, 1985, file DRA-1-09-CO:R:CD:D 218032 [imported merchandise entered for warehouse, and in Customs custody and control, not eligible for substitution same condition drawback if withdrawn and exported]).

In the present case, when transported to the importer's premises under a special permit for immediate delivery, the subject merchandise is considered as remaining in Customs custody (19 CFR 142.22(b); see T.D. 79-221, 44 F.R. 46794, the notice of proposed rulemaking leading thereto, 43 F.R. 55774 (1978), and T.D. 76-220, 41 F.R. 33248).

When thereafter entered for transportation and exportation, the merchandise continues in Customs custody. See *American Shipping Co.* v. *United States,* 65 Treas. Dec. 178, T.D. 46879. In that case, imported tomatoes, entered for transportation and exportation, were diverted for inspection at the request of the shippers, a consumption entry filed, duty-paid, and an unconditional delivery permit issued for the merchandise. The tomatoes, however, were subsequently exported through error. In denying a claim for refund of duty on the ground that no provision of law than existed justifying such action under the circumstances after the merchandise was released from Customs custody, the Customs Court stated in this respect that "[w]hen the consumption entry was made * * * and the delivery permit issued, possession and control passed from the Government to the importers * * *" (emphasis added) (*supra,* at 180) (also see *United States* v. *Maine Central Railway Co.,* 9 Ct. Cust. Appls., T.D. 38015; and *Illinois Central Railroad Co.* v. *United States,* 2 Cust. Ct. 422, C.D. 168).

Furthermore, in the October 24, 1985, ruling, cited above, concerning imported merchandise entered for warehouse, it was implicit that such merchandise, when withdrawn for exportation or for transportation and exportation, would thereby remain continuously in Customs custody until exported (also see T.D. 4843; and see *Hudson Shipping Co., Inc.* v. *United States,* 18 Cust. Ct. 17, 21, C.D. 1038).

Imported merchandise, initially transported under a special permit for immediate delivery to the importer's premises and then entered for transportation and exportation, and remaining in Customs custody and control, consequently, does not fall within the scope of section 1313, including, in particular, the provisions for same condition drawback under subsection (j).

Parenthetically, even if same condition drawback were applicable herein, the necessity that the claimant have "possession" of the substituted merchandise as contemplated by section 1313(j)(3) would not be met while the merchandise remains in Customs custody and control (see *American Shipping Co., supra*). In addition, it is axiomatic that the designated and substituted merchandise herein would not be fungible and in the same condition, if each is sorted respectively from the same import shipment.

(2) The term "merchandise" as used in section 1313, including subsection (j) thereof, means "goods, wares and chattels of every description" (19 U.S.C. 1401(c)). Assuming that there is compliance with the law and relevant regulations, therefore, perishable goods would be eligible for same condition drawback.

Holdings: (1) Imported merchandise is not eligible for drawback under the substitution same condition drawback law, 19 U.S.C. 1313(j)(3), when it is initially transported under a special permit for immediate delivery to the importer's premises, and is thereafter entered for transportation and exportation, and exported.

(2) Perishable merchandise, such as fresh fruits and vegetables, is eligible for same condition drawback under 19 U.S.C. 1313(j)(1) or (3), assuming that there is compliance with the law and applicable regulations.

(C.S.D. 86-16)

This ruling holds that fungible merchandise, entered temporarily free of duty under bond (TIB) for foreign sales and under consumption entries for domestic sales, may be commingled in storage and manufacture with the TIBs being cancelled on a first-in-first-out basis.

Date: December 9, 1985
CON-9-04-CO:R:CD:D
218370 MM/GS

Issue: If fungible merchandise is entered temporarily free of duty under bond (TIB) under item 864.05, Tariff Schedules of the United States, for foreign sales and under consumption entries for domestic sales, and is then commingled, may the TIBs be cancelled on a FIFO basis and the consumption entries identified for domestic withdrawals?

Facts: Cut rag tobacco will be blended in Germany and imported for use in manufacturing cigarettes. The tobacco to be used for

cigarettes for the domestic market will be entered for consumption with duty being paid thereon. The tobacco to be used for cigarettes for the export market will be entered under item 864.05, TSUS. All the imported tobacco will be fungible (i.e. commercially identical) and will be commingled in storage and manufacture.

Law and Analysis: An importer at the time of importation under item 864.05, TSUS, must have the intent to export the articles produced from the merchandise. If the articles or the merchandise are diverted to the domestic market, the importer is liable under its bond for twice the duties and in addition is subject to a penalty if it is established that the intent to export was not present at the time of exportation. Thus the importer will have to have on hand at all times sufficient merchandise and/or articles to cancel all of the open TIB entries. On the other hand merchandise which is imported under a consumption entry may be exported or used to manufacture articles which are exported.

Commingling of fungible TIB merchandise and other merchandise has previously been approved (C.S.D. 84-12). In the present case the importer proposes to commingle fungible tobacco imported under TIB and consumption entries and to cancel the TIB entries on a FIFO basis. In addition the importer would have on hand at all times sufficient merchandise or articles to cancel all open TIB bonds.

Holding: Fungible merchandise imported under TIB and under consumption entries may be commingled and the TIBs cancelled on a FIFO basis, provided the importer has on hand at all times in the commingled inventory sufficient merchandise (or articles manufactured therefrom) to cancel all outstanding TIBs.

U.S. Customs Service

General Notice

19 CFR Part 175

Supplemental Solicitation of Comments Regarding Tariff Classification of Prefinished Hardboard Siding

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Supplemental Solicitation of Comments.

SUMMARY: By notice published in the Federal Register on March 11, 1986 (51 FR 8338), the public was informed that Customs is reviewing its position regarding the tariff classification of certain imported prefinished hardboard lap siding. Although the merchandise was accurately described in the notice, we believe it is advisable to supplement that description in order to clarify the precise issue in a case remanded to Customs for further review by the Court of International Trade. Therefore, this notice provides a revised description of the merchandise subject to review.

DATE: Comments (preferably in triplicate) must be received on or before April 25, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Jeremy N. Baskin, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

By notice published in the Federal Register on March 11, 1986 (51 FR 8338), the public was informed that Customs is reviewing its position regarding the tariff classification of certain imported prefinished hardboard siding. Although the merchandise was accurately described in the notice, because of the technical issue being considered by the Court, the Department of Justice recommends that

we supplement the prior notice in order to clarify the description and avoid any possible doubt regarding the precise merchandise under consideration.

The product in question is a plank of hardboard, 7/16-inch thick, and either 9 or 12 inches wide. Approximately 1-inch from the bottom, a hard plastic locking strip or "spline" is fixed into a groove in the back of each plank. The top edge of each plank is machined to form a groove or "rabbet", which fits the spline in the plank above. The planks are prefinished at the time of importation. Part of the prefinishing process involves the application of a newsprint paper face to the wet wood fiber mat, which mat has a water content of 70 percent. This occurs prior to compression and heat treatment which forms the hardboard planks, and prior to the sawing and finishing operations which form the prefinished siding. Acrylic latex paint is also applied to the planks prior to importation.

As fully discussed in the March 11, 1986, notice, because of the short deadline imposed upon Customs by the Court to report on our decision, Customs must quickly resolve this classification issue. Therefore, comments must be received within 10 days from the date of publication of this notice.

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (2 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue NW., Washington, D.C. 20229.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: April 9, 1986.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, April 15, 1986, (51 FR 12712]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Decisions of the United States Court of International Trade

(Slip Op. 86–38)

BADGER-POWHATAN, A DIVISION OF FIGGIE INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, RUBINETTERIE A. GIACOMINI, S.P.A., INTERVENOR

Court No. 85–4–00467

OPINION

[Plaintiff's motion for judgment on the agency record granted. Plaintiff's motion for access to confidential documents under protective order denied.]

(Decided April 2, 1986)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Velta A. Melnbrencis,* Civil Division, Department of Justice, for defendant.

Law Office of Larry Klayman, P.C. (*Larry Klayman, John M. Gurley*) for intervenor.

RESTANI, *Judge:* In this action, plaintiff, Badger-Powhatan, a division of Figgie International, Inc., challenges the method of calculation used to determine the less than fair value (LTFV) margin in the antidumping duty order issued by the United States Department of Commerce International Trade Administration (ITA) regarding certain brass fire protection products from Italy. 50 Fed. Reg. 8354 (1985). Specifically, plaintiff claims ITA erred by failing to recalculate the LTFV margin after the International Trade Commission (ITC) determined that only a subclass of the class of merchandise sold at LTFV is causing material injury to an industry in the United States. Plaintiff has moved for judgment upon the agency record on the merits of its position.[1] CIT Rule 56.1. In re-

[1] Plaintiff also moves for access to confidential documents under protective order. Defendant opposes this motion, contending that release of these documents to plaintiff is unnecessary if the action is remanded for recalculation of the LTFV margin in accordance with plaintiff's position. Plaintiff's counsel indicated at oral argument that should the court remand the ITA final determination for recalculation, there would be no need to reach this issue inasmuch as the agency historically has provided access to such documents at the administrative level. Therefore, the court dismisses this motion without prejudice.

sponse, defendant seeks a remand of the action for a recalculation of the LTFV margin in accordance with the method proposed by plaintiff. Intervenor, Rubinetterie A. Giacomini, S.P.A. (Giacomini), opposes the positions of both plaintiff and defendant. It contends that the original determination is correct and that a recalculation of the LTFV margin is prohibited by statute.

The basic facts underlying this controversy are undisputed. Plaintiff is a domestic producer of brass fire protection products. On January 3, 1984, plaintiff filed an antidumping petition with ITA and ITC pursuant to 19 U.S.C. § 1673a(b) (1982). The petition alleged that imports of brass interior fire protection products were being, or were likely to be, sold in the United States, at less than their fair value. In addition, the petition alleged that such products materially injured or threatened to materially injure the domestic industry producing interior fire protection products. *See* 19 U.S.C. § 1673a(b)(1) (1982); 9 U.S.C. § 1673 (1982 & West Supp. 1985). The petition defined the class or kind of imported merchandise as brass valves, connections, nozzles, and couplings which serve as components in interior fire protection systems to control the flow and direction of water through such systems. The specific products involved were described as:

1. fire hose couplings (1½ and 2½ inch),
2. fog/straight steam nozzles (1½ and 2½ inch),
3. angle-type hose valve (1½ and 2½ inch),
4. wedge-disc hose gate valves (2½ inch),
5. single and double clapper siamese fire department connections (2½ inch inlet and 4 inch outlet),
6. pressure restricting valves, and
7. pressure regulating valves.[2]

On February 21, 1984, in response to plaintiff's petition, ITA published notice of initiation of antidumping investigations. *See* 19 U.S.C. § 1673a(c)(2) (1982) (requires ITA to make determination on petition and, if determination is affirmative, to commence investigation and publish notice in Federal Register); 49 Fed. Reg. 6396 (1984) (notice of initiation of antidumping investigations at issue). The notice of initiation of investigations indicates that the investigations were to cover the seven products described in plaintiff's petition. 49 Fed. Reg. 6396 (1984).

ITC issued a preliminary determination on March 1, 1984, that concluded that there was a reasonable likelihood that the brass fire protection products under investigation were causing material

[2] In its documents relating to this antidumping investigation, ITA identifies these products by their *Tariff Schedules of the United States* item numbers as well as by their names. 49 Fed. Reg. 47,066 (1984). The products are currently classified under the following *TSUS* numbers:
1. fire hose couplings—657.3540,
2. fog/straight steam nozzles—680.1480,
3. angle-type hose gate valves—680.1440,
4. wedge-disc hose gate valves—680.1430,
5. single and double clapper siamese fire department connections—680.1420,
6. pressure restricting valves—680.1440, and
7. pressure regulating valves—680.2740.

injury to United States industries. *Certain Valves, Nozzles, and Connectors of Brass from Italy for Use in Fire Protection Systems,* U.S.I.T.C. Public. 1500, Investigation No. 731-TA-165 (Preliminary), 49 Fed. Reg. 4046 (1984); 19 U.S.C. § 1673b(a) (1982). On July 10, 1984, ITA published an affirmative preliminary determination of sales at LTFV. 49 Fed. Reg. 28,083 (1984); 19 U.S.C. § 1673b(b) (1982). This determination was also based on an investigation that included all seven products. At that time ITA preliminarily determined the weighted-average margin of sales at LTFV to be 1.16%. *Id.* at 28,083, 28,084.

On November 30, 1984, ITA published its final affirmative determination of sales at LTFV. 49 Fed. Reg. 47,066 (1984). ITA identified the merchandise covered by the investigation as the same seven products. *Id.* at 47,066, 47,067. The determination announced a weighted-average LTFV margin of 3.47% for this class or kind of merchandise. *Id.* at 47,073. Following the signing of the final LTFV determination, the confidential versions of computer printouts containing LTFV margin calculations were disclosed to counsel for both Badger-Powhatan and Giacomini. After examining the data, counsel for Giacomini and Badger-Powhatan identified clerical and factual errors in the analysis. In response to these comments, ITA published an amendment to its final affirmative LTFV determination, changing the weighted-average LTFV margin for all seven categories of merchandise to 1.28%. 50 Fed. Reg. 1099 (1985).

Subsequent to the ITA determination that the seven products were being sold at LTFV, ITC issued its final determination on material injury. *Certain Valves, Nozzles, and Connectors of Brass from Italy for Use in Fire Protection Systems,* U.S.I.T.C. Public. 1649, Investigation No. 731-TA-165 (Final), 50 Fed. Reg. 7971 (1985); 19 U.S.C. § 1673d(b) (1982 & West Supp. 1985). ITC, by majority decision, determined that industries in the United States are materially injured by reason of imports from Italy of single and double clapper siamese connections and pressure-restricting valves. It further found that the other five products from Italy were not causing or threatening to cause material injury to a United States industry.

After being notified of the ITC findings, ITA published an antidumping duty order. *Antidumping Duty Order: Certain Brass Fire Protection Products from Italy,* 50 Fed. Reg. 8354 (1985); 19 U.S.C. § 1673e (1982). The order identified the merchandise covered by the investigation as the original seven products. It then noted the material injury findings of ITC, and issued the following order:

> [T]he Department directs United States Customs officers to assess * * * antidumping duties equal to the amount by which the foreign market value of the merchandise exceeds the United States price for all entries of certain brass fire protection products, which include single and double clapper siamese fire department connections and pressure restricting valves.

50 Fed. Reg. 8354–55. These duties are to be assessed solely on imports of single and double clapper siamese fire department connections and pressure restricting valves from Italy.[3] *Id.* at 8355. The estimated weighted-average antidumping duty margin adopted was that published in the amended final affirmative LTFV determination (1.28%), based on data on the aggregate value of Giacomini's U.S. sales of all seven products. *Id.*; 50 Fed. Reg. 1099.

Plaintiff now moves for judgment upon the agency record on the issue of the propriety of ITA's calculation of the estimated antidumping duty deposit rate based upon the weighted-average LTFV margin for all seven product categories.[4] Plaintiff argues that data relevant to the five product categories not subject to antidumping duties should not have been included in the LTFV margin calculations.[5] Instead, plaintiff contends, the estimated antidumping duty deposit rate should be based solely upon the weighted-average LTFV margin for the two product categories identified in the antidumping order. Defendant responds by agreeing to base future deposits of estimated duties upon a recalculated LTFV margin determined for the two products involved. To this end, it seeks a remand of the action to ITA for recalculation of the LTFV margin and amendment of the order. On the other hand, intervenor Giacomini contends that ITA's use of a weighted-average LTFV margin that includes margins for the entire class or kind is proper under these circumstances. Furthermore, it contends that a recalculation of the LTFV margin would constitute a prohibited second final determination. Intervenor, then, not only challenges the grounds supporting a change in the order, but also ITA's authority to implement such a change.

The first issue the court must address is whether ITA, having rendered its final determination as to the LTFV margin, may now alter the basis of its calculation.[6] It is now well established that

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[3] In an independent proceeding before this court, plaintiff challenged the ability of ITA to issue an order that imposes duties on only a subset of the class or kind of merchandise as to which ITA has made an affirmative LTFV sales determination. This court held that an antidumping duty order cannot direct Customs to assess duties on a product unless ITA determines that it is in a class or kind of merchandise being sold at LTFV *and* ITC determines that the merchandise to be dutied is causing material injury to a domestic industry. *Badger-Powhatan* v. *United States*, 9 CIT ___, 608 F. Supp. 653, 656 (1985). The statute arguably could have been interpreted by the agency and the court to require duties to be imposed on the entire LTFV "class or kind of merchandise," as defined by ITA, so long as any industry in the United States was being injured by reason of imports within the defined class. The court reasoned, however, that ITC was required to determine which industry or industries are injured, according to specific statutory requirements. 19 U.S.C. §§ 1673(2), 1677(4)(A), (10) (1982 & West Supp. 1985). In this case, a majority of the commissioners found seven different industries to exist, only two of which were injured by reason of merchandise in the class defined by ITA. The court went on to approve, as consistent with the statutory scheme, the ITA practice of imposing duties only on merchandise "like" merchandise produced by the injured industry. *Badger-Powhatan*, 9 CIT at ___, 608 F. Supp. at 657.

[4] Plaintiff originally pled three counts against defendant. In its motion for judgment upon the agency record, plaintiff withdrew Counts I and III. Consequently, only Count II of the complaint is at issue here.

[5] These five products constituted 71% of the class or kind of merchandise originally subject to the investigation. *Badger-Powhatan* v. *United States*, 9 CIT ___, 608 F. Supp. 653, 657 n.2 (1985).

[6] In their briefs plaintiff and defendant appear to characterize the proposed recalculation as an amendment to the antidumping order, not as an amendment to ITA's final determination. This characterization is incorrect. It is clear that an antidumping order may not vary the terms of the underlying determination. *Royal Business Machines, Inc.* v. *United States*, 1 CIT 80, 86, 507 F. Supp. 1007, 1012 (1980), *aff'd*, 69 CCPA 61, 669 F. 2d 692 (1982). Because LTFV margins for the various products were not separately stated in the ITA final determination, the determination must be amended if the LTFV margin derived from the seven product categories is in-

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amendment, before or after remand, is appropriate when the agency has utilized a legally improper method in making a determination or when the original determination contains an error of inadvertence or mistake. *Timken Co.* v. *United States,* 10 CIT ___ Slip Op. 86–17 at 9 (Feb. 20, 1986); *Melamine Chemicals, Inc.* v. *United States,* 8 CIT 105, 592 F. Supp. 1338, 1340 (1984); *Timken Co.* v. *United States,* 7 CIT 319, Slip Op. 84–63 at 3 (June 5, 1984); *Gilmore Steel Corp.* v. *United States,* 7 CIT 219, 585 F. Supp. 670, 674 (1984).[7] The court notes that all parties, including intervenor, seemed to accept the concept of amended final determinations when they participated in the calculation of a reduced LTFV margin following the original determination. *See* discussion *supra.*

The question has arisen as to whether the court may remand this matter without considering the merits. There is no indication anywhere in the statutory scheme that the agency, for policy or similar reasons, may simply change a final determination after an antidumping order is issued. If there is such a provision, defendant has not cited it. The court believes, rather that Congress expected a single and prompt final determination. After all, it provided very short time limits for decision-making. *See* 19 U.S.C. § 1673d(a) (1982 & West Supp. 1985). If the agency could amend determinations endlessly, it would be difficult to answer the question as to when a *final* determination would ever be made. The Supreme Court has ruled that the Interstate Commerce Commission cannot, without specific statutory authority, reconsider license and certificate decisions because of policy changes. *American Trucking Association* v. *Frisco Transportation Co.,* 358 U.S. 133, 146 (1958); *United States* v. *Seatrain Lines,* 329 U.S. 424, 429–33 (1947). This principle has been applied in other licensing cases. *See, e.g., Hirschey* v. *Federal Energy Regulatory Commission,* 701 F.2d 215 (D.C. Cir. 1983). This situation is analogous. The original determination and order resulted in a deposit rate which affects both domestic and foreign interests, just as a license decision affects those whose businesses must

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correct. The amended final determination will then be incorporated into the order in accordance with 19 C.F.R. § 353.48 (1985), which reads in pertinent part.

> (b) *Calculation of the amount of the estimated duty to be deposited.* The deposit of estimated antidumping duties for each manufacturers, producer or exporter shall be equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise, as determined in the affirmative final determination of the Secretary or the latest administrative review of such determination under § 353.53, or, if appropriate, under § 353.49.

[7] *Compare with Ceramica Regiomontana, S.A.* v. *United States,* 5 CIT 23, 557 F. Supp. 596 (1983), in which this court held that when a subsidy is eliminated after the issuance of a countervailing duty order, ITA does not have the authority to modify the estimated countervailing duty deposit rate outside the scope of the provisions of 19 U.S.C. §§ 1675(b) (changed circumstances) and 1675(a) (periodic review). *Ceramica Regiomontana* at 29–30, 557 F. Supp. at 602. Intervenor cites *Ceramica Regiomontan* for the proposition that ITA does not have statutory authority to issue a second final determination after issuance of an ITC final material injury determination inasmuch as the cited provisions adequately protect the interests of those seeking change. Contrary to intervenor's position, the court considers *Ceramica Regiomontana* to be consistent with the *Gilmore* line of cases. *Ceramica Regiomontana* involved a situation in which an event occurred *after* the issuance of the order that changed the facts upon which the calculation was made. *Id.* at 24, 557 F. Supp. at 598. In contrast, the case at bar involves a situation in which none of the underlying facts have changed, but one of the parties challenges the basis for the original calculation. Under *Melamine* and *Ceramica Regiomontana,* if the original calculation is in error, then the final determination may be amended; on the other hand, if circumstances affecting the calculation change after the issuance of the order, then the adjustment must be made pursuant to the changed circumstances or periodic review provisions.

be licensed. The statute contains no exceptions to the general rule that these adjudicatory-type decisions, which are relied upon, may later be changed for policy reasons, and the parties have cited no applicable judicial exceptions to the rule. That this principle may give way when errors are committed does not give the agency authority to upset final decisions where no errors have occurred. Therefore, in order to determine if remand is appropriate, the court must rule on plaintiff's motion for judgment on the agency record.

To determine whether ITA erred in not performing the recalculation, the court must ascertain whether Congress intended that a LTV recalculation occur in a situation in which the injury determination narrows the potential scope of the antidumping order and information is available in the administrative record from which to perform the recalculation. The parties offer different theories as to Congress' intent. Intervenor argues that the statutory scheme clearly precludes such a recalculation. Plaintiff argues that the legislative history indicates that a new calculation must be undertaken. Defendant agrees with plaintiff as to the results of this case, but it is difficult to determine if defendant believes it could reasonably arrive at a contrary result in a similiar situation.[8]

The statute, of course, is our primary guide in determining Congress' intent. *United States* v. *Hepp*, 497 F. Supp. 348, 349 (N.D. Iowa 1980), *aff'd*, 656 F.2d 350 (8th Cir. 1981) (citing *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979); *Simpson* v. *United States*, 435 U.S. 6 (1977); *Scarborough* v. *United States*, 431 U.S. 563 (1976)) ("[T]he starting point in any case involving the interpretation of a statute is the statute itself."). Intervenor notes that the statutory scheme provides for, in chronological order, a LTFV final determination (19 U.S.C. §1673d(a)(1) (1982)), a final injury determination (19 U.S.C. §1673d(b) (1982) West Supp. 1984)), and a final order (19 U.S.C. §1673e(a) (1982)). Intervenor argues that there is no room in the statutory scheme for a new determination modifying the LTFV determination where the products found to be causing injury are fewer than the products considered in arriving at the original LTFV margins.[9] Intervenor further argues that the high probability that LTFV margins will be inaccurate in situations in which the margin is based in part on imports not causing material injury is irrelevant. It notes that the LTFV margin contained in the anti-

[8] The court is of the opinion that if the facts of this case would allow ITA's original opinion to stand as a reasonable exercise of agency discretion, then remand is not appropriate. The court finds no support for remand to alter reasonable discretionary decisions where there is an objecting party. *See* discussion *supra*.

[9] Intervenor notes the possibility of a situation akin to the hypothetical conflicts problem of the endless "renvoi" if commissioners consider margins in making injury determinations, a current practice of some commissioners. *See, e.g., Iron Construction Castings from Canada*, U.S.I.T.C. Public. 1811, Investigation No. 731-TA-263 at 9 n. 34, 15 n. 56, 25, 40-41 (1986), *Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada*, U.S.I.T.C. Public. 1808, Investigation No. 731-TA-254 at 13-14 (1986). Thus far, there has been no court determination sanctioning the use of margins analysis in arriving at an injury determination. If such practice is approved, the possibility of a true endless "renvoi" is too remote to be considered. Margins analysis is also more likely in cases where the margin is small and a negative determination is made. Here the margin will increase, and thus, there is no likelihood of further negative injury determinations as to specific products.

dumping duty order is considered an estimate, and that although the importer is required to deposit these estimated duties, the actual duties will be assessed based on the LTFV margin calculated during the section 751 periodic review. 19 U.S.C. § 1673e(a)(3) (1982) (deposit of estimated antidumping duties); 19 U.S.C. § 1675 (1982 & West Supp. 1985) (periodic review). Therefore, actual duties may vary substantially from estimated deposits even where there is no inconsistency between the ITA and ITC determinations.

Intervenor's argument focuses too closely on what is contained in the statute, without considering what is missing from the express statutory scheme. *United States* v. *Morton*, 104 S. Ct. 2769, 2773, *reh'g denied*, 105 S. Ct. 27 (1984) (statutes should be read as a whole); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (same). Intervenor ignores the fact that Congress failed to tell ITA how to calculate the estimated antidumping duties. For example, 19 U.S.C. § 1673e(a)(3) (1982) states that ITA shall publish an anitdumping duty order which "requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited." This provision does not provide any guidance as to how to calculate the estimated duties to be deposited. The only guidance as to calculation is provided in the overview provision, 19 U.S.C. § 1673 (1982 & West Supp. 1985), which states that once an affirmative LTFV determination and material injury determination are made as to certain merchandise, "then there shall be imposed upon *such merchandise* an antidumping duty * * * in an amount equal to the amount by which the foreign market value exceeds the United States price for *the merchandise*." (Emphasis added.) This court has defined the term "such merchandise" as merchandise which is both in a class of merchandise being sold at LTFV *and* which is causing material injury to a domestic industry. *Badger-Powhatan* v. *United States*, 9 CIT ___ ——, 608 F. Supp. 653, 656 (1985). Intervenor conceded at oral argument that the term "the merchandise" at the end of that sentence refers to the same merchandise as does the term "such merchandise." Thus, the antidumping duty actually imposed should be based, as far as is possible, on the LTFV margin for the merchandise that is actually subject to the duty. Intervenor argues that section 1673 does not address how estimated antidumping duties should be calculated, but only the manner of calculation of actually imposed duties. The agency, however, may have concluded that it is to calculate estimated deposits in the same way, inasmuch as the initial language of the regulation describing how ITA is to calculate the amount of estimated duty to be deposited, echoes the language of section 1673. 19 C.F.R. § 353.48(b) (1985); *see supra* note 6.[10] It should be noted

[10] If this is so, there apparently was a failure to consider this construction in connection with the *Carbon Steel Pipes* and *Color Television Receivers* administrative decisions discussed *infra*.

that defendant does not argue for this particular construction of its regulation.

Neither the statute, as indicated, nor the legislative history, explicitly refers to the question of recalculation when the ITA and ITC final determinations vary in scope. When such a legislative gap occurs, the court can infer that Congress did not consider the problem at issue. In such a case, "it is incumbent on the court to consider the policies underlying the statutory provision." *Four "H" Corp.* v. *United States,* 9 CIT ____, 611 F. Supp. 981, 984 (1985) (citing *Rose* v. *Lundy,* 455 U.S. 509, 516–18 (1982)).

The court notes the Supreme Court's admonition that in filling interstitial silences in statutes courts must proceed with caution and attend to the view of the administrative entity appointed to enforce the statute. *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 565 (1980). Intervenor argues that past ITA actions in cases similar to the one at bar constitute an interpretation of the statute by those officers charged with its administration. If this is so, such an interpretation would be entitled to considerable deference by the court. *Securities Industry Association* v. *Board of Governors,* 104 S. Ct. 2979, 2983 (1984); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978); *American Lamb Co.* v. *United States,* No. 86–560 at 13 (Fed. Cir. Feb. 28, 1986).

The court has looked at three cases cited by the parties to analyze ITA's decision-making in this area. In two cases relied on by intervenor, in which the ITC material injury determination was narrower in scope than the ITA LTFV determination, ITA, as it did in this case, apparently adopted without change the LTFV weighted-average margin contained in the ITA final determination. *Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea,* 49 Fed. Reg. 9936, 9939 (1984) (final determination of sales at LTFV); 49 Fed. Reg. 20,045 (1984) (antidumping duty order); *Color Television Receivers from Taiwan,* 49 Fed. Reg. 7628, 7638 (1984) (final determination of sales at LTFV), 49 Fed. Reg. 18,337, 18,338 (1984) (antidumping duty order). In contrast, in a third case, ITA recalculated the LTFV margin after the ITC determination eliminated one product from the scope of the order. *High-Capacity Pagers from Japan,* 48 Fed. Reg. 28,682, 28,688 (1983) (final determination of sales at LTFV), 48 Fed. Reg. 37,058, 37,059 (antidumping duty order). Defendant has not offered any explanation of how or why ITA recalculated the margin in the *High-Capacity Pagers* situation, but not in the *Carbon Steel Pipes* and *Color Television Receivers* contexts. In giving weight to an administrative determination, a court should consider not only its consistency with other pronouncements but the validity of the reasoning underlying it. *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 287–88 n.5 (1978). Here there is no consistency and ITA offers no explanation for the inconsistency.

The other parties offer various explanations for the mixed results. Plaintiff suggests that the margins would not have been significantly affected in the first two cases, but that a significant difference in the third case mandated a recalculation. The difference, in fact, was significant in the third case, but no facts were presented regarding the potential change in the first two cases. Intervenor notes that the original determination in the third case stated separate LTFV margins for the relevant products. Thus, no amendment of the determination was required. In this case, the LTFV margins were not separately stated for each product, therefore, a recalculation based on review of the record would be required.[11] Although intervenor's explanation is intriguing, there is no statement from the concerned agency that this is its reasoning. In fact, its latest position in this case would indicate that it does not share this view. The court itself has difficulty accepting intervenor's formalistic approach. That approach would make the decision as to whether to apply a more accurate deposit rate solely the result of chance. That is, if ITA decides for whatever unrelated reason to state LTFV margins separately in its final determination, the deposit rates will be fairly accurate. If not, rates totally unrelated to the correct duty may be imposed. Furthermore, even if the three opinions should be harmonized in this way, it is difficult to say that three unexplicated decisions made during a short and recent time period constitute a consistent administrative practice, especially in light of the agency's new position. In any case, if there is an agency practice to be given weight in this case, the court is simply at a loss as to what that practice is.

Plaintiff has directed the court's attention to legislative history which demonstrates the importance that Congress placed on the deposit of the estimated duties. In particular, the report of the House Committee on Ways and Means indicates that the Committee viewed the inclusion of a provision requiring the deposit of estimated during duties as a critical change intended to expedite the assessment of antidumping duties. In discussing the new requirement that merchandise subject to an antidumping order be entered only upon deposit of estimated duties, the Committee stated:

> The Committee feels strongly that this practice [of allowing such merchandise to enter under bond] does not sufficiently deter dumping. Rather, it provides an incentive to exporters and importers to delay in submitting the information necessary to form the basis of an assessment. The Committee believes that the requirement of cash deposits will ensure that complete information will be submitted to the Authority in a timely manner.

[11] In this regard the *High Capacity Pagers* case is similar to *Plaw Knox Construction Equipment Co. v. United States*, 8 CIT 210, 596 F. Supp. 476 (1984) (corrected cash deposit instructions issued to Customs based on figures in an annual review determination).

H.R. Rep. No. 317, 96th Cong., 1st Sess. 69 (1979). Under the circumstances of this case, Congress' intent to prevent exporters and importers from delaying in providing information for accurate assessment of duties is furthered by tailoring the LTFV margins to only those products subject to the order. If the estimated duties are substantially less than the actual duties as a result of the failure to recalculate, then exporters and importers will benefit by delaying the calculation of actual duties. This potential problem is compounded by the fact that the first assessment of actual duties may not occur for approximately two years after the issuance of the order, 19 U.S.C. § 1675(a)(1) (1982 & West Supp. 1985), during which time the exporter or importer would deposit only a fraction of the amount of duties necessary to compensate for the dumping.[12]

Reading this legislative history to support recalculation in this case does not conflict with the statutory scheme. That the statute provides for only one final ITA determination is not dispositive. First, as discussed previously, various situations may give rise to valid amended determinations. Second, ITA could have avoided making a new amended determination by providing separate LTFV margins for each product. That, not foreseeing the ITC result, ITA chose to state an average margin for reasons of convenience does not relieve it of the burden of producing a proper calculation from information already available in the original administrative record.[13] In the absence of any definitive guidance it is sufficient justification for the court's conclusion that the result reached is both logical and fair, as well as not unduly burdensome. Therefore, the court concludes that the statutory scheme requires that estimated antidumping duties be as closely tailored to actual antidumping duties as is reasonable given data available to ITA at the time the antidumping order is issued.[14]

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[12] Of course, there is the possibility that in other cases inclusion of the margins of non-injurying products would raise the deposit rate. This possibility does not prevent the conclusion that Congress favors reasonably accurate deposits. In theory, a duty rate that allows the foreign and domestic products to compete on an equal basis is what Congress intended, not a rate that puts the domestic product in an advantageous position.

[13] The recent case of *Alsthom Atlantique* v. *United States*, Nos. 85-2082 and 85-2158 (Fed. Cir. March 24, 1986) left open the question of whether merchandise with de minimus or zero LTFV margins may be included within the scope of ITA determinations. Apparently ITA has allowed this. With this practice in mind, intervenor opines that the court's ruling today would allow a "no duty" situation in certain cases where there are affirmative ITA and ITC decisions. The court suggests that this is not likely. For example, assume products A and B compose the "class or kind of merchandise" being sold at LTFV. Product A has a zero margin and product B has a 10% margin. ITC then determines that there are two domestic industries, one for product A and one for product B. There is a negative determination with regard to industry B. Given the causal nexus required between LTFV imports and injury, it is not likely that ITC will render an affirmative determination as to industry A. Only if product B somehow competes with goods from industry A, could ITC make a positive finding. This seems unlikely, if not impossible, since ITC, in finding that there are two different industries, would have already found that products A and B were not alike, that is, did not have the same uses and characteristics. Assuming, *arguendo*, that the court has not foreseen all possibilities, the court nonetheless concludes that it will not rewrite the statute to avoid hypothetical anomalies. Congress may not have foreseen all of the possible results of separating LTFV and injury decision-making, and Congress may choose to amend the statute if it finds untenable the remote chance of such anomalous results occurring.

[14] Contrary to intervenor's contentions, this court's decision in *Diversified Products Corp.* v. *United States*, 7 CIT 49, 572 F. Supp. 883 (1983), does not dictate otherwise. In *Diversified Products*, ITA requested a remand in order to adjust the deposit rate for Diversified's imports based on a percentage derived from the weighted-average rate computed for all responding firms. Diversified challenged the imposition of estimated cash deposits because ITA had never computed a dumping margin for one of the products of Diversified's primary supplier. The court rejected Diversified's claim, noting that the statute only requires the deposit of *estimated* duties. The court

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There is no room here for a result which would allow the erroneous deposit rate to continue in this case, based on a contrary discretionary or policy decision. Therefore, ITA did make an error which should now be corrected. The recalculation shall be based on information available from the record and an amended final determination shall be issued containing the recalculated LTFV margin. An antidumping duty order will then be issued reflecting the findings of the ITC final affirmative material injury determination and the ITA amended final affirmative LTFV determination.

(Slip Op. 86-39)

DONNA KELLY, ET AL., PLAINTIFFS *v.* SECRETARY, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 85-03-00437

OPINION

(Dated April 2, 1986)

Donna Kelley, pro se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Platte B. Moring, III,* Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Defendant moves for clarification of the court's opinion of December 30, 1985, Slip Op. 85-132. In that opinion this court remanded for further consideration the Secretary of Labor's (Secretary's) denial of a petition for trade adjustment assistance filed pursuant to section 221(a) of the Trade Act of 1974, as amended (Act).[1] 19 U.S.C. § 2271(a) (1982). Clarification would appear useful.

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stated that "[t]here is no statutory support for Diversified's theory that if there is insufficient data available to assess absolutely accurate amounts for such duty deposits that they may not be required until the next section 751 review." *Id.* at ___, 572 F. Supp. at 890. *Diversified Products* stands for the proposition that the estimated duty deposit rate does not have to be absolutely accurate. Rather, it may approximate the actual duties when ITA lacks sufficient data to make an accurate calculation. This holding, however, does not indicate that ITA may derive an unnecessarily inaccurate estimated duty deposit in a case in which a more accurate calculation can be made based on available data.

[1] The petition alleged that increased imports of articles like or directly competitive with the cotton and synthetic sewing thread produced at the American Thread Company's (American Thread's) plant in Tallapoosa, Georgia (Tallapoosa plant), contributed importantly to the worker separations or threat of worker separations at the Tallapoosa plant.

The requirements for eligibility to apply trade adjustment assistance are set forth in § 222 of the Act which provides:

> The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part if he determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.
>
> For purposes of paragraph (3), the term "contributed importantly" means a cause which is important, but not necessarily more important than any other cause.

19 U.S.C. § 2272 (1982 & Supp I 1983).

A question has been raised as to whether data sheets in the administrative record, upon which the Secretary apparently based his decision, represent sales figures of industrial thread[2] from the Tallapoosa plant alone or from American Thread as a whole. Defendant asserts that these data sheets give sales information from the entire American Thread Company. This claim is not supported by the record. Each of the data sheets is headed "Plant" with the word "Tallapoosa" typed below, thereby indicating that they are plant specific and do not represent company-wide sales. If these data sheets do in fact include sales from various plants, the administrative record should be supplemented to so indicate. If, on the other hand, they are from the Tallapoosa plant alone, the record must be supplemented with data from any other plants operated by American Thread that produce the article in question.[3] Even assuming that the data sheets in question do represent company-wide sales, they are insufficient to support the Secretary's denial of plaintiffs' petition.

Significant worker separations, or the threat thereof, within the meaning of the statute, 19 U.S.C. § 2272(1) (1982 & Supp. I 1983) (*supra* note 1), took place at the Tallapoosa plant, in industrial thread production, during both 1983 and 1984. *See* 29 C.F.R. § 90.2 (1984) (defining "significant number or proportion of the workers"). *Accord* S. Rep. No. 1298, 93d Cong. 2d Sess. 133, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7275. From the record, it is evident that the Secretary considered the period from 1982 through the first eight months of 1984 as relevant for comparison in reviewing plaintiffs' petition. Having so concluded, the Secretary was obliged to conduct the investigation within this period in accordance with law. The record indicates that corporate sales of industrial thread decreased in quantity by twelve percent from 1982 to 1983.[4] Assuming that the data sheets referred to earlier represent company-wide sales of industrial thread, data would appear to have been obtained from American Thread customers accounting for only six percent and eight percent (approximately) of corporate industrial thread sales for 1982 and 1983, respectively. It is of even

---

[2] Defendant uses the term "industrial thread" as a synonym for the term "cotton and synthetic sewing thread." In the absence of information to the contrary, the court will equate the two.

[3] The administrative record, in a press release from American Thread, indicates that the Tallapoosa plant was closed due to a need to consolidate and that the consolidation was made necessary by "*increasing imports of* both apparel and *thread*." Administrative Record at 4 (emphasis added). The need to consolidate should not be viewed as a cause of worker separations distinct from increased imports of articles like or directly competitive with those under consideration, if such imports did in fact contribute importantly to the need to consolidate. If, as defendant now asserts, the articles in question are produced at more than one plant operated by American Thread, and the Tallapoosa plant was closed due to a need to consolidate, survey data from Tallapoosa alone would be insufficient to provide substantial evidence from which to eliminate increased imports of articles like or directly competitive with those produced by the petitioning workers, as contributing importantly to the decline in sales or production, and to the worker separations in question.

[4] According to the record, the value of corporate industrial thread sales between 1982 and 1983 increased by 4%. Apparently based on value rather than quantity, sales during this period are characterized in the record as having increased. There is no indication, however, that the Secretary viewed this "increase" in sales as a failure to satisfy one of the statutory requirements of eligibility to apply for trade adjustment assistance. *See* 19 U.S.C. § 2272(2) (1982 & Supp. I 1983) (*supra* note 1). In any event, the court doubts that, within the meaning of the statute, it is appropriate to classify sales as increasing where sales decrease in quantity, yet increase in value.

greater significance that, according to the record before the court, those companies from which survey data regarding purchases of imports was obtained, and that also decreased purchases, accounted for approximately three percent of American Thread's net decline in sales of industrial thread during this period. The court does not propose to establish a specific level of sales or of a sales decline that must be accounted for in the record. The samplings in the records are so small, however, that they simply cannot provide sufficient support for the Secretary's denial of eligibility to apply for trade adjustment assistance, in the context of the information provided thus far. *See Local 167, International Molders and Allied Workers' Union* v. *Marshall*, 643 F.2d 26, 31 (1st Cir. 1981) (survey accounted for 49% and 68% of sales during relevant period); *United Glass and Ceramic Workers* v. *Marshall*, 584 F.2d 398, 403 (D.C. Cir. 1978) (survey accounted for 21.5% and 38.3% of sales during relevant period); *Stipe* v. *United States Department of Labor*, 9 CIT ___, Slip Op. 85-112 at 4 (October 25, 1985) (survey accounted for 94-9% and 82.4% of sales decline during relevant period); *Estate of Finkel* v. *Donovan*, 9 CIT ___, 614 F. Supp. 1245, 1250-51 (1985) (customers responding to survey accounted for "substantial percentage" of lost sales during relevant period). The figures noted above in the case at bar obviously do not approach even the lowest figures in the above cited cases.

The failure to consider data from customers accounting for more than a slight fraction of American Thread's total sales of the article in question during the 1982-1983 period was repeated by the Secretary in his comparison of the first eight months of 1983 with the same months of 1984. In addition, in Slip Op. 85-132, this court noted that the Secretary should have included in the survey, or indicated on the record the reason for failing to so include, the company that had decreased its purchases of industrial thread during this period by a greater amount than did any other customer of American Thread for which data was given in the record. Defendant questions the relevance of the failure to include in the administrative record survey data from this company, which gave its address as being in Canada. Presumably, trade adjustment assistance is available only if imports *into the United States* contribute importantly to worker displacements. Although survey data from a company operating totally outside the United States thus would appear to be irrelevant, this would not be the case if, for example, the company, although headquartered or having a mailing address outside the United States, operates plants in the United States to which it imports articles like or directly competitive with those under investigation. Without such knowledge about the company in question, the court is unable to rule on the relevance of data from that company.

Finally, the court notes that if the Secretary provides substantial evidence on the record to support his denial of the petition, he need

not give an alternative explanation of what was the precise cause of the worker separations in question. An explanation of any such alternative cause of the consolidation would provide a clearer picture as to what occurred and would bolster the Secretary's conclusion.

Defendant will comply with the remand order contained in Slip Op. 85–132, within sixty days after the date of this memorandum, as ordered by the court in February 28, 1986.

(Slip Op. 86–40]

GLASS PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–1–00001

Before RE, *Chief Judge.*
[Judgment for plaintiff.]

(Decided April 8, 1986)

Ross & Hardies (*John B. Pellegrini*), for the plaintiff.
Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, for the defendant.

MEMORANDUM OPINION AND ORDER

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Mexico, and described on the customs invoices as "crystal votives" or "cristal votives."

The merchandise was classified by the Customs Service as household articles of glass, under item 546.60 of the Tariff Schedules of the United States (TSUS). Consequently, it was assessed with duty at the rate of 30 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item A548.05, TSUS, as articles of glass not specially provided for, free of duty under the Generalized System of Preferences. Plaintiff has conceded, however, that entry numbers 304099, 304159, 353365, and 353372, are not entitled to duty-free treatment under item A548.05, TSUS, because it has not been supplied the appropriate documentation.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified Under:

Schedule 5, Part 3, Subpart C:

Articles chiefly used in the household or elsewhere for preparing, serving, or storing food or beverages, or food or beverage ingredients; * * * *household articles*, and art and ornamental articles, all the foregoing not specially provided for:

* * *

Other glassware:

* * *

Other:

546.60	Valued over $0.30 but not over $3 each...	30% ad val. [emphasis added].

Claimed Under:

Schedule 5, Part 3, Subpart D:

Articles not specially provided for, of glass:

* * *

A548.05	Other.....	10.3% ad val. [1982] [9.6% in 1983].

The question presented is whether, within the meaning of the competing tariff provisions, the imported merchandise is dutiable as household articles of glass, as classified by Customs, or as glass articles not specially provided for, as claimed by plaintiff. In order to decide this issue, the Court must consider "whether the government's classification is correct both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States*, 733 F.2d 873, 878, *rehg denied*, 739 F.2d 628 (Fed. Cir. 1984); *see E.R. Hawthorne & Co.* v. *United States*, 730 F.2d 1490, 1490 (Fed. Cir. 1984). The Court has approved a stipulation of the facts, and the parties have submitted the action for decision in lieu of trial.

The Court has carefully examined the merchandise, the stipulated facts and supporting papers, the pertinent tariff provisions, and the relevant case law. It is the determination of the Court that plaintiff has satisfied its burden of establishing that the government's classification is wrong, and that its claimed classification is correct. *See* 28 U.S.C. § 2639 (1982); *Jarvis Clark Co.*, 733 F.2d at 878.

The imported articles consist of closed-bottom candle receptacles of glass. They are imported in a variety of shapes, sizes, and colors, and are commercially known as votive cups or votive lights. Each votive has a lug which projects from its bottom, which enables the cups to be inserted into a candleholder, sconce, or other holder. It has been stipulated that the imported merchandise is chiefly used in households as parts of decorative articles of metal, plastic, or

wood. It is further stipulated that the votives are neither freestanding nor self-supporting, and are incapable of any practical use in their condition as imported.

The tariff provision for household articles, item 546.60, TSUS, under which the imported votives were classified, does not provide for parts. *See L & B Products Corp.* v. *United States,* 70 Cust. Ct. 30, 32, C.D. 4404 (1973). It is well established that a tariff provision which does not specifically provide for parts does not include them. *See, e.g., United States* v. *Bruckmann,* 65 CCPA 90, C.A.D. 1211, 582 F.2d 622, 625 (1978); *The Westminster Corp.* v. *United States,* 78 Cust. Ct. 22, 26, C.D. 4687, 432 F. Supp. 1055, 1058, *appeal dismissed,* 64 CCPA 179 (1977). For example, in *Henry A. Weiss, Inc.* v. *United States,* 79 Cust. Ct. 6, C.D. 4706 (1977), the question presented pertained to the classification of parts of a practical joke article, which were classified by Customs as "[t]oys and parts of toys, not specially provided for * * * Other," under item 737.90, TSUS. Plaintiff contended, *inter alia,* that the imported parts were properly classifiable under item 737.65, TSUS, as "practical joke articles." The court explained that "[f]or customs classification purposes, parts of an acticle, and the article itself, are deemed to be separate and distinct articles." *Id.* at 8. Thus, the court concluded that, since the provision for practical joke articles did not specifically provide for parts, the imported parts could not be classified under that item. Accordingly, the court held that the merchandise had been properly classified as "parts of toys," under item 737.90, TSUS. *Id.* at 13.

In its brief, the government acknowledges that "it is well established that an *eo nomine* provision which does not specifically provide for parts does not include parts." Nevertheless, it argues that the general rule is inapplicable to the "broad descriptive provision" for household articles. Defendant attempts to show that the cases relied upon by plaintiff are not persuasive or controlling because they were decided under paragraph 218 of the Tariff Act of 1930. There is no indication, however, that, in enacting the TSUS, the legislature intended to abandon the well-established principle that parts must be specifically mentioned to be classified under a particular tariff item. Indeed, courts which have construed the term household articles under the TSUS have examined cases decided under prior acts for guidance. *See, e.g., Riekes Crisa Corp.* v. *United States,* 84 Cust. Ct. 132, C.D. 4852 (1980); *L. & B. Products Corp.* v. *United States,* 70 Cust. Ct. 32, C.D. 4404 (1973).

The *Tariff Classification Study* makes clear that the TSUS eliminated the product distinctions between the separate provisions for "kitchen and table articles and utensils" and "household articles" other than kitchen and table articles and utensils. *See Tariff Classification Study,* Sched. 5, at 142 (1960). Moreover, in *Riekes Crisa Corp.* v. *United States,* it was determined that "there is no basic distinction between the provisions for 'blown-glass household arti-

cles' in paragraph 218(f) of the Tariff Act of 1930" and the provision for "household articles" which is contained in the TSUS. 84 Cust. Ct. at 134. It is not inappropriate, therefore, for the Court to refer to cases decided under earlier tariff acts to ascertain the meaning of the TSUS provision for household articles.

In *Williams Adams, Inc.* v. *United States*, 56 Cust. Ct. 429, C.D. 2670 (1966), plaintiff challenged the classification of glass plates or dishes. The plates had a small hole "drilled through the bottom at the center [which served] as a means for fitting metal bases or other attachments." The glass plates, which were determined to be parts of household articles, possessed "no independent function and logically would not be substituted for household glassware without holes." *Id.* at 437. Customs classified the imported merchandise as household or table articles under paragraph 218(f) of the Tariff Act of 1930. Plaintiff claimed that the merchandise was classifiable either as manufactures of glass, not specially provided for, or as articles in chief value of glass, other than household table, or kitchen articles. The court stated:

> The imported items of glass, although in the form of candy dishes, cake plates, etc., are designed specifically to be used with various metal bases and columns. They function in the household, not as imported, but as units, attached to and assembled with other substantial components. They possess no independent function and logically would not be substituted for household glassware without holes.
>
> * * *
>
> The law is clear that where there is no provision for "parts" of articles, whether the tariff provision be *eo nomine* or use in character, imported merchandise held to be "parts" will not be susceptible of classification thereunder.

Id. at 437. Consequently, the court sustained the protests, and held that the imported merchandise was properly classifiable as "other glass articles."

The *Adams* rationale was followed in *Hudson Merchandise Co.* v. *United States*, 58 Cust. Ct. 341, C.D. 2980 (1967). In the *Hudson* case, the imported merchandise consisted of parts of small, hourglass-shaped sandtimers. The customs officials classified the merchandise as glass household articles. Plaintiff protested this classification, and claimed that the merchandise was properly classifiable as "manufactures of glass, not specially provided for." *Id.* at 342. The merchandise was not "usable in the home without the addition of plastic stands, housing or similar units." The imported glass articles represented "but a portion of the thing described in the collector's classification." *Id.* at 344. Thus, in view of its finding that "the glass items form complete and independent parts of articles used in the home," the court held that "the collector's classification of the imports as household articles [was] erroneous inasmuch as the applicable modified provision of paragraph 218(f) [did] not pro-

vide for parts of the merchandise described." *Id.* at 346. Ultimately, the court orderd the merchandise reclassified pursuant to the residuary provision of paragraph 218(f) as "other glass articles." *See* 59 Cust. Ct. 67, 68, C.D. 3075 (1967).

Defendant contends that the decision in *L & B Products Corp.* v. *United States,* 70 Cust. Ct. 30, C.D. 4404 (1973), supports the determination of the Customs Service. In the *L & B Products* case, glass jars imported from Canada without lids were classified as "Articles [of glass] chiefly used in the household or elsewhere for preparing, serving, or storing food or beverages," under item 546.52, TSUS. Plaintiff contended that the imported glass articles were "not articles chiefly used in the household or elsewhere * * * but [were] merely parts of such articles, to wit, parts of sugar dispensers or salt and pepper shakers." *Id.* at 31. Plaintiff also relied on the *William Adams* and *Hudson Merchandise* cases for the proposition that "[s]ince the classifying provision for articles chiefly used in the household does not make provision for parts of such articles * * * as a matter of law, the imported glass articles [were] not classifiable under TSUS item 546.42." Defendant contended that the imported merchandise were not parts but were unfinished glass articles.

The *L & B Products* court stated that "whether the imported glass articles be considered 'parts' of articles chiefly used in the household or elsewhere or 'unfinished' articles chiefly used in the household or elsewhere is not the decisive question or issue * * *." *Id.* at 33. The court viewed the issue as one of proof; that is, plaintiff had shown only that the jars were not used as sugar dispensers or salt and pepper shakers. Plaintiff had not demonstrated that the glass jars were not chiefly used in the household. Significantly, the court noted that "Plaintiff's evidence is palpably weaker than the evidence in [*William Adams* and *Hudson Merchandise*]." Hence, the court held that plaintiff had failed to overcome the presumption of correctness that attached to Customs' classification.

In this case, the level of proof is demonstrably different from the *L & B Products* case. There is no dispute that the merchandise is incapable of use in its condition as imported. In addition, it has been stipulated by the parties that the merchandise is used in households as *parts* of decorative articles of metal, plastic, or wood. Item 546.60, TSUS does not provide for parts of household articles. *See L & B Products Corp.* v. *United States,* 10 Cust. Ct. 30, 32, C.D. 4404 (1973).

None of the cases cited by defendant support its contention that the provision for household articles encompasses the imported merchandise. Defendant argues that the imported votive cups are articles used in the home, and, therefore, have been properly classified. Yet, it is stipulated, and an examination of the merchandise shows, that the votive cup is merely *a part* of decorative articles used in the home. The applicable precedents make clear that a glass article

which can be used only as a part of another article used in the home cannot be classified as a household article. *See Hudson Merchandise Co., supra,* 58 Cust. Ct. at 344. Thus, the Court holds that the votives have been improperly classified under item 546.60, TSUS. The Court also holds that the merchandise should be classified as articles of glass not specially provided for, pursuant to item 548.05, TSUS.

Finally, it should be noted that plaintiff has conceded that this Court lacks jurisdiction over entry numbers 353364, 353365, and 353367, because the protests were filed more than 90 days after the entries were liquidated. Consequently, the protests pertaining to entry numbers 353364, 353365, and 353367, are dismissed. Likewise, plaintiff has conceded that the merchandise covered by entry numbers 304099, 304159, and 353372 are not entitled to duty-free treatment. Hence, the merchandise for these entries are dutiable at the applicable rate of duty for the year of entry.

In view of the foregoing, it is the determination of the Court that the imported merchandise was improperly classified under the provision for household articles. The Court has also determined that the merchandise is properly classifiable as glass articles not specially provided for, under item 548.05, TSUS. Judgment for plaintiff will issue accordingly.

APRIL 16, 1986

NOTICE OF PROPOSED RULE CHANGES

The Committee on Rules and Practice of the United States Court of International Trade is considering several proposed amendments to the Rules of the Court.

The proposed amendments pertain to Rules 3, 4, 47, 48, 60, 62 and 75.

The Committee invites comment on the proposed amendments, along with suggestions for additional changes in the Rules.

Those who wish to present their views should submit an original and one copy of a written statement to the Committee, in care of Joseph E. Lombardi, Clerk of Court, by the close of business on Friday, May 16, 1986. Each statement shall be typewritten and not more than 10 double-spaced pages in length. It also should bear an indication whether the views contained therein are solely those of the author or are submitted on behalf of a particular organization.

Copies of the proposed amendments may be obtained by writing the Clerk of Court or by calling 212-264-2800.

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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 86-88)

Revocation of Independent Surveyors of Petroleum, Inc., as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Independent Surveyors of Petroleum, Inc., Post Office Box 2175, Port Arthur, Texas, 77640, was approved to gauge imported petroleum and petroleum products in the Customs Districts of Tampa, Mobile, New Orleans, Port Arthur, Laredo, and Houston-Galveston on December 12, 1983. Notice of this approval was published as T.D. 83-264 in the Federal Register of December 15, 1983 (48 FR 55799), and in the CUSTOMS BULLETIN of December 28, 1983. To be approved and to keep approval in force, each public gauger must maintain a valid Customs bond in effect and must notify Customs, in writing, within 60 days of any change in name, address, ownership, or financial condition. Customs tried to get in touch with Independent Surveyors of Petroleum, Inc., several times to ask it to replace its obsolete bond with a Customs Form 301 bond as required by §§ 151.43(b)(6) and 113.67 of the Customs Regulations (19 CFR 151.43(b)(6) and 113.67) but has been unable to do so. After exhausting all feasible means to locate Independent Surveyors of Petroleum, Inc., Customs has been unable to get in touch with them or determine if they are still in business.

Accordingly, the approval of Independent Surveyors of Petroleum, Inc., to gauge imported petroleum and petroleum products is revoked.

EFFECTIVE DATE: April 18, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: April 18, 1986.

ROGER J. CRAIN,
Chief, Technical Section
Technical Services Division.

[Published in the Federal Register, April 24, 1986 (51 FR 15571)]

(T.D. 86-89)

Fish—Tariff-Rate Quota for Calendar Year 1986

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity on certain fish for Calendar Year 1986.

SUMMARY: The tariff-rate quota for fish pursuant to item 110.55 (TSUS) for the 1986 Calendar Year is 58,652,549 pounds.

EFFECTIVE DATES: The 1986 tariff-rate quota is applicable to fish described in item 110.50, TSUS, which are entered, or withdrawn from warehouse, for consumption during Calendar Year 1986.

FOR FURTHER INFORMATION CONTACT: Karen L. Cooper, Acting Quota Program Manager, Admissibility Requirements Section, Commercial Law Enforcement Branch, Commercial Compliance Division, Office of Commercial Operations, U.S. Customs Service, Washington, DC 20229, (202) 566-8592.

SUPPLEMENTARY INFORMATION: This tariff-rate quota for fish is equal to 15 percent of the average aggregate apparent annual consumption in the United States of fish, fresh, chilled or frozen, fillets, steaks, and sticks of cod, cusk, haddock, hake, pollock, and rosefish, for the 3 preceding years, as provided for in Headnote 1, part 3A Schedule 1, and item 110.50, TSUS.

It has been determined that the average aggregate consumption for Calendar Years 1983 through 1985 was 391,016,990 pounds. Therefore, the quota quantity for fish, item 110.50, TSUS for Calendar Year 1986 is 58,652,549 pounds.

Dated: April 21, 1986.

WILLIAM VON RAAB,
Commissioner of Customs.

Attachment.

U.S. Production, Entries of American Fisheries, and Imports for Consumption of: Fresh or frozen fillets, steaks and sticks of cod, haddock, hake, pollock, cusk and rosefish.

Pounds—1982–84

Year	Production	Entries of American fisheries	Imports of consumption	Total [1]
1983	[2] 81,223,000		295,143,139	376,366,139
1984	[2] 94,943,000		305,496,287	400,439,287
1985	82,775,000		[3] 313,470,545	396,245,545
Total	258,941,000		914,109,971	1,173,050,971

3-year Average	391,016,990
15% of 3-year Average	58,652,549
Quarterly quotas for 1985:	
1st	14,663,137
2nd	14,663,137
3rd	14,663,137
4th	14,663,138
Yearly total	58,652,549

[1] Apparent consumption as provided in Headnote 1 and item 110.50, Part 3A Schedule 1, TSUS.

[2] Production figures for 1983 and 1984 were revised by National Fisheries Service, U.S. Department of Commerce by letter dated March 4, 1986.

[3] The 1985 import figure is as shown on computer records on March 21, 1986, for the period ending December 31, 1986.

Source: Production from National Marine Fisheries Service, U.S. Department of Commerce, entries of American Fisheries by U.S. International Trade Commission from records of the U.S. Department of Commerce; imports for consumption from records of U.S. Customs Service, Department of the Treasury.

Fish:	January–March 1985
Canada	35,531,348
Total Other Countries	36,367,591
GRAND TOTAL	71,898,939
	April–June 1985
Canada	43,090,402
Total Other Countries	39,490,155
GRAND TOTAL	82,580,557
	July–September 1985
Canada	53,315,083
Total Other Countries	34,151,760
GRAND TOTAL	87,466,843

	October–December 1985
Canada	34,826,515
Total Other Countries	36,697,691
GRAND TOTAL	71,524,206
YEARLY TOTAL	313,470,545

[Published in the Federal Register, April 24, 1986 (51 FR 15570)]

(T.D. 86-90)

Customs Broker License: Cancellation With Prejudice

This is to advise that pursuant to § 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and § 111.51(b), Customs Regulations (19 CFR 111.51(b)), upon the specific request of Charles A. Lorme', Jr., Massapequa, New York, the individual Customs Broker license No. 4458, issued to Charles A. Lorme', Jr., and the Corporate Customs Broker License No. 4646, issued for Lorme' International Ltd., both for the New York Customs Region, are hereby cancelled with prejudice.

Dated: April 21, 1986.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

[Published in the Federal Register, April 28, 1986 (51 FR 15856)]

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19 CFR Part 10

(T.D. 86-91)

Withdrawal of Customs Regulations Amendments Relating to Cancellation of Temporary Importation Bonds

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of withdrawal.

SUMMARY: This document withdraws amendments to the Customs Regulations which would have eliminated the requirement that Customs officers examine merchandise imported temporarily under bond or under an A.T.A. carnet, before exportation, and supervise the exportation process in order to have the temporary importation bond or carnet cancelled. Proof of exportation would have been verified by documentary evidence ordinarily submitted to Customs.

It has now been determined that while these amendments would have eased Customs workload and been of some benefit to importers, the changes could have compromised enforcement efforts.

DATE: Withdrawal effective April 28, 1986.

FOR FURTHER INFORMATION CONTACT: Arnold Sarasky, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8648).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under the provisions of Schedule 8, Part 5, Subpart C, Tariff Schedules of the United States (19 U.S.C. 1202), certain classes of articles, when not imported for sale or sale on approval, may be admitted to the U.S. without the payment of duty by furnishing Customs with a bond providing for exportation of the articles under Customs supervision. The Customs Regulations governing these temporary importations under bond are found in § 10.31 *et seq.* (19 CFR 10.31 *et seq.*). These regulations, as well as those in Part 114, Customs Regulations (19 CFR Part 114), also govern importations made under an A.T.A. carnet, which is an international customs document which may be used for the temporary duty-free importation of certain articles into a country in lieu of the usual customs documents required. The carnet serves as a guarantee for the payment of duties which may become due on articles temporarily imported and not exported.

Pursuant to § 10.38(a), Customs Regulations (19 CFR 10.38(a)), an "Application for Exportation of Articles Under Special Customs Bond", Customs Form 3495, must be filed with the district director a sufficient length of time in advance of the date on which articles entered under a temporary importation bond or carnet are to be exported. This requirement permits Customs to examine and identify the articles if circumstances warrant examination. Customs is required to supervise the exportation process.

Section 10.39, Customs Regulations (19 CFR 10.39), sets forth the procedures for cancellation of bonds.

Because of increased demands for Customs Service and decreased staffing, it was believed that the requirements of supervision and examination were unrealistic and not necessary. Accordingly, by a document published in the Federal Register as T.D. 85-40 on March 12, 1985 (50 FR 9797), §§ 10.38 and 10.39 were amended to eliminate the requirement that Customs officers examine articles imported temporarily under bond or an A.T.A. carnet, before exportation, and supervise the exportation process in order to have the bond or carnet cancelled. The amendments provided that documentary evidence ordinarily submitted to Customs, which shows

that the articles were exported, would be considered adequate proof of exportation.

As explained in T.D. 85–40, the procedure for allowing the submission of documentary evidence as proof of exportation was already in effect in Customs field offices by virtue of notification given the field offices on April 3, 1981. Shortly thereafter, by T.D. 81–124, published in the CUSTOMS BULLETIN on May 20, 1981, the public was informed that the requirements of §§ 10.38 and 10.39, Customs Regulations, were being suspended at the importer's option of presenting documentary proof of exportation. T.D. 81–124 was not published in the Federal Register.

T.D. 85–40 provided that the amendments to §§ 10.38 and 10.39 were to become effective on April 11, 1985. However, because of concern that the changes could have compromised enforcement efforts, by notice published in the Federal Register as T.D. 85–66 on April 10, 1985 (50 FR 14092), the effective date of the amendments was delayed indefinitely.

After consideration of comments received from our field offices in regard to this change and further review of this matter, it has been determined advisable to withdraw T.D. 85–40 and the proposal published in the Federal Register on September 9, 1983 (48 FR 40738). It has also been decided to rescind T.D. 81–124 inasmuch as there is now no basis for permitting the procedures allowed by this rule.

The existing §§ 10.38 and 10.39, Customs Regulations, therefore, will remain in effect. Thus, the Customs Form 3495 must be filed with the district director and Customs will retain the option of examining the merchandise imported temporarily under bond or carnet, before exportation, and supervising its exportation.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: April 21, 1986.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

[Published in the Federal Register, April 28, 1986 (51 FR 15762)]

U.S. Customs Service

General Notices

Application for Recordation of Trade Name: "CHRISTIAN KIM, INC."

ACTION: Notice of Application for Recordation of Trade Name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CHRISTIAN KIM, INC." used by Christian Kim, Inc., a corporation organized under the laws of the State of Californie, located at 124 East Olympic Boulevard, Los Angeles, California 90015.

The application states that the trade name is used in connection with footwear, manufactured in Korea.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before June 27, 1986.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: April 24, 1986.

STEVEN I. PINTER,
Acting Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, April 28, 1986 (51 FR 15857)]

Importation of Tuna and Tuna Products From Costa Rica Prohibited

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice is to advise that under the Fishery Conservation and Management Act of 1976 ("the Act"), the Secretary of State has certified to the Secretary of the Treasury that a U.S. fishing vessel, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the U.S., was seized by Costa Rica as a consequence of a claim of jurisdiction which is not recognized by the U.S. Pursuant to section 205(b), of the Act, the Secretary of the Treasury has determined that the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Costa Rica is prohibited until the Department of State notifies the Secretary of the Treasury that the reasons for this prohibition no longer prevail.

EFFECTIVE DATE: This prohibition is effective as to tuna and tuna products from Costa Rica imported on or after April 24, 1986. Such importation shall not be entered for consumption or withdrawn from warehouse for consumption on or after that date.

FOR FURTHER INFORMATION CONTACT: Harrison C. Feese, Commercial Law Enforcement Branch, Commercial Compliance Division, Office of Trade Operations, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8651).

SUPPLEMENTARY INFORMATION:

Background

Section 205(a)(4)(C) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801 *et seq.*), provides that the Secretary of State shall certify to the Secretary of the Treasury any determination that a fishing vessel of the U.S., while fishing in water beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the U.S., has been seized by a foreign nation as a consequence of a claim of jurisdiction not recognized by the U.S.

Pursuant to section 205(b) of the Act, upon receiving this certification, the Secretary of the Treasury is required to take such action as may be necessary and appropriate to prohibit the importation of all fish and fish products from the fishery involved.

Section 205(c) of the Act provides that if the Secretary of State finds that the reasons for the import prohibition under section 205 no longer prevail, the Secretary of State shall notify the Secretary of the Treasury, who shall promptly remove the import prohibition.

On January 29, 1986, the Evelyn Da Rosa, a fishing vessel of the U.S., was seized by authorities of the government of Costa Rica approximately 50 miles off the coast of Costa Rica for fishing for tuna

without the authorization required by Costa Rican law. Cost Rica claims jurisdiction over tuna within 200 miles of its coast. The U.S. does not recognize this jurisdiction.

Pursuant to § 205(a) of the Act, on March 10, 1986, the Secretary of State certified the seizure of this vessel as meeting the requirements of § 205(a)(4)(C) of the Act.

DETERMINATION

Under the authority of § 205 (b) and (c) of the Fishery Conservation and Management Act of 1976, the Secretary of the Treasury has determined that the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Costa Rica (the "country of origin") is prohibited until the Department of State notifies the Secretary of the Treasury that the reasons for this prohibition no longer prevail. Tuna and tuna products processed in Costa Rica to any extent, will be considered tuna or tuna products from Costa Rica. At this time, this prohibition does not extend to in-bond shipments to and through the U.S.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: April 11, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 24, 1986 (51 FR 15571)]

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 111

Proposed Customs Regulations Amendment Relating to Customs Broker Examinations

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: Customs currently gives an examination to those wishing to become licensed Customs brokers twice per year. The administration of these exams is proving to be a burden on the limited resources of Customs. In order to maintain the high standards of the exam and pass only those capable of rendering valuable information and services to their clients, Customs is proposing to reduce the number of times the exam is given to once a year.

DATE: Comments must be received on or before June 24, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Pinto, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2654).

SUPPLEMENTARY INFORMATION:

Background

Part 111, Customs Regulations (19 CFR Part 111), sets forth the general provisions as well as specific procedures relating to Customs brokers, that is, individuals, partnerships, associations, or corporations licensed to transact Customs business on behalf of others. In particular, § 111.13 contains the procedural aspects of the examination of applicants for individual brokers licenses.

Currently, pursuant to § 111.13(b), Customs gives two brokers exams per year, in April and October. The exams are prepared and graded in Customs Headquarters and are designed to test an applicant's knowledge of customs and related laws, regulations, and pro-

cedures, and his or her fitness to render valuable service to importers and exporters. Composing exam questions which are unambiguous and which comprehensivley test an applicant's knowledge of the subject matter is a difficult and time consuming task. The work entailed in preparing and grading the exam is a serious drain on the limited resources of Customs.

There has been a continual increase in the number of applicants wishing to take the brokers exam each time that it is given. It has reached the point that Customs is concerned that the quality of the exam will suffer if we continue to give it twice yearly. Up to now, a high standard of quality has been maintained on the exam and it is generally recognized as a fair and thorough test of the qualifications of the applicant. It is with the goal of maintaining this high standard that Customs now proposes to amend § 111.13(b), Customs Regulations, to reduce the frequency of exams to once yearly. The proposed schedule provides for an exam every June. If the number of applicants continues to increase while the resourses Customs can allocate to preparing and grading the exam fails to keep pace, Customs is concerned this would result in inadequate testing of an applicant's knowledge and consequently the granting of licenses to those who may not qualify to act for others in Customs matters.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washignton, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 111

Administrative practice and procedure, Brokers.

PROPOSED AMENDMENTS

It is proposed to amend Part 111, Customs Regulations (19 CFR Part 111), as set forth below:

PART 111—CUSTOMS BROKERS

1. The general authority citation for Part 111 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624, 1641.

2. It is proposed to revise § 111.13(b) by removing the words, "April and October", and inserting in their place, "June of each year".

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 4, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 25, 1986 (51 FR 15636)]

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19 CFR Part 172

Proposed Customs Regulations Amendments Relating to Reduction of Petitioning Time in Liquidated Damages Cases

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to expedite the processing of cases in which liquidated damages have been assessed against a bond holder for violations of the Customs laws and regulations. The proposal would reduce the time in which petitions for relief from the payment of the liquidated damages may be filed with Customs in such cases from 60 days to 30 days from the date of mailing of the notice of the liquidated damages incurred. It would thus conform the administrative petitioning time in these cases to that which currently applies to seizure and forfeiture cases.

DATE: Comments must be received on or before June 24, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: James Demb, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5746).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 172.2, Customs Regulations (19 CFR 172.2), provides procedures Customs uses when a petition for relief is not filed or payment is not made to Customs or arrangements made to pay by a party who is liable for the payment of liquidated damages assessed against a bond holder for violation of any of the conditions of the bond. Under this section, a 60-day period from the mailing date of the notice of liquidated damages incurred is allowed before any collection action is taken by Customs. Collection action may be temporarily withheld, however, if it appears that the party liable for the payment of liquidated damages is absent from the U.S. at the time the notice is received or for more than 30 days during the 60-day petitioning period.

Current § 172.12, Customs Regulations (19 CFR 172.12), refers to the 60-day period for filing a petition for relief in liquidated damages cases and current § 172.33, Customs Regulations (19 CFR 172.33), provides for a similar 60-day period for filing supplemental petitions for relief, under certain specified conditions.

Similar 60-day filing periods formerly applied to petitions for relief filed in accord with the provisions of Parts 162 and 171, Customs Regulations (19 CFR Parts 162, 171), which are concerned with cases involving the seizure of merchandise subject to forfeiture or fines and penalties incurred for violations of the Customs laws and regulations. Pursuant to T.D. 85-195, published in the Federal Register on December 10, 1985 (50 FR 50287), however, this 60-day petitioning period was reduced to 30 days. This was done to conform the Customs Regulations to changes made to the Tariff Act of 1930 (19 U.S.C. 1202 *et seq.*), with respect to the forfeiture and disposition of property seized by Customs. The petitioning period change was one of many changes to Parts 162 and 171, which resulted from certain provisions of the Comprehensive Crime Control Act of 1984 (Pub. L. 98-473) and the Tariff and Trade Act of 1984 (Pub. L. 98-573). It was expected that these changes would reduce Customs costs relating to the storage and upkeep of seized property and expedite the processing of penalty and forfeiture cases resulting from the seizure of the property.

At the time that the changes to Parts 162 and 171 were proposed, it was determined advisable not to include liquidated damages cases among those subject to the new 30-day petitioning period. It was believed that inasmuch as property is not being held by Customs in liquidated damages cases, the same urgency did not attach to these cases as it does to seizure and forfeiture cases. Since that time, however, it has been decided that liquidated damages cases should nevertheless be subject to a 30-day petitioning period in order to expedite the disposition of these cases, thereby saving Customs needed time and resources. It was also reasonsed that having the same petitioning period for seizure, forfeiture, and liquidated damages cases would be easier to administer since it would preclude any confusion as to when the 30-day or the 60-day petitioning period would apply.

It is therefore proposed to amend §§ 172.2(a), 172.12(b), and 172.33(a)(1) and (c)(2)(ii), Customs Regulations, to reduce the petitioning time in liquidated damages cases from 60 to 30 days. It is also proposed to amend § 172.2(b), to reduce from "more than 30 days" to "more than 20 days," the time during the 30-day petitioning period a party liable for the payment of liquidated damages must be absent from the U.S. in order for collection action on the case to be temporarily withheld by Customs.

It is also proposed to amend the heading and text of § 172.2(a), to provide that Customs will refer unsatisfied liquidated damages claims to the Department of Justice rather than the U.S. Attorney. This direct referral would expedite the processing of these cases and the collection of liquidated damages.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 172

Administrative practice and procedures, Liquidated damages.

PROPOSED AMENDMENTS

It is proposed to amend Part 172, Customs Regulations (19 CFR Part 172), as set forth below.

PART 172—LIQUIDATED DAMAGES

1. The authority citation for Part 172 would continue to read as follows:

AUTHORITY: 19 U.S.C. 66, 1623, 1624.

2. It is proposed to revise § 172.2 to read as follows:

§ 172.2 Failure to petition for relief.

(a) *Referral of claim to Department of Justice.* If any party liable for liquidated damages fails to petition for relief or to pay or make arrangements to pay the liquidated damages within 30 days from the date of mailing of the notice of the liquidated damages incurred, as provided in § 172.1, or within such additional time as may have been granted, the district director of Customs, after required collection action, shall refer the claim promptly to the Department of Justice.

(b) *Absence from the U.S.* If it appears that the parties liable for liquidated damages are absent from the U.S. or during the 30-day period referred to in paragraph (a) of this section were absent for more than 20 days, the district director may withhold such referral for a reasonable time unless other action is expressly authorized by the Commissioner of Customs.

3. It is proposed to revise § 172.12(b) to read as follows:

§ 172.12 Filing of petition for relief.

* * * * * * *

(b) *When filed.* A petition for relief shall be filed within 30 days from the date of mailing of the notice of the liability for liquidated damages incurred unless an extension of such period has been granted by the district director.

* * * * * * *

4. It is proposed to amend § 172.33 by revising paragraphs (a)(1) and (c)(2)(ii) to read as follows:

§ 172.33 Supplemental petitions for relief.

(a) *Time and place of filing.* If the interested parties are not satisfied with a decision of the district director or the Commissioner of Customs, a supplemental petition may be filed with the district director of Customs by the interested parties. Such a petition shall be filed either:

(1) Within 30 days from the date of notice to the petitioner of the decision from which further relief is requested if no effective period is prescribed in the decision: or

* * * * * * *

(c) * * *

(1) * * *

(2) A second supplemental petition will not be considered except in one of the following circumstances:

(i) * * *

(ii) If it is filed within 30 days following an administrative or judicial decision which reduces the loss of duties upon which the mitigated penalty amount was based; or

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 8, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 25, 1986 (51 FR 15637)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-729)

CABOT CORP., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT, HULES MEXICANOS, S.A. AND NEGROMEX, S.A., INTERVENORS-APPELLANTS

ON MOTION

Sheila N. Ziff, Department of Justice, of Washington, D.C., represented appellant.
Eugene L. Stewart, and *Terence P. Stewart*, of Washington, D.C., represented appellee.
Andrew Jaxa-Debicki, O'Connor & Hannan, of Washington, D.C., represented intervenors Hules Mexicanos, S.A., et al.

Appealed from: U.S. Court of International Trade.

Judge CARMAN.

(Appeal No. 86-729)

CABOT CORP., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT, HULES MEXICANOS, S.A. AND NEGROMEX, S.A., INTERVENORS-APPELLANTS

ON MOTION

Before BALDWIN, SMITH, and NIES, *Circuit Judges*.

ORDER

The court has before it the motion of appellee, Cabot Corporation (Cabot), a domestic producer of carbon black,[1] to dismiss this appeal. Appeal was taken by the United States from an October 4, 1985 order of the Court of International Trade which remanded the case to the International Trade Administration (ITA) for further findings, investigation, and redetermination with regard to a coun-

[1] As defined by the Court of International Trade, carbon black is an "elemental carbon with incidental or planned surface oxidation that is formed under the controlled cracking, heating and quenching of a petroleum derivative feedstock."

tervailing duty determination concerning carbon black imports from Mexico. We grant the motion.

BACKGROUND

In 1982, the ITA published notice that it was initiating a countervailing duty investigation of carbon black imports from Mexico as a result of a petition filed by Cabot alleging that Mexican carbon black producers received certain bounties and grants. In 1983, the ITA issued a final determination finding the net bounty or grant to be 0.88 percent *ad valorem*. 48 Fed. Reg. 29, 564 (1983). The ITA determined that some Mexican government programs conferred bounties or grants to Mexican producers while others did not.

Cabot challenged four of the ITA's determinations in an action brought in the Court of International Trade. These were: (1) the ITA's finding that the provision of carbon black feedstock and natural gas to Mexican carbon black producers did not constitute a countervailable subsidy; (2) the ITA's finding that one Mexican carbon black producer, Hules Mexicanos, had paid all applicable taxes and was therefore not subsidized; (3) the ITA's failure to determine whether the provision of low interest loans by a Mexican government agency (FONEI) to another Mexican carbon black producer, Negromex, constituted a countervailable subsidy; and (4) the ITA's calculation of the percentage *ad valorem* benefit of certain other preferential loans to Negromex.

In its order, the Court of International Trade reversed the ITA's finding that Mexico's provision of carbon black feedstock and natural gas at government set rates to Hules Mexicanos and Negromex did not constitute a countervailable subsidy and remanded the issue for "further investigation and redetermination" in light of the "competitive advantage" standard, which differed from the "generally available benefits" standard applied by the ITA.

The ITA was also directed to render a determination regarding the effect of low interest loan financing received by Negromex. The court sustained the ITA's determination that Hules Mexicanos had paid all applicable taxes, and therefore was not subsidized.[2] The court directed ITA to make findings and redeterminations, with a supplemented administrative record, and report them to the court "within 90 days after the [October 4, 1985] date of entry of this order."

The primary issue which the government wishes to raise on appeal is the Court of International Trade's rejection of the ITA's "generally available benefits" standard and substitution of a "competitive advantage" standard for the determination of what constitutes a countervailable bounty or grant. The government has

[2] The court did not rule on the issue regarding the correct calculation of the percentage *ad valorem* benefits received by Negromex because the "[United States] concedes that [Cabot's] calculations are correct and the error would be corrected in the § 751 (19 U.S.C. § 1675) review then in progress at the time of the filing of the United States cross-motion for review upon the agency record."

stated that the portion of the order directing ITA to make a finding on the low interest loan issue to Negromex is "not in issue and is not a basis for the Government's appeal." Thus, the government does not contest remand on that issue nor the correction of the percentage *ad valorem* benefits calculation.

The question presented is whether the trial court's order is a final decision appealable to this court under 28 U.S.C. § 1295(a)(5).[3]

Cabot argues that, in the absence of interlocutory certification, the appeal is premature because "[o]n its face, this order requires further action by the agency prior to final action by the court."

The government argues that the remand order is final because the Court of International Trade "lost control over the agency action after remanding" and thus lacks "jurisdiction either to review the agency's new determination or to enter final judgment thereon" under the authority of *Freeport Minerals Co.* v. *United States*, 758 F.2d 629 (Fed. Cir. 1985). Alternatively, the government argues that the order should be accorded "pragmatic finality."

ANALYSIS

The requirement of finality has been called "an historic characteristic of federal appellate procedure." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984). The final judgment rule requires that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Id.* The Supreme Court has consistently held that as a general rule an order is final only when it "ends the litigation on the merits and leaves nothing for the court to do but execute judgment." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978); *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). The Court has identified several important interests served by the rule:

> It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

Flanagan, 465 U.S. at 263–64; *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981).

A corollary rule is that an order remanding a matter to an administrative agency for further findings and proceedings is not final. *See, e.g., Memorial Hosp. System* v. *Heckler*, 769 F.2d 1043 (5th Cir. 1985) (district court remand to the Provider Reimburse-

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[3] 28 U.S.C. § 1295 provides in relevant part:

(a) The United States Court of Appeals for the Federal Circuit have exclusive jurisdiction—

* * *

(5) of an appeal from a final decision of the United States Court of International Trade * * *.

For our purposes, "final decision" and "final judgment" are used interchangeably.

ment Review Board); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir. 1984) (en banc) (Benefits Review Board remand to administrative law judge); *Matter of Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984) (district court remand to bankruptcy judge); *United Transportation Union* v. *Illinois Central Railroad Co.*, 433 F.2d 566 (7th Cir. 1970) (district court remand to the National Railroad Adjustment Board), *cert. denied*, 402 U.S. 915 (1971); *McCoy* v. *Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc); *Howell* v. *Schweiker*, 699 F.2d 524, 526 (11th Cir. 1983) (district court remand to the Secretary of Health and Human Services).

In *Newpark Shipbuilding*, for example, Newpark sought review of an order of the federal Benefits Review Board with regard to the claim of a disabled former employee for benefits under a federal workers' compensation act. The board's order had affirmed part of an administrative law judge's (ALJ's) decision concerning the applicable wage basis, rejected the ALJ's method of determining annual earnings, vacated the award of compensation, and remanded for further findings and proceedings. The en banc majority held that the board's remand order was not a "final order,"[4] rejecting a divided panel opinion, 698 F.2d 743 (5th Cir. 1983), which accorded "pragmatic finality" to the board's order. The court reasoned that according pragmatic finality to board remand orders on a case-by-case basis was "in fundamental conflict with the values and purposes of the finality rule to avoid the delay and system-costs of piecemeal and multiple appeals, and to provide a relatively clear test of appealability so that needless precautionary appeals not be taken." 723 F.2d at 405. We think this reasoning applies as well to an order from the Court of International Trade remanding an action to the ITA for further findings and proceedings.

We conclude that the court's order is not a final appealable order. Where, as here, the trial court remands to the administrative agency for additional findings, determination, and redetermination, the remand order is not appealable even though the order resolves an important legal issue such as the applicable standard for countervailability. This result comports with the policies underlying the finality rule and in particular avoids unnecessary piecemeal appellate review without precluding later appellate review of the legal issue or any other determination made on a complete administrative record.

Citing our decision in *Freeport Minerals Co.* v. *United States*, 758 F.2d 629 (Fed. Cir. 1985), the government advances the novel argument that unless the Court of International Trade retains jurisdiction over the particular case during remand, the remand order is final. On this argument we need only say that *Freeport* did not deal

[4] Although judicial review of the board was under 33 U.S.C. § 921(c), the court said that the "required finality for reviewability of an order of the Board follows, for the same reasons of policy, the contours of the finality-requirement under 28 U.S.C. § 1291 for appealability of decisions of the district courts." 723 F.2d at 400.

with the appealability to this court of a Court of International Trade order remanding to the ITA. With respect to that question, the authorities cited above provide the appropriate test for determining finality for purposes of appeal.

Next, the government asks us to consider a "practical rather than a technical" construction of the remand order, citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); and our decision in *Maier* v. *Orr*, 754 F.2d 973 (Fed. Cir. 1985), arguing that the order is final and appealable because it finally determines the controlling issue in the case.

One statutory exception to the final judgment rule, found in 28 U.S.C. § 1292(d)(1), provides a means for a judge of the Court of International Trade to certify for appeal an order not otherwise appealable and allows this court in its discretion to permit appeal of such a certified order. We note in the present case that the government chose not to invoke this exception by requesting the trial court to certify the order. *Compare McCoy* v. *Schweiker*, 683 F.2d 1138, 1141 & n.2 (8th Cir. 1982) (en banc) (district court certified for interlocutory appeal under 28 U.S.C. § 1292(b)) *with Matter of Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984) (even though remand order is not a final decision, this just means that the order is not automatically appealable; it may be appealable under one of the special procedures for interlocutory appeals such as 28 U.S.C. § 1292(b); but, Riggsby made no effort to appeal under § 1292(b)).

The Supreme Court has narrowly circumscribed non-statutory exceptions to the final judgment rule. "The importance of the final judgment rule has led the Court to permit departures from the rule 'only when observance of it would practically defeat the right to any at all.'" *Flanagan* v. *United States*, 465 U.S. at 265 (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940)). Recent decisions have stated that departure will be allowed for the limited category of cases falling within the "collateral order" exception delineated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See, e.g., Richardson-Merrell, Inc.* v. *Koller*, 105 S. Ct. 2757, 2761 (1985); *Flanagan* v. *United States*, 465 U.S. at 265; *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 375. The "collateral order" exception covers orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. To come within the exception, an order must at a minimum "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

The collateral order exception is inapplicable to the facts of this case. The trial court's order satisfies neither the second nor third parts of the three-part test. The proper legal standard for determining countervailability is not a collateral matter but rather goes to the heart of the case. Nor will the correctness of the trial court's use of the "competitive advantage" standard be rendered unreviewable for our decision. Appeal may be taken from any final decision of the trial court after the ITA has completed its findings, determination, and redetermination.[5]

The government's citation of *Maier* v. *Orr*, 754 F.2d 973 (Fed. Cir. 1985), in support of its argument that the remand order here is a final decision because it finally determines the "controlling issue in the case" misses the mark. In *Maier*, the district court issued a writ of mandamus to the Secretary of the Air Force and granted *full relief* to petitioner. True, we noted that the district court "finally determined the controlling legal issue" in the case, 754 F.2d at 981, but that referred to the district court's determination that petitioner was entitled to be retroactively reinstated on active duty with back pay, retroactive promotions, an all other benefits flowing from reinstatement. There was no "remand" for further findings. Indeed, the district court specifically said there were no remaining fact issues. Retroactive reinstatement was finally determined and all that remained was for the Air Force to consider what promotions petitioner would have been entitled to under the circumstances. We held that the order was sufficiently injunctive in nature to justify taking jurisdiction under 28 U.S.C. § 1292(a)(1). Additionally, we cited *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), and said that in considering the "practical factors" for applying for finality requirement of 28 U.S.C. § 1291, the order was a final decision for purposes of that section. Neither the facts nor the conclusions in *Maier* support finality in the present case. The Court of International Trade did not, and could not, make a final conclusion on countervailability because the ITA has to make further findings, determination, and redetermination. Also, the court's remand order here, unlike the order in *Maier*, does not come within the statutory exception to the final judgment rule concerning injunctions found in 28 U.S.C. § 1292(a)(1). Finally, there is no warrant here for applying the *Gillespie* rationale beyond the unique facts of that case. *Coopers & Lybrand*, 437 U.S. at 477 n. 30.

The issue regarding the proper legal standard to be applied to countervailability of benefits may be considered on a proper appeal from the trial court once it has had an opportunity to review the determination and redetermination made by ITA upon a complete administrative record.

Accordingly, IT IS ORDERED THAT:

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[5] Neither party indicates whether the Court of International Trade stayed the remand order, or (if not) whether the ITA has, in fact, reported back to the Court of International Trade. We note that if the ITA had acted within the 90 days set forth in the remand order, its action would have been completed in early January, 1986.

Cabot's motion is granted and this appeal is dismissed.
Dated: April 9, 1986.

For the Court.

PHILLIP B. BALDWIN,
Circuit Judge.

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 115 and 178

(T.D. 86-92)

Certification of Cargo Containers and Road Vehicles Pursuant to International Conventions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the transfer of functions concerning certification of containers and road vehicles for transportation under Customs seal, pursuant to international Customs conventions, from the Secretary of Transportation (acting through the Coast Guard) to the Secretary of the Treasury (acting through the Customs Service). This transfer is mandated by E.O. 12445 of October 17, 1983.

EFFECTIVE DATE: June 2, 1986.

FOR FURTHER INFORMATION CONTACT: Donald Reusch, Office of Regulations and Rulings (202-566-5706) or Arnold L. Sarasky, Office of Inspection and Control, (202-566-8648), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION

Background

By Executive Order 11459, published in the Federal Register (34 FR 5057), March 11, 1969, the President designated the Secretary of Transportation to take all necessary actions to administer the approval and certification of containers and vehicles for International Transport of Goods Under Cover of TIR Carnets (TIR Convention), done at Geneva on January 15, 1959 (TIAS 6633), and the Customs Convention on Containers, done at Geneva on May 18, 1956 (TIAS 6634). Actual administration was undertaken by the Commandant of the U.S. Coast Guard and regulations setting forth the specific

requirements are contained in title 49, Code of Federal Regulations, Parts 420 through 424 (49 CFR Parts 420 through 424).

On October 17, 1983, the President signed E.O. 12445, transferring the administration of approval and certification of containers and road vehicles to the Secretary of the Treasury. In addition to the two Conventions previously mentioned, the E.O. mandates the administration of a third, the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention), done at Geneva on November 14, 1975 (TIAS), which replaces the 1959 convention as to signatories to both conventions and to those conventions as modified, amended, or otherwise supplemented from time to time. Since the U.S. has recently acceded to the Customs Convention on Containers, 1972, provisions which supplement the 1956 convention are included in this document.

Under the certification program, containers (under the terms of the container convention), and containers and road vehicles (under the terms of the TIR convention), or proposed designs for such conveyances, may be submitted to various certifying authorities worldwide for approval. Three such certifying authorities, all named in the regulations, are designated by the Commissioner of Customs to perform the examination and certification functions for the U.S. The regulations set forth the specifics of the certification program, and the approval of a conveyance would merely expedite its movement along with its merchandise.

The regulations by which the Coast Guard administered this area did not reflect the provisions of the TIR Convention, 1975, or the Customs Convention on Containers, 1972, and did not distinguish between Convention provisions applicable to road vehicles and those applicable to containers. The five parts previously codified in the Coast Guard Regulations (49 CFR Parts 420–424), are redesignated as Subparts A through F of new Part 115, Customs Regulations (19 CFR Part 115). References to Commandant of the Coast Guard are changed to Commissioner of Customs, and section references within the regulations are changed to reflect the recodification.

The regulations do not include the Oceanographic Society, Inc., which was listed in § 421.1, Coast Guard Regulations (49 CFR 421.1), as a designated Certifying Authority. They cannot be located and are therefore presumed to no longer exist.

On May 15, 1985, Customs published a notice in the Federal Register (50 FR 20227), proposing to add the new Part 115 to the regulations and inviting the public to submit comments on the proposal by July 15, 1985.

After analysis of the comments received and further consideration of the matter, the proposal is being adopted with certain changes which have been prompted by suggestions submitted by the commenters. These changes will be discussed in the analysis of the comments received which follows.

Analysis of Comments

Three comments were received in response to the May 15, 1985, Federal Register notice. The comments were made in regard to specific sections of the proposed regulations, rather than in general terms.

Two commenters expressed concern over the wording of § 115.2(b) as concerns the physical location of certifying authorities. The proposal provided that a conveyance be presented for approval in a country where the owner is a resident or is established. This was said to be too restrictive, considering existing convention language.

We agree. Accordingly, the language of § 115.2(b) has been changed to permit presentation for approval to any certifying authority to whom an owner or operator is able to present a conveyance.

Two commenters discussed problems with § 115.3(a), which defines "certifying authority" for the purposes of Part 115. It is stated that the section should make it clear that such an "authority" be incorporated or established in the U.S., and be "qualified" to perform the tasks required. In line with these points, we have changed § 115.3(a) to reflect that a certifying authority must be a U.S. company which is competent to carry out all necessary responsibilities.

One commenter objects to the definition of a container as being fully or partially enclosed. This requirement is, however, a direct quote from Chapter I, Article 1(e)(i) of the TIR Convention.

One commenter inquired about the meaning of the phrase "an extended production run" in § 115.8(d), the section dealing with supplementary examinations of road vehicles approved by design type. We consider the phrase to mean a continuous production run of many units over a long period of time, as well as a new production run following the conclusion of a previous run.

Two commenters found a portion of § 115.9 to be cumbersome. The section provides for approval of containers under either of two international container conventions. The commenters believe that the potential need for separate certificates for each container certified could be burdensome and suggest that the possibility of a consolidated form by explored.

We do not believe that the adherence to both conventions will cause a problem. The requirements of both the 1975 TIR and the 1972 Container Conventions are virtually the same. Although there might have been some problem without the inclusion in the regulations of the 1972 Convention because the older convention did not provide for design type approval and reference to it was for information purposes, that problem will no longer exist with inclusion of the 1972 convention. Since the U.S. is a contracting party to both conventions, we believe that we must provide for possible utilization of either or both. In this regard, it is noted that the certificate of approval of both conventions is the same and that check

boxes on the certificate and forms utilized by the certifying authority are all that is needed to avoid any possible problem. Insofar as there might be some small difference between the technical requirements of each convention, the certifying authority will normally be able to discharge its functions by complying with the requirements of either convention. We believe that we have made sufficient changes in the language of § 115.9 to eliminate any of the problem areas perceived by the commenters.

One commenter pointed out that § 115.10, relating to approval of containers, contains erroneous cross-references to sections of Part 115 dealing with road vehicles. These incorrect references have been deleted.

One party considers the § 115.11(a) grant of authority to the Commissioner to approve fees established by each certifying authority to be unwarranted. This provision is merely carried over from the long-standing regulations by which the Coast Guard administered this program.

The same commenter believes that a maximum limit should be placed on the length of time a certifying authority must maintain approval files. It is our position that the records should be maintained indefinitely since there may be a need to check, for example, a series of defects common to one production run of vehicles or containers.

A commenter points out certain inconsistencies in §§ 115.25, 115.26, and 115.27, in that in two sections "manufacturers" or "owners" may seek approval of containers by design type, where as "owners" are not mentioned in the third section. We have examined these provisions in light of the Container Convention which provides for "manufacturers" only, seeking such approval. Accordingly, we have deleted references to "owners" in those sections.

All of the commenters expressed problems with §§ 115.28(f), and 115.63(e), which contain identical language concerning the application for approval by design type of containers and road vehicles. Both sections would require a statement that the applicant is a resident of, or established in, the U.S.

Under a procedure which was not in existence when the May 15, 1985, notice was published, U.S. certifying authorities will now be authorized to approve containers and road vehicles manufactured in non-contracting countries. Accordingly, the provision to which the commenters took exception is no longer needed and has been deleted from §§ 115.28(f) and 115.63(e).

One commenter states that § 115.32(a) (2), (3), and (4), needs some adjustment. The section contains the information which must be displayed on a container's metal approval plate. It is stated that (a)(2) does not provide for the identity of the certifying authority, and that (a) (3) and (4) overlap each other. As to (a)(2), we agree, and have added language to provide for the inclusion of a two digit identifying code. As to (a)(3) and (a)(4), we disagree. Paragraph

(a)(3) provides for the model or type of container, whereas (a)(4) provides for the manufacturer's serial number. Accordingly, no change has been made to § 115.32(a) (3) and (4).

A commenter notes that § 115.39, as proposed, gives the impression that containers manufactured in non-contracting countries may need to be physically produced in a country other than the place of manufacture in order to be inspected. We agree, and have changed the section to make it clear that a container may be submitted for inspection in the country of manufacture.

It is noted that § 115.40 makes no reference to the 1972 Convention on Containers. This was an oversight and the appropriate reference has been added to the section.

One party suggests that § 115.42 should require a container approval plate to contain a number assigned by the certifying authority if the manufacturer's number is unknown. We wish to point out that the manufacturer's number should always be available, otherwise the acceptability of the approval plate itself would be in doubt.

Finally, a commenter points out our erroneous use of the word "containers" in § 115.66(a)(1). We have made the necessary correction by substituting the word "vehicles".

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Paperwork Reduction Act

The collection of information requirements in the amendments are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). Therefore, they have been submitted to and approved by the Office of Management and Budget and assigned control number 1515–0145. Accordingly, Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and the control numbers assigned by OMB, is being amended to include this control number.

Regulatory Flexibility Act

Pursuant to § 3 of the Regulatory Flexibility Act (Pub. L. 96–353, 5 U.S.C. 301 *et seq.*), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 115 AND PART 178

PART 115

Cargo vessels, Coastal zone, Freight, Harbors, Maritime carriers, Vessels.

PART 178

Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

Chapter I of title 19, Code of Federal Regulations (19 CFR Chapter I), is amended by adding a new Part 115 as set forth below and amending Part 178, Customs Regulations (19 CFR Part 178), in the following manner:

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting the following in the appropriate numerical sequence according to the section number under the columns indicated:

§ 178.2 Listing of OMB Control Numbers.

19 CFR section	Description	OMB Control No.
Part 115.....	Information to obtain certification that containers/road vehicles meet construction requirements.	1515-0145

Title 19, Code of Federal Regulations, Part 115 (19 CFR 115), reads as follows:

PART 115—CARGO CONTAINER AND ROAD VEHICLE CERTIFICATION PURSUANT TO INTERNATIONAL CUSTOMS CONVENTIONS

SUBPART A—GENERAL

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115.2 Application.
115.3 Definitions.
115.4 Conflicting provisions.

SUBPART B—ADMINISTRATION

115.6 Designated Certifying Authorities.
115.7 Designation of additional Certifying Authorities.
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115.9 Certifying Authorities responsibilities—containers.
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115.13 Records to be furnished Customs.
115.14 Meetings on program.
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SUBPART E—PROCEDURES FOR APPROVAL OF INDIVIDUAL ROAD VEHICLES

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SUBPART F—PROCEDURES FOR APPROVAL OF ROAD VEHICLES BY DESIGN TYPE

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115.62 Where to apply.
115.63 Application for approval.
115.64 Plan review.
115.65 Technical requirements for road vehicles by design type.
115.66 Examination, inspection, and testing.
115.67 Approval certificate.
115.68 Termination of approval.

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1624; E.O. 12445 of October 17, 1983.

SUBPART A—GENERAL

§ 115.1 Purpose.

This chapter establishes procedures for certifying containers and road vehicles in conformance with the Customs Convention on Containers (1956) (TIAS 6634), the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (1959) (TIAS 6633), the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets, November 14, 1975 (TIAS), and the Customs Convention on Containers, 1972 (TIAS), by applying the procedures and technical conditions set forth in the annexes to these conventions.

§ 115.2 Application.

(a) Certification of containers and road vehicles for international transport under Customs seal is voluntary. This chapter does not require certification of containers and road vehicles.

(b) The Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention), January 15, 1959 (20 UST 184, TIAS 6633), requires that the approval of road vehicles be made by competent authorities of the country in which the owner or carrier is a resident or is established, and that containers should be either similarly approved, or approved by the competent authority of the country where it is first used for transport under Customs seal. The Customs Convention on Containers, May 18, 1956 (20 UST 301, TIAS 6634), requires that the approval of containers be made by competent authorities of the country in which the owner is a resident or is established or by those of the country where the container is used for the first time for transport under Customs seal. The TIR Convention, 1975, generally provides that a road vehicle, for which approval at a stage after manufacture is desired, shall be approved by the competent authority where the vehicle owner or operator is established or located, or where the vehicle is registered. Such approval under the TIR Convention, 1975, or, for containers, the Customs Convention on Containers, 1972, may be accomplished by the competent authority of the country in which the owner or operator is able to produce the conveyance. The 1975 TIR Convention and the Customs Convention on Containers, 1972, also provide that the Certifying Authority of the country of manufacture, if that country is a contracting party to the Convention, may approve a series of road vehicles or containers presented for design type approval. The procedures for applying for certification are contained in §§ 115.28, 115.38, 115.49, and 115.63 of this part.

§ 115.3 Definitions.

For the purposes of this part:

(a) *Certifying Authority.* "Certifying Authority" means a nonprofit firm or association, incorporated or established in the U.S., which the Commissioner finds competent to carry out the functions of this part and which he designates to certify containers and road vehicles for international transport under Customs seal.

(b) *Commissioner.* "Commissioner" means the Commissioner of Customs.

(c) *Container.* "Container" means an article of transport equipment (lift van, portable tank, or other similar structure).

(1) Fully or partially enclosed to constitute a compartment intended for containing goods;

(2) Of a permanent character and strong enough to be suitable for repeated use;

(3) Specifically designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;

(4) Designed for ready handling, particularly its transfer from one mode of transport to another;

(5) Designed to be easily filled and emptied; and

(6) Having an internal volume of 1 cubic meter (35.3 cubic feet) or more.

(d) *Manufacturer.* "Manufacturer" means an organization or person constructing containers or road vehicles for certification in accordance with this chapter.

(e) *Prototype.* "Prototype" means a sample unit of a series of identical containers or road vehicles all built, so far as practical, under the same conditions.

(f) *Road vehicle.* "Road Vehicle", as defined in Chapter 1, Article 1 of the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention), November 14, 1975 (TIAS), means not only any power-driven road vehicle but also any trailer or semi-trailer designed to be coupled to it.

(g) *Customs and TIR/Container Plan.* "Customs and TIR/Container Plan" means the designer's drawing of a vehicle (for TIR purposes) or container (for TIR and Container Convention purposes) that illustrates each requirement in §§ 115.30, 115.40, 115.51, or 15.65, as appropriate to this part.

(h) The definitions in the subject Conventions shall be considered applicable to terms not specifically defined above.

§ 115.4 Conflicting provisions.

The provisions of the most recent TIR/Container Convention shall apply in the event of conflict between it and an earlier TIR/Container Convention covered by these regulations.

SUBPART B—ADMINISTRATION

§ 115.6 Designated Certifying Authorities.

(a) The American Bureau of Shipping, 45 Eisenhower Dr., Paramus, New Jersey 07652.

(b) International Cargo Gear Bureau, Inc., 17 Battery Place, New York, New York 10004.

(c) The National Cargo Bureau, Inc., One World Trade Center, Suite 2757, New York, New York 10048.

§ 115.7 Designation of additional Certifying Authorities.

(a) The Commissioner may designate as a Certifying Authority any nonprofit firm or association that he finds competent to carry out the functions of §§ 115.8 through 115.14 of this subpart.

(b) Any designation as Certifying Authority may be terminated by the Commissioner.

§ 115.8 Certifying Authorities responsibilities—road vehicles.

(a) *General.* Road vehicles may be approved individually or by design type.

(b) *Individual approval.* The Certifying Authority to whom a road vehicle is submitted for approval shall inspect such road vehicle produced in accordance with the general rules contained in Annex 3 of the TIR Convention, 1975.

(c) *Design type approval.* The Certifying Authority to whom a road vehicle is submitted for design type approval shall examine the drawings and detailed design specifications submitted with the application for approval. The Certifying Authority shall advise the applicant of any changes that must be made to the proposed design type in order that approval may be granted. The Certifying Authority shall examine one or more vehicles to confirm that such vehicles comply with the technical conditions contained in Annex 2 of the TIR Convention, 1975. The Certifying Authority shall notify the applicant of its decision to grant design type approval, and it shall issue an approval certificate complying with Annexes 3 and 4 of the TIR Convention, 1975.

(d) *Supplementary examinations.* If a road vehicle approved by design type is the subject of an extended production run under one certificate of approval, the Certifying Authority shall confirm by examination of one or more road vehicles during the manufacturing process, or by other means, that such vehicles continue to meet the approved drawings and detailed design specifications and the technical requirements of Annex 2 of the TIR Convention, 1975.

For the purposes of this section, an extended production run shall be considered a continuous run of many units over long periods of time, as well as a new run following the completion of a previous run.

§ 115.9 Certifying Authorities responsibilities—containers.

(a) *General.* Containers may be approved for transport under seal by design type at the manufacturing stage or, otherwise, at a stage subsequent to manufacture.

(b) *Design type approval.* The Certifying Authority to whom a container is submitted for design type approval shall examine the drawings and detailed design specifications submitted with the application for approval. The Certifying Authority shall advise the applicant of any changes that must be made to the proposed design type so that approval may be granted. The Certifying Authority shall examine one or more containers to confirm that such containers comply with the technical requirements of Part 1, Annex 7, TIR Convention, 1975, and Annex 4 of the Customs Convention on Containers, 1972. The Certifying Authority shall issue a certificate authorizing the applicant to affix an approval plate, as described in Appendix 1 to Part II, Annex 7 of the TIR Convention, 1975, and Annex 5 of the Customs Convention on Containers, 1972, for all

containers manufactured in conformity with the specifications of the type of container approved. This certificate shall comply with the model certificate in Appendix 2, Part II, Annex 7 of the TIR Convention, 1975, and Appendix 2 of Annex 5 of the Customs Convention on Containers, 1972.

(c) *After manufacture.* The Certifying Authority to whom containers are submitted for approval after manufacture, shall examine as many containers as necessary to ascertain that they comply with the technical conditions prescribed in Part 1, Annex 7, TIR Convention, 1975, and Annex 5 of the Customs Convention on Containers, 1972. The Certifying Authority shall issue a certificate of approval authorizing the applicant to affix an approval plate to the specific number or series of containers being approved. The certificate shall comply with the model certificate of approval in Appendix 3, Part II, Annex 7, TIR Convention, 1975, and Appendix 3, Annex 5, Customs Convention on Containers, 1972.

(d) *Supplementary examinations.* If a container approved by design type is the subject of an extended production run or several production runs under one certificate of approval, the Certifying Authority shall confirm by examination of one or more containers during the manufacturing process, or by other means, that such containers continue to meet the approved drawings and detailed design specifications and the technical requirements of Annex 7 of the TIR Convention, 1975, and Annex 4 of the Customs Convention on Containers, 1972. For the purposes of this section, an extended production run shall be considered as a continuous run of many units over long periods of time, as well as a new run following completion of a previous run.

§ 115.10 Certificate of approval.

A Certifying Authority shall issue a certificate of approval by design type for a specified number or unlimited series of containers that are approved in accordance with the procedures contained in §§ 115.29, 115.31, 115.38, and 115.41, and road vehicles that are approved in accordance with the procedures contained in §§ 115.49, 115.52, 115.63, and 115.66 of this part.

(a) *Road vehicles.* A Certifying Authority shall issue a certificate of approval conforming to the model in Annex 4 of the 1975 TIR Convention for vehicles submitted for individual or design type approval, if satisfied that the vehicles comply with the technical conditions prescribed in Annex 2 of the TIR Convention, 1975.

(b) *Containers.*

(1) Approval after Manufacture.

A Certifying Authority shall issue a certificate of approval conforming to the model in Appendix 3, Part II to Annex 7 of the TIR Convention, 1975, and Appendix 3 to Annex 5 of the Customs Convention on Containers, 1972, for containers approved at a stage after manufacture, when it has been ascertained that the containers comply with the technical conditions prescribed in Annex 7 of

the TIR Convention, 1975, and Annex 4 of the Customs Convention on Containers, 1972. The certificate shall be valid for the number of containers approved.

(2) Design type approved.

A Certifying Authority shall issue a single certificate of approval conforming to the model in Appendix 2, Part II to Annex 7 of the TIR Convention, 1975, and Appendix 2 to Annex 5 of the Customs convention on Containers, 1972, for containers approved by design type when it has been ascertained that the container type complies with the technical conditions prescribed in Annex 7 of the 1975 TIR Convention, and Annex 4 of the Customs Convention on Containers, 1972. The certificate shall be valid for all containers manufactured in conformity with the specifications of the type approved.

(c) *Provisions common to both approval procedures.*

The certificate of approval issued pursuant to paragraphs (a) and (b) of this section shall be valid for either the specific number of containers approved, or for an unlimited series of containers of the approved type.

§ 115.11 Establishment of fees.

(a) Each Certifying Authority shall establish and file with the Commissioner a schedule of fees for the performance of the certification procedures under this chapter. The fees shall be based on the costs (including transportation expense) actually incurred by the Certifying Authority. The fees are subject to approval by the Commissioner before their use by the Certifying Authority.

(b) Each Certifying Authority shall make available a schedule of its fees approved by the Commissioner. In addition, the schedules of approved fees for all the Certifying Authorities are available from the Headquarters, U.S. Customs Service, Office of Inspection and Control, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

§ 115.12 Records maintained by Certifying Authority.

(a) Each Certifying Authority shall maintain—

(1) A copy of each individual certificate of approval issued, together with a copy of the plans and the application to which the approval refers, along with any information submitted by the manufacturer and/or owner or operator for the certification of a container or a road vehicle.

(2) A record of each serial number assigned and affixed by the manufacturer to the road vehicles and containers manufactured under a design type approval, and containers approved at a stage after manufacture.

(b) The Commissioner may examine the Certifying Authority's files required by paragraph (a) of this section.

§ 115.13 Records to be furnished Customs.

Each Certifying Authority shall furnish the Headquarters, U.S. Customs Service, Office of Inspection and Control, 1301 Constitu-

tion Avenue, NW., Washington, D.C. 20229, unless waived by Customs;

(a) A copy of each issued certificate of approval for containers and road vehicles and a copy of the plans and application to which the approval refers;

(b) A copy of each issued individual approval for a container or road vehicle.

§ 115.14 Meeting on program.

If determined necessary by Customs, each Certifying Authority's representative for certification functions shall meet, after notice, with the Commissioner to review their administration of the certification program.

§ 115.15 Reports by road vehicle or container manufacturer.

Each manufacturer shall forward to the appropriate Certifying Authority, quarterly or when otherwise requested by that Authority:

(a) The registration number or other identifying information on road vehicles, or serial numbers assigned to containers manufactured under a certificate of approval by design type; and

(b) An attestation that each road vehicle or container to which a serial number was assigned was manufactured in full compliance with the certificate of approval by design type.

§ 115.16 Notification of Certifying Authority by manufacturer.

In order that the Certifying Authority can schedule an appropriate inspection, a manufacturer shall give notification to that Authority before each production run of road vehicles or containers to be built pursuant either to plans approved by the Certifying Authority, or revised plans (approved or unapproved).

§ 115.17 Appeal to Commissioner of Customs.

(a) Any manufacturer, carrier, or owner may, within 30 days after he has been notified by a Certifying Authority of an adverse determination, including any review provided, appeal that determination to the Commissioner.

(b) Any determination which is appealed remains in effect pending a decision by the Commissioner.

§ 115.18 Decision of Commissioner of Customs final.

The decision of the Commissioner on any matter appealed to him is final.

SUBPART C—PROCEDURES FOR APPROVAL OF CONTAINERS BY DESIGN TYPE

§ 115.25 General.

The Certifying Authority shall, at the request of a manufacturer, evaluate containers for approval by design type during the manufacturing stage.

§ 115.26 Eligibility.

Any manufacturer of containers to be manufactured in a type series from standard design and specifications so that each container has identical characteristics, may apply for approval by design type.

§ 115.27 Where to apply.

A manufacturer may apply for approval of a container by design type to a Certifying Authority of the country in which the container is manufactured if such country is a contracting party to the TIR Convention, 1975, or the Customs Convention on Containers, 1972.

§ 115.28 Application for approval.

Each application by a manufacturer or an owner for certification of a container by design type must include:

(a) Three copies, each on larger than 3 feet by 4 feet, of the Customs and TIR/Container plan;

(b) Customs and TIR/Container plan number;

(c) Three copies of the specifications which include the following information:

(1) The name and address of the manufacturer and the owner; and

(2) A description of the container including the—

(i) Type of construction;

(ii) Dimensions;

(iii) Material of construction;

(iv) Coating system used;

(v) Identification marks and numbers; and

(vi) Tare weight;

(d) The location and date for inspection; and

(e) A statement signed by the manufacturer that:

(1) A container of the design type concerned is available for inspection and approval by the Certifying Authority before, during, and after the production run;

(2) Notification will be given to the Certifying Authority of each change in the design before adoption; and

(3) Each container will be marked with:

(i) The metal plate required in § 115.32;

(ii) The identification number or letter of the design type assigned by the manufacturer; and

(iii) The serial number of the container assigned by the manufacturer.

§ 115.29 Plan review.

(a) A manufacturer or owner who wants containers to be approved by design type must submit the plans and specifications for the container to the Certifying Authority.

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(b) The Certifying Authority examining the plans and specifications submitted in accordance with paragraph (a) of this section shall:

(1) Approve the plans and specifications in accordance with the requirements of § 115.30 and arrange to inspect a container in accordance with § 115.31; or

(2) Advise the applicant of any necessary changes to be made for compliance with the requirements of § 115.30.

(c) If changes in the design of the container are made during production but after approval of the plans and specifications by the Certifying Authority and furnish it with "as-built" drawings of the container so that the plans can be reviewed and one or more containers inspected during the production stage to confirm that they continue to comply with the requirements of § 115.30.

§ 115.30 Technical requirements for containers by design type.

The plans and specifications of a container submitted in accordance with the requirements contained in § 115.29, and the one or more containers inspected in accordance with the requirements of § 115.31, must comply with the requirements of Annex 7 of the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention), November 14, 1975 (TIAS), and Annex 4 of the Customs Convention on Containers (Container Convention), December 2, 1972. Copies of Annex 7 and Annex 4 may be obtained from the Headquarters, U.S. Customs Service, Office of Inspection and Control, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

§ 115.31 Examination, inspection, and testing.

(a) Before the issuance of a certificate of approval by design type, the Certifying Authority shall:

(1) Make a physical examination of one or more containers of the production series concerned;

(2) Assure itself as to the adequacy of the manufacturer's system to control quality of materials used, manufacturing methods, and finished containers; and

(3) Require the manufacturer to make available to the Certifying Authority records of material, including affidavits furnished by suppliers.

(b) The Certifying Authority shall conduct such examinations, inspections, and tests of the production run containers as it deems necessary.

§ 115.32 Approval plates.

The manufacturer shall affix, in a clearly visbile place on or near one of the doors or other main openings of each container manufactured to the approved design, a metal approval plate measuring at least 20 by 10 centimeters (7.8 by 3.9 inches). The following shall be embossed on or stamped into the surface of the approval plate:

(a) "Approved for transport under Customs seal."

(b) "USA/(number of the certificate of approval)/(last two digits of year of approval)." (e.g. "USA/1600/84" means "United States of America certificate of approval number 1600, issued in 1984)." A two digit alpha suffix may be added to the certificate of approval number to identify the Certifying Authority, e.g., USA/1600-AB/85, USA/1600-IB/85.

(c) Identification of the type of container and of the number of the container in the type series.

(d) The serial number assigned to the container by the manufacturer (manufacturer's number).

§ 115.33 Termination of approval.

Any container, the essential features of which are changed, shall no longer be covered by the design type approval. Such a container may be made available to a Certifying Authority for inspection and individual approval in accordance with subpart D of the part. However, repairs in kind do not constitute a change of the essential features.

Subpart D—Procedures for Approval of Containers After Manufacture

§ 115.37 General.

This subpart provides for the approval and certification of containers after manufacture, and for those altered so as to void their design type approval.

§ 115.38 Application.

A written request for approval of a container after manufacture may be made by the owner or operator to a Certifying Authority and must include the following:

(a) Three copies, each no larger than 3 feet by 4 feet, of the Customs and TIR/Container plan;

(b) Customs and TIR/Container plan number;

(c) Three copies of the specifications which include the following information:

(1) Type of container;

(2) Name and business address of applicant;

(3) Identification marks and numbers;

(4) Tare weight;

(5) Nominal overall dimensions in centimeters;

(6) Type of construction and essential particulars of structure (nature of materials, coating system used, parts which are reinforced, whether bolts are riveted or welded, and similar matters); and

(7) Proposed location and date for inspection of the container.

§ 115.39 Eligibility.

The owner or operator may submit containers to be approved after the manufacturing stage to:

(a) The Certifying Authority of the country of manufacture if such country is a contracting party to the Convention.

(b) The Certifying Authority of the country where the owner or operator is resident or established, when such Certifying Authority has representatives located in the country of manufacture, which is a noncontracting party to the Convention.

(c) The Certifying Authority of the country where a container is used for the first time for transport of merchandise under Customs seal or where it is otherwise physically located.

§ 115.40 Technical requirements for containers.

A container that is submitted for inspection for approval after manufacture must comply with the requirements of Annex 7 of the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention), November 14, 1975 (TIAS) and Annex 4 of the Customs Convention on Containers (Container Convention), December 2, 1972. Copies of Annex 7 and Annex 4 may be obtained from the Headquarters, U.S. Customs Service, Office of Inspection and Control, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

§ 115.41 Certificate of approval for containers approved after manufacture.

The Certifying Authority shall issue an individual certificate of approval for each container that meets the requirements in § 115.40.

§ 115.42 Approval Plates.

(a) The owner or operator applicant shall, upon receipt of a certificate of approval from the Certifying Authority, affix an approval plate in the manner specified for containers approved by design type (see § 115.32).

(b) Although an entry is not required in the space provided for type identifiers on an approval plate for containers approved after manufacture, identification number and letters indicating that a series of containers comply with the same specifications may be placed in such space. This may be used to assist in the identification of a series of containers in which a common defect may be discovered subsequent to certification. In such case the approval number on the plate shall be altered by an addition to the second or third element of such number. The specific method of altering the approval number may be established by each Certifying Authority, for containers approved by it, and communicated to the U.S. Customs Service.

(c) Two possible methods of accomplishing this are:

(1) Placing an "X" in front of the numeric portion of the middle element of the approval number, e.g., USA/X123-IB/85.

(2) Placing a suffix at the end of the approval number, e.g. USA/123-AB/85-01.

§ 115.43 Termination of approval.

Approval of a container terminates upon a change in the container by a major repair or alteration of any of the essential features required in § 115.40. Repairs by replacement in kind do not constitute a change of the essential features.

Subpart E—Procedures for Approval of Individual Road Vehicles

§ 115.48 General.

This subpart provides for the approval and certification of individual road vehicles that comply with the technical requirements in § 115.51.

§ 115.49 Application.

A written request for approval of an individual road vehicle may be made by the owner, or carrier to a Certifying Authority and must include:

(a) Three copies, each no longer than 3 feet by 4 feet, or the Customs and TIR plan;

(b) Customs and TIR plan number;

(c) Three copies of the specifications which include the following information:

(1) Type of vehicle;

(2) Name and business address of owner or operator;

(3) Name of the manufacturer;

(4) Chassis number;

(5) Engine number (if applicable);

(6) Registration number;

(7) Particulars of construction;

(8) Any photos or diagrams required by the Certifying Authority to facilitate approval; and

(9) A proposed place and date for inspection of the road vehicle.

§ 115.50 Eligibility.

A road vehicle may be submitted for inspection by its owner or operator to a Certifying Authority of the country in which the owner or operator is a resident or is established, or where the vehicle is registered.

§ 115.51 Technical requirements.

A road vehicle that is submitted for inspection for individual approval must comply with the requirements of Annex 2 of the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention), November 14, 1975, (TIAS). Copies of Annex 2 may be obtained from the Headquarters, U.S.

Customs Service, Office of Inspection and Control, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

§ 115.52 Approval.

The Certifying Authority shall issue a certificate of approval, valid for 2 years, to each road vehicle that complies with the applicable requirements in § 115.51.

§ 115.53 Certificate of approval.

A certificate of approval must be kept on the vehicle as evidence of approval.

§ 115.54 Renewal of certificate.

A certificate of approval may be renewed if the Certifying Authority determines by inspection every 2 years that the vehicle continues to comply with the applicable requirements in § 115.51.

§ 115.55 Termination of approval.

Approval of a road vehicle terminates:

(a) Upon expiration of the certificate of approval; or

(b) Upon a change in the road vehicle by a major repair or alteration of any of the essential features required in § 115.51. Repairs by replacement in kind do not constitute a change of the essential features.

SUBPART F—PROCEDURES FOR APPROVAL OF ROAD VEHICLES BY DESIGN TYPE

§ 115.60 General.

This subpart provides for the approval and certification of road vehicles manufactured by design type.

§ 115.61 Eligibility.

Any manufacturer of road vehicles which are being manufactured in a type series from a standard design and specifications, so that each road vehicle has identical characteristics, may apply for an approval by design type.

§ 115.62 Where to apply.

A manufacturer may apply for approval of a road vehicle by design type to a Certifying Authority of the country in which the road vehicle is manufactured, if such country is a contracting party to the TIR Convention, 1975.

§ 115.63 Application for approval.

Each application by a manufacturer for certification of a road vehicle by design type must include:

(a) Three copies, each no larger than 3 feet by 4 feet, of the Customs and TIR plan;

(b) Customs and TIR plan number;

(c) Three copies of the specifications which include the following information:

(1) The name and address of the manufacturer and the owner; and

(2) A description of the road vehicle including the:

(i) Particulars of construction;

(ii) Dimensions;

(iii) Construction materials; and

(iv) Marks and numbers, including chassis, engine, and registration numbers.

(d) A statement signed by the manufacturer that:

(1) It will present vehicles of the type concerned to the Certifying Authority which that Authority may wish to examine;

(2) Permit the Certifying Authority to examine further units at any time during or after the production run;

(3) Notify the Certifying Authority of each change in the design or specifications before adoption;

(4) Mark the road vehicles in a visible place with the identification number or letters of the design type and the serial number of the vehicle in the type series manufacturer's number; and

(5) Keep a record of vehicles manufactured according to the design type.

§ 115.64 Plan review.

(a) A manufacturer or owner who wants road vehicles to be approved by design type must submit the plans and specifications of the road vehicles to the Certifying Authority.

(b) The Certifying Authority that examines the plans and specifications submitted in accordance with paragraph (a) of this section shall:

(1) Approve the plans and specifications in accordance with the requirements of § 115.65 and arrange to inspect a road vehicle in accordance with § 115.66; or

(2) Advise the applicant of any necessary changes to be made for compliance with the requirements of § 115.65.

(c) If changes in design of the road vehicle are made during production but after approval of the plans and specifications by the Certifying Authority, the manufacturer shall immediately notify the Certifying Authority and furnish it with "as-built" drawings of the road vehicle so that the plans can be reviewed and one or more road vehicles inspected during the production stage to confirm that they continue to comply with the requirements of § 115.65.

§ 115.65 Technical requirements for road vehicles by design type.

The plans and specifications of a road vehicle that are submitted in accordance with the requirements contained in § 115.64, and the one or more road vehicles that are inspected in accordance with the requirements of § 115.66, must comply with the requirements of Annex 2 of the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention), November

14, 1975 (TIAS). Copies of Annex 2 may be obtained from the Headquarters, U.S. Customs Service, Office of Inspection and Control, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

§ 115.66 Examination, inspection, and testing.

(a) Before the issuance of a certificate of approval by design type, the Certifying Authority shall:

(1) Make a physical examination of one or more vehicles of the production series concerned,

(2) Assure itself as to the adequacy of the manufacturer's system to control quality of materials used, manufacturing methods, and finished road vehicles; and

(3) Require the manufacturer to make available to the Certifying Authority records of materials, including affidavits furnished by suppliers.

(b) The Certifying Authority shall conduct such examinations, inspections, and testing of the production run road vehicles as it deems necessary.

§ 115.67 Approval certificate.

The holder of the approval certificate shall, before using the vehicle for the carriage of goods under the cover of a TIR Carnet, fill in as may be required on the approval certificate:

(a) The registration number given to the vehicle (item No. 1); or

(b) In the case of a vehicle not subject to registration, particulars of his name and business address (item No. 8). (See Annex 4 of the Convention for model of certificate of approval).

§ 115.68 Termination of approval.

Any road vehicle whose essential features are changed shall no longer be covered by the design type approval. Such a road vehicle may be made available to a Certifying Authority for inspection and individual approval in accordance with subpart E of this part. However, repairs in kind do not constitute a change of the essential features.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 17, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 1, 1986 (51 FR 16159)]

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19 CFR Part 101

(T.D. 86-93)

Change in Hours of Customs Service Provided at Neche, North Dakota

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Change in hours of service.

SUMMARY: This document reduces the hours of service currently provided at the Customs port of entry at Neche, North Dakota, located on the U.S.-Canadian border, in the Pembina, North Dakota, Customs District.

Because the traffic at Neche does not justify the current 8:00 a.m. to midnight schedule, service between 8:00 a.m.-9:00 a.m. and 10:00 p.m.-midnight is being eliminated. The Customs port of Pembina, just 16 miles east of Neche, is in operation 24 hours daily and can easily absorb any additional workload.

This change will enable Customs to obtain more efficient use of its personnel, facilities, and resources. Further, it will not have any major adverse impact on industry, transportation, or the local population.

EFFECTIVE DATE: June 2, 1986.

FOR FURTHER INFORMATION CONTACT: Bernie Harris, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 101.6, Customs Regulations (19 CFR 101.6), provides that each Customs office shall be open for the transaction of Customs business between the hours of 8:30 a.m. and 5:00 p.m. on all days of the year except Saturdays, Sundays, and national holidays. It also provides that services performed outside a Customs office generally shall be furnished between the hours of 8:00 a.m. and 5:00 p.m. However, because of local conditions, different but equivalent hours may be necessary to maintain adequate and efficient service.

The Customs port of entry of Neche, North Dakota, located on the U.S.-Canadian border in the Pembina, North Dakota, Customs District is currently open and staffed from 8:00 a.m. to midnight, daily. A recent survey showed that there is an average daily total of less than 10 trucks and other vehicles entering the U.S. through Neche from Canada during the hours of 8:00 a.m.-9:00 a.m. and 10:00 p.m.-midnight. The Customs port of entry at Pembina, North Dakota, which is 16 miles east of Neche, is open for operation 24 hours daily.

Due to the minimal traffic using the port of entry, and current budgetary constraints, Customs published a notice in the Federal Register on November 5, 1985 (50 FR 45957), proposing the elimination of those 3 hours of sevice at the port of Neche. The proposal was consistent with Customs nationwide efforts to obtain more efficient use of personnel, facilities, and resources, and would save one full-time position. In addition, the reduction in hours would not

have any major adverse impact on industry, transportation, or the local residents because of the close proximity to Pembina which could easily absorb any additional workload. Public comments were invited on the proposal.

Disscussion of Comments

There were 21 responses to the proposal, including one containing a petition signed by 167 area residents. All of the commenters opposed the reduction; some for personal reasons, others, for business reasons.

Personal reasons for opposing the change included the disruption to schedules, increased travel time, and the possible weakening of cultural and social ties between U.S. and Canadian neighbors.

Business reasons cited included inconvenience to shoppers and the possible negative impact the change might have on future economic growth.

Although Customs sympathizes with persons inconvenienced by the reduced hours, there does not appear to be a potential significant impact on either area residents or businesses. Eliminating the 3 hours specified is in keeping with Customs goal of using our limited resources as efficiently as possible. Customs realizes that every reduction in hours of service is an inconvenience to some person or business in the area affected. However, based on the minimal amount of traffic using Neche during the hours being eliminated, Customs believes the saving of one full-time position and the more efficient use of personnel, facilities, and resources is justified in this instance.

Accordingly, after consideration of the comments, and further review of the matter, Customs has determined that it is necessary to make the change as proposed.

Change in Hours of Service

Customs service at the port of entry of Neche, North Dakota, will be provided between the hours of 9:00 a.m.–10:00 p.m., daily. No service will be provided from 8:00 a.m.–9:00 a.m., or from 10:00 p.m.–midnight.

Drafting Information

The principal author of this document was John Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: April 8, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 1, 1986 (51 FR 16158)]

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19 CFR Parts 141 and 178

(T.D. 86-94)

Customs Regulations Amendment Relating to Additional Information on Invoices for Imported Footwear

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by updating the information required on invoices of imported footwear. Customs had determined that much of the information now required, which generally is descriptive of footwear, no longer is necessary, and that other information, relating to the construction of footwear, is needed. The information is used by Customs to establish the correct tariff classification and value of imported footwear for duty and/or quota urposes.

EFFECTIVE DATE: May 30, 1986.

FOR FURTHER INFORMATION CONTACT:

Legal Aspects: Donald F. Cahill, Classification and Value Division (202-566-8181);

Operational Aspects: Alex Olenick, Duty Assessment Division (202-566-5307); Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Technical Aspects: James Sheridan, National Import Specialist, New York Region (212-466-5889; FTS-668-5889).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Invoices of merchandise imported into the U.S. are required by § 481, Tariff Act of 1930 (19 U.S.C. 1481), to include certain specified information and "any other facts deemed necessary to a proper appraisement, examination, and classification of the merchandise that the Secretary of the Treasury may require." Section 141.89(a), Customs Regulations (19 CFR 141.89(a)), requires additional information on invoices of footwear classifiable under Schedule 7, Part 1A, Tariff Schedules of the United States (19 U.S.C. 1202). The additional information assists Customs in establishing the correct tariff classification and value of imported footwear for duty and/or quota purposes.

Footwear manufacturing methods have changed since the additional reporting requirements were established. Approximately

seven new distinctions in footwear construction which result in classification differences are effective for footwear imports since July 1, 1981 (Pub. L. 96-39, July 26, 1979, § 223(b)(2)). As a result, much of the information now required, which generally is descriptive of footwear, no longer is necessary, and other information, relating to the construction of footwear, is needed. Accordingly, Customs proposed to amend § 141.89(a) to reflect those changes and to update the information reporting requirements.

The original notice proposing to amend § 141.89(a) was published in the Federal Register on July 28, 1978 (43 FR 32819). Essentially, that proposal requested comments on questions concerning the materials used in the manufacture of imported footwear, as well as the nature of the manufacturing process itself. After consideration of the comments received in response to that notice, it was determined advisable to expand the previous proposal's questions regarding the materials used in the manufacture of footwear, so that the information received would be adequate as an aid in the correct classification. The new proposal, published in the Federal Register on May 1, 1984 (49 FR 18543), also provided certain definitions to be used in completing footwear invoices, clarified the question concerning material(s) of chief value, and revised Customs Form 5523, titled "Invoice Details For Footwear." Specifically, importers were asked to provide the following information with regard to imported footwear on Customs Form 5523.

(1) Manufacturer's style number.
(2) Importer's style number.
(3) Type of shoe:
(i) After ski boot
(ii) Basketball shoe
(iii) Beachcomber
(iv) Boat shoe
(v) Clog
(vi) Disposable, not rubber or plastic
(vii) Espadrille
(viii) Field (Football/Soccer/Astroturf) shoe
(ix) Hiking boot
(x) Inner liner
(xi) Jogger/Training shoe
(xii) Kung-Fu shoe
(xiii) Moccasin/Soled moccasin
(xiv) Oxford
(xv) Popsicle
(xvi) Pump
(xvii) Rubber/Plastic Protective and Waterproof footwear
(xviii) Rubber/Plastic Ski boot
(xix) Slipper
(xx) Slipper sock
(xxi) Spiked Track shoe

(xxii) Tennis shoe
(xxiii) Workboot
(xxiv) Woven bootie
(xxv) Zori
(xxvi) Other (specify)

(4) Component materials of upper with value percentage of each component. If chief value of upper is fiber, and weight of entire shoe is neither 50 percent rubber or plastic, state the percentage by weight and value of each fiber used in the upper.

(5) Component materials of entire article with value percentage of each component. If the materials in (4) and (5) are primarily of leather, answer only (8) and (12). Otherwise answer all questions.

(6) Component materials of sole with value percentage of each component.

(7) Percentage of weight of entire article:
(i) Fiber
(ii) Rubber and/or plastic
(iii) Other (specify material)

(8) Percentage of exterior surface area of the upper:
(i) Leather
(ii) Rubber and/or plastic
(iii) Other (Specify material)

(9) Is there a foxing or foxing-like band around bottom of upper? If so, specify component materials of the band.

(10) Does the sole overlap the upper? If so, specify the part(s) of the upper overlapped.

(11) Does the upper extend over the ankle?

(12) Type of construction:
(i) Stitched-Turned
(ii) Stitched-Goodyear Welt
(iii) Stitched-Welt other than Goodyear
(iv) Stitched-Slip-lasted (California)
(v) Stitched-Other (specify method)
(vi) Exclusively Adhesive (Cement)
(vii) Shell molded bottom cemented and/or stitched to upper
(viii) Unit molded bottom cemented to upper
(ix) Rolled Sole
(x) Sole simultaneously molded and attached to upper (Simultaneous injection)
(xi) Vulcanized
(xii) Riveted, Nailed or Stapled
(xiii) Unsoled Moccasin
(xiv) Combination of the above (specify types combined)
(xv) Other (specify)

(13) Is the shoe of the slip-on type, i.e., no laces, buckles or other fasteners?

(14) Does the upper have either an open toe or an open heel?

Comments on this proposal were to have been received by July 2, 1984. However, due to the complexity of the issues involved, by notice published in the FEDERAL REGISTER on July 9, 1984 (49 FR 27954), the comment period was extended to August 3, 1984.

Twelve comments were received in response to the proposal. Most of the commenters objected to the expanded information requirement as placing an inordinate burden on importers to collect and process many items of information not necessary for the classification of many types of footwear. Their specific comments and our responses follow.

DISCUSSION OF COMMENTS

Comment: The lists of types and construction of shoes in proposed § 141.89(a) are too lengthy. Customs Form 5523, which would reflect the requirements in the proposal, is merely a basic entry form to aid in the classification of footwear. It need not be the most detailed and exhaustive footwear submission possible.

Response: We agree. Therefore, we are eliminating the exhaustive lists in favor of a requirement for a scaled down description of the imported footwear in terms normally used in the trade, with examples of the type, method of construction, and kind of construction provided only on the list of instructions for the final Customs Form 5523. Furthermore, we are reducing the number of examples of types of footwear from 26 to 11.

It is estimated that 25 percent of all footwear imports will require completion of only items 1 through 7, and that items 1 through 5 and 8 through 10 will need to be filled in on another 25 percent of imports. Items 1 through 5 and 8 will need to be filled in on 10 percent of imports, and 40 percent will not require the completion of a footwear invoice or an equivalent document. In no case will all items on the footwear invoice or other document be required to be completed.

Comment: Many of the terms mentioned in the proposal, such as "foxing" and "overlap", are difficult to apply to specific importations and lend themselves to misinterpretation.

Response: Providing specific definitions for all the terms used would render the document and invoice more cumbersome than now. However, we are adding a definition for the term "foxing-like band" since this term applies to many footwear importations. Also, we are deleting some definitions contained in the proposal, which we believe are unnecessary.

Comment: The requirement for information on percentage value is not necessary for proper classification of imported footwear. Only component material of chief value should be required.

Response: We agree. Therefore, we are removing the requests for percentage value, which were contained in several items in the proposal. However, Customs may request this or any other informa-

tion on specific imports as may be necessary to properly classify the imported footwear.

After consideration of the comments received and upon further review of the matter, it has been deemed advisable to adopt the proposed amendment to § 141.89(a), Customs Regulations, with the modifications noted above. Final Customs Form 5523, which has been revised to reflect the information required in items 1 through 10 of § 141.89(a), may not be available at the time of publication of this document. Accordingly, Customs field offices may accept the existing Customs Form 5523 (3/2/78 version) or the proposed Customs Form 5523 (6/11/85 version) until the new form is available.

Executive Order 12291

It has been determined that the amendment is not a "major rule" within the criteria provided in § 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S C. 601, *et seq.*), it is certified that this amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 or 604.

Paperwork Reduction Act

The collection of information requirements contained in § 141.89(a) are subject to provisions of the Paperwork Reduction Act (44 U.S.C. 3504(h)) and have been cleared by the Office of Management and Budget (OMB). Accordingly, Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and the control numbers assigned by OMB, is being amended to include OMB Control Number 1515–0047.

Drafting Information

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Parts 141 and 178

Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

PART 141—ENTRY OF MERCHANDISE

1. The general citation authority for Part 141 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624; Section 141.89 also issued under 19 U.S.C. 1202 (Gen. Hdnote 11), 1481.

2. Section 141.89(a), Customs Regulations (19 CFR 141.89(a)), is amended by revising the paragraph for footwear to read as follows:

§ 141.89 Additional information for certain classes of merchandise.

(a) * * *

Footwear, classifiable under Schedule 7, Part 1A, Tariff Schedules of the United States (19 U.S.C. 1202)—

(1) The manufacturer's style number
(2) The importer's style and/or stock number
(3) Type of shoe
(4) Percentage by weight of entire article:
(i) fiber
(ii) rubber and/or plastic
(iii) other (specify)
(5) Percentage of exterior surface area of the upper
(i) leather
(ii) rubber and/or plastic
(iii) other (specify)

If item 4(ii) is 10 percent or more, if item 4(iii) is less than 50 percent *and* if item 5(i) is less than 50 percent, omit items 6 and 7 and provide the information requested in items 8 through 12 below. If one or more of these conditions are not met, provide the information requested in items 6 and 7 and omit items 8 through 12.

(6) Component material of chief value in
(i) upper
(ii) sole
(iii) entire article
(7) Method of construction
(8) Kind of construction
(9) Whether slip-on type (no laces, buckles, or other closures)
(10) Whether upper has open toe or open heel
(11) Does shoe have foxing or foxing-like band? If so, state material(s).
(12) Whether sole overlaps upper

The information requested in items 1 through 10 may be furnished on Customs Form 5523 or other appropriate format by the exporter, manufacturer or shipper. However, the information requested in items 11 and 12 must be furnished by the importer.

Definitions

For the purpose of this section, the following terms have the approximate definitions below. If either a more complete definition or a decision as to its application to a particular article is needed, the maker or importer of record (or the agent of either) should contact Customs prior to entry of the article.

(a) *Fiber.* "Fiber" means a material made from cotton, other vegetable fibers, wool, hair, silk, or man-made fibers. The term "man-made" fibers includes filaments and strips. Note: Cork, wood, cardboard, and leather are not "fibers".

(b) *Foxing-like band.* "Foxing-like band" means a strip of material which is attached to the side or the top of the outsole or is molded of the same piece as the outsole and which overlaps the upper.

(c) *Turned.* "Turned" means that construction in which the upper is sewn to the sole while the shoe is turned inside out.

(d) *Upper.* "Upper" means everything above insole level.

(e) *Welt.* "Welt" means that construction in which a separate strip (the welt) is attached to the edge of the sole and in which the welt, the upper and a lip on the surface of the insole are stitched together with a single stitch.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

19 CFR Part 178 is amdnded as follows:

1. The general authority citation for Part 178 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2, Customs Regulations (19 CFR 178.2), is amended by inserting the following in appropriate numerical sequence according to the section number under the columns indicated:

§ 178.2 Listing of OMB Control Numbers.

* * * * * * *

19 CFR section	Description	OMB Control No.
§ 141.89(a).....	Additional information on invoices for imported footwear.	1515–0047

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: April 11, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 30, 1986 (51 FR 16012)]

U.S. Court of Appeals for the Federal Circuit

ERRATUM

(Appeal No. 86-560)

AMERICAN LAMB CO., ET AL., APPELLEES *v.* UNITED STATES, APPELLANT, AND NEW ZEALAND MEAT PRODUCTS BOARD, ET AL., INTERVENORS

In CUSTOMS BULLETIN, volume 20, No. 11, dated March 19, 1986, appearing on page 20, 17th line from the bottom, delete "380 U.S. 1, 85 (1964)" and insert in lieu thereof "380 U.S. 1, 16 (1964)".

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-41)

HERAEUS-AMERSIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80-9-01501

Before DiCARLO, *Judge.*

Plaintiff seeks classification of merchandise consisting of rolled precious metal contact tape as parts of electrical relays under item 685.90 of the Tariff Schedules of the United States (TSUS). Defendant concedes that the merchandise was erroneously classified and contends it is properly classified under item 605.66, TSUS, as other semimanufactured rolled precious metals.

Held: The contact tape is so far advanced in manufacture as to be dedicated solely for use as contacts for electrical relays and is classifiable under item 685.90, TSUS. Merchandise consisting of small articles manufactured together in one piece is classifiable as if already cut apart. Positioning and welding of the contact tape are steps towards integrating the contacts into the relays.

[Judgment for plaintiff.]

(Decided April 18, 1986)

Fitch, King and Caffentzis (Richard C. King) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Susan Handler-Menahem)* for defendant.

MEMORANDUM OPINION AND ORDER

DiCARLO, *Judge:* Plaintiff contests the classification under item 605.05, Tariff Schedules of the United States (TSUS), of two entries of precious metal contact tape from the Federal Republic of Germany claiming that the correct classification is under item 685.90, TSUS. Defendant now seeks classification under item 605.66, TSUS. Since defendant concedes that Customs classification was erroneous, no presumption of correctness attaches to the classification urged by defendant. *See Jarvis Clark Co.* v. *United States,* 773 F.2d 873, *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984).

The question presented is whether the tapes are (1) advanced beyond the state of materials and are contacts which are parts of relays described under item 685.90, TSUS, or (2) not advanced beyond the state of materials so that classification is proper under item 605.66, TSUS, as semimanufactured rolled precious metal.

The Court holds that the tapes are properly classified as parts of relays under item 685.90, TSUS.

The case was submitted to the Court on the following stipulated facts:

1. The merchandise involved in this action consists of contact tape composed of two layers, the upper being (by weight) 91.7% gold/8.3% silver, and the lower 60% palladium/40% silver.

2. The tape was imported wound in continuous lengths on Western Electric No. 544 Delrin Reels. Each reel was marked "R156", and each reel was labeled showing the gross, net, and tare weights in grams. Each reel was wrapped with a minimum of one layer of thin polyethelene strip, and was packed in a carton or box with packing surrounding each reel. Certificates of compliance to the Western Electric purchase specification and a laboratory chemical analysis report of major constituents accompanied each shipment.

3. The imported merchandise was manufactured to, and conforms to, Western Electric Specification 900128547.

4. The imported merchandise was designed for, and used only as, contacts in AF-type telephone relays manufactured by Western Electric.

5. AF-type telephone relays are composed of a coil armature assembly and a contact spring pile-up assembly.

6. The contact spring pile-up assembly contains moveable sub-assemblies called contact springs and fixed contact sub-assemblies called transfer springs.

7. A relay can have as many as twelve moveable contact springs and six transfer springs.

8. The moveable springs in the spring pile-up assembly each have two precious-metal contacts.

9. The mating transfer spring has one contact for normally open operation and one contact for normally closed operation.

10. On the average there are twenty-four contacts in each relay.

11. Transfer springs and contact springs are designed in clusters in which four or six springs are held together by two webs.

12. The contact spring cluster is punched from a continuous strip of 0.006 inch phosphor-bronze material; the transfer spring cluster is punched from 0.025 inch copper nickel alloy.

13. The contact spring clusters and transfer spring clusters appear as depicted below:

[Diagrams omitted.]

14. The contacts are welded to the ends of the springs, which are located at Area A in the depiction under paragraph 13 of this Stipulation.

15. The shear strength requirements of the welds on the contacts are:

Contact spring—12 to 22 lbs.
Transfer spring—20 lbs. minimum

16. The maximum of 22 pounds on the contact spring weld serves to eliminate spring distortions which result from excessive welding temperatures.

17. The contacts are positioned on the springs to within ± 0.005 inch from the reference.

18. When assembled in a relay, the contact spring contacts and the relay spring contacts must have maximum mating of contact surfaces.

19. In the earliest designed welders which welded contacts to the contact springs, each contact had to be individually welded to the spring cluster.

20. Manufacturers of contact cluster springs and transfer cluster springs developed a manufacturing method by which contact tape could be welded to the tips of each of the springs of the spring cluster which had contacts attached, and then cut to the correct length to form a contact. This method avoided the problem of feeding contact slugs and resulted in greater accuracy in contact positioning.

21. To use the weld-then-cut contact tape application method requires that contact tape be fed over the tip of the spring in a direction that coincides with the longitudinal axis of the spring.

22. To use the weld-then-cut process, it is necessary to insure the weld strength of the welded contact can withstand the shearing force of cutting and that the contact form is not distorted.

23. The weld-then-cut process is now used to manufacture contact spring clusters and transfer spring clusters. This manufacturing process is performed by an automatic transfer spring welder for transfer spring clusters; and by an automatic contact spring welder for contact spring clusters.

24. The operations of the automatic contact spring welder and automatic transfer spring welder, and development and construction of the contact and transfer spring contacts are described in Exhibit 1 to this Stipulation, Califano and Scherb, *Spring Assemblies for [M]iniature Relays,* XII, The Western Electric Engineer (1968).

The stipulation further provides:

The entry papers and the following exhibits attached to the Stipulation are deemed admitted into evidence and may be considered by the Court without further foundation being laid:

Exhibit 1: Califano and Scherb, *Spring Assemblies for Miniature Relays, XII, The Western Electric Engineer (1968).*

Exhibit 2: Advertising Brochure published by Heraeus Volkert, entitled *"Precious Metal Contact Tapes."*

Exhibit 3: Advertising Brochure published by W.C. Heraeus GmbH, entitled *"Automatic Welding Machine, type KSA 600."*

Exhibit 4: A contact spring cluster with the top web cut and contacts welded in place.

Exhibit 5: A photograph of contact tape wound on a reel in the same condition as the merchandise involved in this action was imported.

A provision for parts includes unfinished parts which have been so far advanced in manufacture as to be dedicated solely to a specific use. *Geo. S. Bush & Co.* v. *United States,* 32 Cust. Ct. 316, 321, C.D. 1620 (1954); General Interpretive Headnote 10(h), TSUS. Whether the imported contact tapes are materials or unfinished parts depends on whether they were sufficiently advanced toward and dedicated to use as contacts for relays at the time of importation, and were capable of no other substantial commercial use. *See Finn Bros. Inc.* v. *United States,* 59 CCPA 72, 75–76, C.A.D. 1042, 454 F.2d 1404 (1972); *Paramount Import Export Co.* v. *United States,* 45 CCPA 82, 85–87, C.A.D. 677 (1958).

Defendant claims that the merchandise comes within the common meaning of the term "wire" and therefore comes under the definition of "semimanufactured" contained in Headnote 2(b) of Schedule 6, Subpart A, which covers item 605.66, TSUS. Defendant says the merchandise is not sufficiently advanced toward or dedicated for use as parts of relays since (1) it has more than one use and, (2) it undergoes significant processing after importation.

Defendant's contention that the contact tape has a variety of uses is based on plaintiff's advertising brochure (Exhibit 2) which states in part:

> A major application for precious metal tapes is electrical switch contacts, either movable contacts on relay springs or as fixed contacts on stationary blades (crossbar contact systems). Further applications include sliding and wiping contacts, plug connectors, controls sliders, card edge connector contacts, push-buttons, etc.

The brochure simply demonstrates the availability of many different kinds of precious metal tapes and their applications. The brochure does not state that tape designed solely for contacts in relays can be used for any other purpose.

Paragraphs three and four of the stipulation state that the contact tape was manufactured to particular specifications and that it was designed for, and used only as, contacts in certain telephone relays. The absence of any evidence of alternate uses may be considered by the Court in determining whether the merchandise is dedicated exclusively to its ultimate use. *See United States* v. *Nylonge Corp.,* 48 CCPA 55, 62–63, C.A.D. 764 (1961). Based on the stipulation, the photographic evidence, examination of all of the exhibits and the absence of evidence that the contact tape is adaptable to any use other than its actual use, the Court concludes that the importations are dedicated exclusively to use as contacts for relays.

Defendant also argues that the contact tape in its imported form has not been advanced beyond the state of materials because the tape must be cut after importation, and before cutting it is positioned on the relay transfer springs and welded to certain strength requirements. Defendant argues that until the tape undergoes such

processing, the contact tape is not identifiable as parts of relays. The Court disagrees.

The cases have consistently held that importations consisting of small articles manufactured together in one piece should be classified as if already cut apart:

> The rule * * * recognizes the fact that most small articles are not produced as individual or separate products * * *. The rule of decision is therefore established that where such articles are imported in the piece and nothing remains to be done except to cut them apart they shall be treated for dutiable purposes as if already cut apart and assessed according to their individual character or identity. This follows, however, only in case the character or identity of the individual articles is fixed with certainty and in case the woven piece in its entirety is not commercially capable of any other use.

United States v. *Buss & Co.*, 5 C.C.A. 110, 113, T.D. 34138 (1914).

In *United States* v. *Nylonge Corp., supra,* the Court held that blocks of sponge material which had not been cut into pads prior to importation were classifiable as finished or partly finished sponges rather than as blocks of cellulose compounds not made into finished or partly finished articles. 48 CCPA at 62–63; *see also R. T. Saunders & Co.* v. *United States,* 54 CCPA 53, C.A.D. 904 (1967).

More recently, the Court in *Doherty-Barrow of Texas, Inc.* v. *United States,* 3 CIT 228 (1982), held that steel strip dedicated for use in making steel bale ties and which needed only to be cut to length was dutiable as bale ties rather than as steel strip.

The Court disagrees with defendant's argument that the contact tapes must undergo significant processing before they can be classified as parts since they must be positioned and welded as described in paragraphs 14–23 of the Stipulation and Exhibits 1 and 3. Paragraph 19 of the Stipulation states that under the earliest designed welding process, each contact had to be individually welded to the spring cluster. The individual welding of the contacts was part of an assembly process in which contacts were integrated into the relay. While advancements in technology have provided a more efficient method of integrating the contacts into the relays, the process is still one of assembly. Therefore the Court finds it is irrelevant whether the contacts are welded and positioned before or after they are cut.

The cases relied on by defendant are distinguishable. In those cases, the merchandise was not stipulated or found to be dedicated to any particular use, or incapable of other uses. *See, e.g., Avins Industrial Products Co.* v. *United States,* 72 Cust. Ct. 43, C.D. 4503, 376 F. Supp. 879, *reh'g denied,* 72 Cust. Ct. 147, C.D. 4522 (1974), *aff'd,* 62 CCPA 83, C.A.D. 1150, 515 F.2d 782 (1975) (merchandise required further processing, was adaptable to other uses); *Dehler Signoret Corp.* v. *United States,* 7 Cust. Ct. 103, C.D. 545 (1941) (merchandise not dedicated to any particular use).

Judgment will be entered accordingly. So ordered.

(Slip Op. 86-42)

AL TECH SPECIALTY STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 84-08-01192

OPINION

[Defendant's motion to dismiss is denied; motion to intervene, is denied.]

(Decided April 22, 1986)

Collier, Shannon, Rill & Scott (David A. Marquist, Paul C. Rosenthal, Jeffrey S. Beckington) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Platte B. Moring, III,* Civil Division, United States Department of Justice, for defendant.

Kirkpatrick & Lockhart (Glenn R. Reichardt) for proposed intervenor.

RESTANI, *Judge:* Plaintiffs filed a timely summons and complaint pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (1982 & West Supp. 1986), contesting an early antidumping determination made by the International Trade Administration (ITA) of the United States Department of Commerce (Commerce).[1] Plaintiffs' complaint alleged that ITA should have adjusted the cost of production calculation for Arbed Saarstahl GmbH (Saarstahl), one of the West German producers of the product under investigation, to account for domestic subsidies alleged to benefit that company. On February 18, 1985, plaintiffs filed a Motion for Judgment upon an Agency Record pursuant to Rule 56.1 of the Rules of this Court.

After examining plaintiffs' motion and the administrative record filed in this action, ITA concluded that it had erroneously neglected to address the above-mentioned issue. A consent order was then issued by this court suspending all proceedings in this action pending a determination on remand by ITA.

On remand, ITA again decided that subsidies should not be included in calculating the cost of production. ITA did, however, increase the dumping margin for Saarstahl from 8.09% to 19.35%, on the grounds that ITA had allegedly committed certain errors and omissions in the calculation performed in the early determination. Before the court at this time is defendant's motion to dismiss for lack of jurisdiction and Saarstahl's motion to intervene.

To support its motion to dismiss for lack of jurisdiction, defendant relies primarily on the Federal Circuit's decision in *Freeport Minerals Co.* v. *United States,* 758 F.2d 629 (Fed. Cir. 1985). The *Freeport Minerals* appeal arose out of the events surrounding the Court of International Trade's (CIT's) decision in *Chevron Standard Ltd.* v. *United States,* 5 CIT 174, 563 F. Supp. 1381 (1983). In that action, Chevron Standard, Ltd. (Chevron) challenged ITA's decision

[1] *Tool Steel from the Federal Republic of Germany, Early Determination of Antidumping Duty,* 49 Fed. Reg. 29,995 (1984).

to postpone revocation of an antidumping order. ITA had made a preliminary determination in an administrative review that Chevron and four other Canadian companies had refrained from selling the subject merchandise in the United States at less-than-fair value for a sufficient period of time to warrant revocation of the antidumping order as to the five companies. 46 Fed. Reg. 21,214, 21,215–16 (1981). In the final results of administrative review, however, ITA postponed revocation as to three of the five companies, including Chevron, in an attempt to have these three companies encourage another Canadian company, of which they were significant stockholders, to provide data sought by ITA. 47 Fed. Reg. 31,911, 31,912 (1982). The court in *Chevron Standard,* 5 CIT at 178, 563 F. Supp. at 1384, found ITA's failure to revoke the antidumping order as to Chevron to be unreasonable and remanded the case to ITA with an order to make a new determination in accordance with ITA's earlier findings. Upon remand, ITA notified the court of its intent to revoke the antidumping order as to Chevron and the court issued an order affirming this remand determination. ITA then published notice of the revocation in the Federal Register. 48 Fed. Reg. 40,760, 40,761 (1983). Freeport Mineral Company (Freeport Minerals) filed suit to challenge ITA's remand determination and the CIT dismissed the action. *Freeport Minerals Co.* v. *United States,* 7 CIT 65, 583 F. Supp. 586 (1984), *rev'd,* 758 F.2d 629 (1985). The court held that Freeport Minerals' suit was untimely because the company failed to timely challenge ITA's administrative review determination made prior to remand. 7 CIT at 69, 583 F. Supp. at 589–90. In addition, the suit was barred as a collateral attack because, according to the court, the CIT's order affirming ITA's remand determination was *res judicata. Id.* at 70, 583 F. Supp. at 590–91. The Federal Circuit reversed on appeal, 758 F.2d 629 (Fed. Cir. 1985), and it is this opinion which, according to defendant here, dictates that this court lacks jurisdiction over the case at bar.

On the collateral estoppel issue, intervenor-Chevron argued to the appellate court in *Freeport Minerals* that having assumed jurisdiction over Chevron's challenge of ITA's decision to postpone revocation, the CIT never lost jurisdiction over the case. Thus, Chevron claimed, ITA's decision on remand was made pursuant to the CIT's authority rather than under ITA's statutory authority. It would follow from Chevron's argument that the remand determination was *res judicata* and Freeport Minerals would therefore be collaterally estopped from challenging that determination before the CIT. The Federal Circuit rejected this argument and stated:

> Congress has granted the lower court broad powers of relief, including authority to issue "orders of remand," but nowhere has it granted that court authority to assume control of an agency case, once that case has come to it for judicial review, and retain control over it regardless of the statutes which the agency must follow.

758 F.2d at 636 (footnotes omitted).

From this, defendant here argues that upon remand this court lost jurisdiction over plaintiff's action.

The court cannot agree, however, that *Freeport Minerals* controls the case at bar in the way defendant contends. As noted, plaintiff here filed an action with this court to contest ITA's failure to include subsidies in calculating the cost of production in an antidumping proceeding. In its early antidumping determination, prior to remand, ITA addressed a comment in which petitioners at the administrative level contended that subsidies should be so included. ITA rejected this contention, stating that "those costs recorded in the manufacturer's books and records * * * fairly represent the costs of producing the product." 49 Fed. Reg. 29,995, 29,996 (1984). Saarstahl's cost of production was therefore calculated, as in the antidumping duty order, without regard to subsidies.

On remand, ITA responded to additional comments submitted on the subsidies issue and again concluded that subsidies should not be included in the calculation of the cost of production. As stated by ITA in its remand results submitted to this court,

> [ITA] also considered the issue of whether it should add the amount of subsidies received by Saarstahl to cost in calculating cost of production.
>
> To calculate Saarstahl's production costs, we used the cost recorded in the company books and records and *reaffirm our position* that these recorded costs fairly represent Saarstahl's cost of producing the product.

Tool Steel From the Federal Republic of Germany; Remand Results of Early Determination of Antidumping Duty at 9 (October 8, 1985) (emphasis added). Thus, unlike *Freeport Minerals,* ITA here did not reach a "new determination" on the relevant issue but, rather, simply gave additional consideration to its initial determination and reaffirmed that determination. Plaintiff is evidently still dissatisfied with ITA's conclusion on the subsidies issue and thus wishes to proceed with its suit against the government. Defendant, however, claims that plaintiff must file a new action now that the remand determination has been published. 51 Fed. Reg. 10,071 (1986).

Had ITA issued a "new determination" on remand reversing its earlier position, a party who had "no previous opportunity to attack the determination," *Freeport Minerals,* 758 F.2d at 636, might successfully argue that *Freeport Minerals* protected him from being barred by collateral estoppel or timeliness claims from challenging the "new determination." It does not necessarily follow from this or from the previously quoted language from *Freeport Minerals,* however, that the very act of remanding a case for further consideration deprives this court of jurisdiction over the suit. *Cf. Cabot Corp.* v. *United States,* No. 86-729 (Fed. Cir. Apr. 9, 1986).

As noted by this court in *Roquette Freres* v. *United States*, 6 CIT 329, Slip Op. 83-137 at 4 (Dec. 31, 1983), *appeal docketed*, No. 84-856 (Fed. Cir. Feb. 27, 1984) "[j]urisdiction once vested in the court is neither so fleeting nor illusory as to dissipate upon the court's exercise of its inherent discretionary power to require further deliberation by the administrative body."[2] Despite remanding an administrative decision for further consideration, the court in *Roquette Freres* retained jurisdiction over the cause of action and therefore refused to permit plaintiff to initiate a new suit to challenge the remand determination. *Id.* Similarly, in the case at bar, this court retained jurisdiciton following remand and, therefore, will not require plaintiff to file a new action to challenge the very issue already before the court; namely, whether ITA was required to include subsidies in calculating Saarstahl's cost of production. To hold otherwise would "serve no purpose other than to impede sound judicial administration." *Id.* Thus, defendant's motion to dismiss for lack of jurisdiction is denied.

Saarstahl moves to intervene in this action, pursuant to Rule 24 of the Rules of this Court and 28 U.S.C. § 2631(j) (1982), to challenge ITA's recalculation of the dumping margin on remand. Saarstahl does not challenge, however, the remand results on the issue of subsidies raised by plaintiffs in their complaint. Plaintiffs and defendant resist the intervention on the grounds that it raises issues not in dispute between the original parties.

Intervention in a suit before this court challenging an antidumping investigation is governed by 28 U.S.C. 2631(j)(1)(B),[3] and Rule 24 of the Rules of this Court.[4] On the face of the statute and the rule, Saarstahl would appear to be entitled to intervene as of right, but certain constraints have been read into these provisions. In particular, the Court of Customs and Patent Appeals ruled in *Sumitomo Metal Industries* v. *Babcock and Wilcox, Co.* 69 CCPA 75, 81-83, 669 F.2d 703, 707-08 (1982), that timeliness is a requirement of the right to intervene granted under Rule 24(a)(1) where a "statute of the United States confers an unconditional right to intervene." CIT Rule 24(a)(1). The timeliness aspect has been further defined by this court in at least two cases. In both *Fuji Electric Co.* v. *United States*, 7 CIT 247, 595 F. Supp. 1152, 1153 (1984) and *Nakajima All Co.* v. *United States*, 2 CIT 170, 172 (1981), this court ruled that an intervenor who challenges aspects of an antidumping de-

[2] This statement is no less true where, as here, remand is consented to by the parties.

[3] 28 U.S.C § 2631(j)(1)(B) (1982) reads:

(j)(1) Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—

* * * * * * *

(B) in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right * * *

[4] Rule 24(a) of the Rules of the Court of International Trade reads:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

termination not challenged by the original parties must comply with the statutory time limits for filing the original action.

If the proposed intervenor here wanted to challenge an additional aspect of the original determination, most likely it would be time barred. As to the new determination, on remand, increasing Saarstahl's antidumping duties, Saarstahl may challenge that determination by filing a suit. *See Freeport Minerals*, 758 F.2d at 634, 636. Furthermore, if the intervenor wanted to join in the dispute between the original parties, it might or might not be permitted to do so depending on the analysis of the factors discussed in *Sumitomo*. 69 CCPA at 81, 669 F.2d at 707. This intervenor, however, does not wish to join in the original dispute. Its complaint is new.

Saarstahl argues that it has an interest in the dispute at hand because the original dispute resulted in a remand order setting forth a determination which injured Saarstahl. The recalculation of the dumping margin, however, was a wholly independent act of ITA. It has nothing to do with the case at hand and must rise or fall on its own. Thus, Saarstahl is not concerned with the issues arising in the original dispute between the parties and may not intervene as of right under 28 U.S.C. § 2831(j)(1)(B) and Rule 24(a).

Saarstahl argues that it should, in the alternative, be allowed to intervene permissively under Rule 24(b).[5] The government contends, however, that there is no permissive intervention in a proceeding challenging an antidumping determination. The government is clearly correct, insofar as a person who does not participate in the proceeding below may not intervene, even if the conditions of Rule 24(b)(2) are met. 28 U.S.C. § 2631(j)(1)(B). In this case, however, Saarstahl did participate. Nevertheless, there is no ground for permissive intervention here under Rule 24(b)(2), because intervenor's claim raises no issues in common with plaintiff's cause of action. If there had been a question of law or fact in common with the main proceeding, under the statutes and judicial precedent applicable in this court, intervention most likely would have been permitted under Rule 24(a) as of right. Whether all interventions in actions brought pursuant to 28 U.S.C. § 1581(c) must be of right need not be decided here.[6] Saarstahl can sustain no grounds for intervention of any kind.

Furthermore, the court is guided by the clear judicial policy of keeping these already complicated cases as free of unnecessary con-

---

[5] Rules 24(b) of the Rules of the Court of International Trade reads:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[6] One might argue that the judicial interpretations of 28 U.S.C. § 2631(j)(1)(B) have rendered all interventions in these cases permissive in that the right of intervention is conditioned. See CIT Rule 24(b)(1). On the other hand, the bar against intervention for failure to raise new challenges within the statutory timeframe admits of no discretion, and in that sense, is not permissive.

fusion as possible. Neither the original parties nor the proposed intervenor, however, should be prejudiced by adherence to this policy. The original parties might be prejudiced by Saarstahl's intervention, but Saarstahl is not prejudiced by the denial of its motion to intervene. Saarstahl is free to challenge in an independent action, both the act of ITA in amending its margin determination and the appropriateness of the margin itself.

As to the subsidies issue, plaintiff is already protected by its presently filed action, but to avoid any further procedural quagmire, now that the new determination has been published in the Federal Register, plaintiff might move to amend its complaint to challenge the new determination as to the subsidies issue.

For these reasons, the request for intervention is denied.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/56	DiCarlo, J. April 2, 1986	Allis-Chalmers Corp.	84-3-00441	Item 727.06 4%, 3.9%, or 3.6%	Item 692.34 Free of duty	Agreed statement of facts	Norfolk Seats and/or Driver seats
C86/57	DiCarlo, J. April 2, 1986	W.R. Filbin & Co.	84-8-01099, etc.	Item 660.71 4.7%	Item 660.64 Free of duty	Agreed statement of facts	Detroit Gray cast iron engine parts
C86/58	Carman, J. April 9, 1986	Mattel, Inc.	83-6-00870	Item 737.22 16.8% or 16.1% Item 737.24 15.4%	Item A774.55 Free of duty except for merchandise imported from the Republic of China (Taiwan) from April 1 to Dec 1981 which is dutiable under item 774.55 7.7%	Mattel, Inc. v. U.S., Slip Op. 84-133	New York Base stands and leg holders
C86/59	Restani, J. April 11, 1986	Samuel Brilliant Co.	84-5-00681	Item 700.95 12.5%	Item 700.35 8.5%	Agreed statement of facts	Boston Men's and boys' footwear

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/22	Watson, J. April 9, 1986	Mitsui & Co.	R66/408	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts, an entirety
V86/23	Watson, J. April 9, 1986	Nomura (American) Corp.	R63/13004	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety
V86/24	Watson, J. April 9, 1986	Novelty Veiling Co.	291402A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk scarves
V86/25	Watson, J. April 9, 1986	Rugby Int'l Corp.	R65/15228, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Tube mats
V86/26	Watson, J. April 9, 1986	Rugby Rugs Inc.	R66/9207	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Charleston Rugs
V86/27	Watson, J. April 9, 1986	S. Shamash & Sons, Inc.	R58/22140, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics

ABSTRACTED VALUATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/28	Watson, J. April 9, 1986	S. Shamash & Sons, Inc.	R58/22963, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
V86/29	Watson, J. April 9, 1986	S. Shamash & Sons, Inc.	R58/27535, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
V86/30	Watson, J. April 9, 1986	Trans-Ocean Import Co.	R64/22582	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Philadelphia Rugs
V86/31	Watson, J. April 10, 1986	Bunge Corp.	R58/19311, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Wool hooked rugs
V86/32	Watson, J. April 10, 1986	Durlacher & Co.	233248A, etc.	Export value	Respective appraised values less 7.5% thereof	Agreed statement of facts	New York Silk wearing apparel
V86/33	Watson, J. April 10, 1986	George E. Bardwill & Sons	R60/17930, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Table cloths and napkins
V86/34	Watson, J. April 10, 1986	International Importers, Inc.	R61/5055, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts, an entirety
V86/35	Watson, J. April 10, 1986	Mitsui & Co.	R64/17995	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts, an entirety

ABSTRACTED VALUATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/36	Watson, J. April 10, 1986	Novelty Veiling Co.	R59/15604, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk scarves

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U.S. Customs Service

Treasury Decision

(T.D. 86-95)

Reimbursable Service—Excess Cost of Preclearance Operation

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 2, 1986.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning April 27, 1986.

Installation	Biweekly excess cost
Montreal, Canada	$27,072
Toronto, Canada	38,400
Kindley Field, Bermuda	19,432
Nassau, Bahama Islands	32,988
Vancouver, Canada	16,990
Winnipeg, Canada	4,104
Freeport, Bahama Islands	16,607
Calgary, Canada	10,121
Edmonton, Canada	6,908

D. LYNN GORDON,
Acting Comptroller.

[Published in the Federal Register, May 7, 1986 (51 FR 16947)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao,
James L. Watson
Gregory W. Carman

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Thomas J. Aquilino, Jr.

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Bernard Newman

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-43)

ZENITH ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-06-00788

INDEPENDENT RADIONIC WORKERS OF AMERICA, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85-07-00905

Before WATSON, *Judge.*

In consolidated actions contesting final results of administrative review of antidumping finding involving television receiving sets from Japan, plaintiffs moved for judgment upon agency record on challenge to ITA's calculation of adjustment for Japanese commodity tax pursuant to 19 U.S.C. § 1677a(d)(1)(C).

Held: ITA abused its discretion by failing to increase United States price by amount of tax forgiven on merchandise exported to United States; and by failing to measure tax absorption in home market sales so as to limit adjustment by amount of tax passed through to home market purchasers. ITA's assumption that tax was fully passed through in all cases is not supported by substantial evidence.

[Plaintiffs' motions granted; ITA determination reversed and remanded.]

MEMORANDUM OPINION AND ORDER

(Decided April 24, 1986)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson and *J. Eric Nissley),* for plaintiff Zenith Electronics Corporation.

Collier, Shannon, Rill & Scott (Paul D. Cullen, Patrick B. Fazzone and *Laurence J. Lasoff),* for plaintiffs Independent Radionic Workers of America, et al.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(Velta A. Melnbrencis),* for defendant.

Weil, Gotshal & Manges (A. Paul Victor, Stuart M. Rosen, Charles H. Bayar and *Michelle S. Benjamin),* for defendant-intervenors Matsushita Electric Industrial Co., et al.

Sharretts Paley Carter & Blauvelt, P.C. (Gail T. Cumins and *Neil H. Marshak),* for defendant-intervenors, Sanyo Electric Co., Ltd.

Siegel Mandell & Davidson, P.C. (Brian S. Goldstein and *Edward B. Ackerman)* for defendant-intervenor The General Corporation of Japan.

Baker & McKenzie (Thomas P. Ondeck and *Arthur L. George)* for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

WATSON, *Judge:* These consolidated actions are brought by Zenith Electronics Corporation ("Zenith"), an American manufacturer of television sets, and by three unions [1] representing American workers engaged in television manufacturing, contesting the final determination of the United States Department of Commerce, International Trade Administration ("ITA"), in *Television Receiving Sets, Monochrome and Color, From Japan,* 50 Fed. Reg. 24278 (June 10, 1985). The determination stems from an administrative review of an antidumping finding, conducted pursuant to 19 U.S.C. § 1675(a), covering television sets exported to the United States by 16 Japanese manufacturers and/or exporters between April 1, 1980 and March 31, 1981. The ITA, in all cases, concluded either that there was no dumping or that the dumping margins were *de minimis* or small (not exceeding 0.86% *ad valorem* weighted average margin).

Presently before the court are motions by Zenith for judgment upon the agency record in case No. 85-06-00788,[2] and by the Unions for partial judgment upon the agency record in case No. 85-07-00905.[3] The two motions involve identical challenges to the method by which the ITA calculated the adjustment for the Japanese commodity tax under 19 U.S.C. § 1677a(d)(1)(C). Zenith and the Unions contend that the ITA violated the requirements of that provision by (1) reducing foreign market value by the amount of commodity tax assessed on home market sales, rather than increasing United States price by the amount of tax forgiven on exports to the United States, and (2) assuming a full pass-through of the commodity tax to customers in home market sales, rather than determining the extent to which the tax was included in home market price so as to limit the commodity tax adjustment to that amount.

The defendant, United States, oppposes plaintiffs' motions, but has filed cross-motions for remand in both cases, The defendant requests that the ITA be permitted on remand (1) to seek information concerning the appropriate commodity tax base for the exported merchandise, and (2) to reconsider the pass-through issue in light of its subsequent determination in *Grand and Upright Pianos From the Republic of Korea,* 50 Fed. Reg. 37561 (Sept. 16, 1985). Alternatively, the government asks the court to hold that no pass-through analysis is required under § 1677a(d)(1)(C).

Two additional opposing positions are taken by the intervening defendants representing Japanese exporting interests. The Mitsubi-

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[1] The plaintiff unions are the Independent Radionic Workers of America, The International Brotherhood of Electrical Workers, and The International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO-CLC. They are collectively referred to herein as "the Unions".

[2] Zenith's motion, made pursuant to Rule 56.1 of this court, was originally a motion for partial judgment. Zenith has since abandoned its remaining challenges, which involved issues decided adversely to Zenith in *Zenith Radio Corp. v. United States,* 9 CIT —, 606 F. Supp. 695 (1985), *aff'd,* 783 F.2d 184 (Fed. Cir. 1986). *See* letter to court from counsel for Zenith, dated February 12, 1986.

[3] The Unions have raised two claims in their complaint which are not covered by their Rule 56.1 motion. The first, contesting foreign market value adjustments for certain discounts and rebates, was resolved adversely to the Unions in *Zenith Radio Corp. v. United States, supra.* The second claim challenges the ITA's use of weighted average margins. Because the parties have not briefed this issue, the court will reserve determination thereon.

shi company-intervenors [4] ("Mitsubishi") seek remand but would require the ITA to make an upward adjustment to United States price either in the amount of tax collected on comparision home market sales, or in the amount of tax forgiven on exports coupled with an additional circumstances of sale adjustment to home market price. Several other Japanese interest intervenors [5] (collectively referred to as "Matsushita *et al.*" or "joint intervenors") jointly contend that the adjustment performed by the ITA was within its discretion and should be affirmed either as a reasonable method of performing the tax adjustment under § 1677a(d)(1)(C) or as a circumstances of sale adjustment required under 19 U.S.C. § 1677b(a)(4)(B). Both Mitsubishi and Matsushita *et al.* contend that § 1677a(d)(1)(C) does not require the ITA to make a pass-through determination.

Background

Under the antidumping law, dumping margins for sales of imported merchandise are calculated by comparing determinations of foreign market value ("FMV") and United States price ("USP"). 19 U.S.C. § 1673. Where merchandise identical or similar to the imported merchandise is sold in the home market of the exporting country, FMV is determined from the home market price of that merchandise, pursuant to 19 U.S.C. § 1677b(a)(1)(A). In the absence of such sales, FMV may be determined from a price method using export sales to countries other than the United States, pursuant to 19 U.S.C. § 1677b(a)(1)(B), or a non-price method known as constructed value, pursuant to 19 U.S.C. § 1677b(a)(2) and (e). Determinations of USP are based upon the import "purchase price", as defined in 19 U.S.C. § 1677a(b), or if the first sale to an unrelated American purchaser occurred in the United States, upon the "exporter's sales price", as defined in 19 U.S.C. § 1677a(c). To these price or value determinations, various upward and downward adjustments are made pursuant to statutory provisions and Commerce Department regulations to arrive at determinations of FMV and USP. The "absolute dumping margin" for a sale is the amount, if any, by which FMV exceeds USP. Absolute margins are calculated for the assessment of antidumping duties. The "*ad valorem* (or percentage) margin" for a sale is the ratio of the absolute margin over the USP. The "*ad valorem* weighted average margin" for sales during the period under investigation or review is the total amount of absolute margins on individual sales divided by the total USP for all entries. *See* 19 U.S.C. § 1677b(f) (1982) (authorizing use of averaging or sampling for determinations of FMV). The ITA calcu-

[4] The Mitsubishi intervenors consist of Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

[5] The joint intervenors are comprised of Matsushita Electric Industrial Co., Ltd., Panasonic Company and Quasar Company (divisions of Matsushita Electric Corporation of America), Panasonic Hawaii, Inc. and Panasonic Sales Company (a division of Matsushita Electric of Puerto Rico, Inc.); Victor Company of Japan, Ltd. and US JVC Corp.; Sanyo Electric Co., Ltd.; and The General Corporation of Japan.

lates *ad valorem* margins for purposes of issuing and revoking orders and setting cash deposit rates. *See* 50 Fed. Reg. at 24279.

The antidumping law contemplates that the unadjusted price determinations by the ITA are "after-foreign-tax prices", in the sense that they are measured after the producing country has assessed indirect taxes tied to the manufacture or sale of the merchandise in question. One such tax is the Japanese Commodity Tax, an *ad valorem* tax which Japan imposes on many types of products, including television receivers. For televisions with screen sizes under 27 inches, the commodity tax rate is 15% of the manufacturer's ex-factory sales price, based either on actual wholesale price or suggested retail price less a standard deduction. Commodity Tax Law of Japan (13 March 1962, Law No. 48), as amended, Arts. 11, 13. Like most countries that impose excise or consumption taxes on goods, Japan assesses the commodity tax on sales for domestic consumption, but does not collect the tax on export sales. *Id.*, Arts. 19, 21.

To prevent dumping margins from arising merely because the country of exportation assesses such taxes on home market sales but not on export sales, the antidumping law provides for an offsetting adjustment in the calculation of United States price. The provision, 19 U.S.C. § 1677a(d)(1)(C) (1982), states:

> The purchase price and the exporter's sales price shall be adjusted by being * * * increased by * * * the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in a country of exportation.

This adjustment, by its terms, has two components. First, USP—whether determined by purchase price or exporter's sales price—is to be increased by the amount of foreign taxes imposed directly upon the exported merchandise or its components, which have been forgiven (rebated or not collected) because the merchandise was exported to the United States. Second, the adjustment it to be limited or "capped" by the amount that such taxes are added to or included in the price of comparision merchandise sold in the home market.

ITA Proceedings

In its preliminary results and tentative determination, published August 18, 1983 (48 Fed. Reg. 37506, 37508), the ITA indicated that it computed the FMV of most Japanese television models under review based upon the delivered price of such merchandise to customers in the home market, in accordance with 19 U.S.C.

§ 1677b(a)(1)(A).[6] Its determinations of USP were based upon "purchase price" or, where appropriate, "exporter's sales price", pursuant to 19 U.S.C. § 1677a(b) and (c). Among the adjustments made to USP was the foreign tax adjustment under 19 U.S.C. § 1677a(d)(1)(C). The ITA stated that in all cases, it calculated an addition to purchase price or exporter's sales price "for the amount of Japanese commodity tax not collected because of the exportation of the merchandise to the United States." *Id.* at 37507. It was later disclosed, however, that the ITA in fact did not add to USP the amount of tax forgiven on export merchandise, but instead added the full amount of the tax paid on comparison home market sales.[7] Because the Japanese commodity tax is an *ad valorem* tax (imposed as a percentage of price), these two amounts would not be the same unless the tax-free prices of exported and domestically sold merchandise were the same. Where the United States export price is less than the non-taxed home market price, the addition to USP under the ITA's approach would be greater than that called for by the terms of § 1677a(d)(1)(C).

In its final determination, published June 10, 1985 (50 Fed. Reg. 24278), the ITA again adjusted for the full amount of commodity tax paid on comparison sales in Japan, but this time instead of adding that amount to the purchase price or exporter's sales price in its determinations of USP, the ITA subtracted that amount from the home market price in its determinations of FMV.[8] The ITA agreed with Zenith and the Unions, petitioners below, that this methodology conflicts with the directives of § 1677a(d)(1)(C) and was specifically rejected by Congress when it enacted the 1921 Antidumping Act. The agency's explanation for nevertheless having taken this approach was two-fold. First, it noted that in cases where dumping margin would exist in the absence of taxes, the statutory approach artificially increases (or "multiplies") the absolute dumping margin.[9] Conversely, the method employed in the

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[6] In certain cases where there were insufficient comparison sales in the home market, the ITA computed FMV based upon the price of exports to Canada, pursuant to 19 U.S.C. § 1677b(a)(1)(B), or upon the constructed value of the exported merchandise, pursuant to 19 U.S.C. § 1677b(a)(2).

[7] The ITA acknowledged the actual methodology used in the preliminary results in the recitation of comments to the final determination, at comment 1:

> Zenith and the Unions argue that the Department erred when, in its preliminary results of administrative review, it added to United States price the commodity tax imposed on the home market merchandise. They contend that [19 U.S.C. § 1677a(d)(1)(C)] clearly directs the Department to add to U.S. price the tax amount that would have been imposed had it been sold in Japan.

50 Fed. Reg. at 24278. *See also Color Television Receivers From Korea*, 49 Fed. Reg. 7620, 7622 (Mar. 1, 1984) (comment 1).

[8] The ITA had also employed this approach in three interim determinations, involving television receivers from Korea and Taiwan. *Color Television Receivers From Korea* ("*Korean Televisions I*"), 49 Fed. Reg. 7620 (Mar. 1, 1984) (final determination of sales at less than fair value); *Color Television Receivers From Taiwan* ("*Taiwan Televisions*"), 49 Fed. Reg. 7628 (Mar. 1, 1984) (final determination of sales at less than fair value); *Color Television Receivers From Korea* ("*Korean Televisions II*"), 49 Fed. Reg. 50420 (Dec. 28, 1984) (final results of administrative review of antidumping duty order).

[9] This "multiplier" effect can be illustrated in the following example: Suppose the pre-tax home market price for a certain model of Japanese television is equal to $100, while the purchase price for the same model when sold for export to the United States is $90. In this tax-free comparison, the absolute margin of dumping would be $10 ($100 – $90) and the *ad valorem* margin would be 11.1% ($10/$90).

Since the Japanese commodity tax is 15%, the tax on the home market sale equals $15 (15% of $100). If we assume that this tax is fully shifted forward to the home market purchaser, then the after-tax home market

Continued

agency's preliminary findings (i.e., adding to USP the tax paid on home market sales), in such cases, artificially suppresses *ad valorem* (or percentage) margins.[10] The ITA believed that the margin distortions caused by either method were further increased by significant differences in the circumstances of sale and the physical characteristics of the merchandise. Only by deducting from FMV the amount of commodity tax paid on home market sales, as the ITA did in its final determination, is pure tax neutrality achieved in calculations of both absolute and *ad valorem* margins.[11] Second, the ITA claimed it was unable to establish from the information it obtained "what the appropriate tax basis would be for the exported merchandise and exactly how the Japanese taxing authority would calculate the amount of tax on exported merchandise." It therefore felt that the deduction of home market taxes from FMV was "a reasonable alternative calculation * * * based on the best available information." *Id.* at 24279.

The ITA further acknowledged that the "cap" provision in § 1677a(b)(1)(C) directs the agency to measure the degree to which a seller absorbs the tax in home market sales, and to limit the adjustment to the amount of tax shifted forward to purchasers. The petitioners below emphasized that several Japanese manufacturers granted various after-invoice discounts, rebates or other allowances to home market purchasers, which, because they were not certain at the time of sale, did not reduce the commodity tax base. Zenith argued that the amount by which a manufacturer's commodity tax value plus commodity tax exceeded the manufacturer's home market sales price reported to the ITA represents the amount of the commodity tax not passed on to the purchasers. The ITA rejected Zenith's approach and, in effect, merely assumed a full pass-through of the commodity tax, stating:

> Discounts and rebates may be provided for a number of reasons, and we have no evidence of a relationship between the discounts and rebates and the manufacturer's commodity tax liability. Absent evidence that clearly demonstrates that a manufacturer's commodity tax cost is not reflected in home market sales prices, the Department may reasonably conclude that cost and price are directly related. To date, the Depart-

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price equals $115. By contrast, the amount of tax rebated or not collected on the exported television because it was sold for export would equal only $13.50 (15% of $90). Hence, if the United States price were increased by this latter amount, in accordance with the terms of 19 U.S.C. § 1677a(d)(C), the adjusted calculation of USP would be $103.50 ($90 + $13.50). The absolute margin, determined by subtracting the adjusted USP from the after-tax home market price, would be $11.50 ($115 – $103.50), an amount greater than the $10 absolute margin calculated in the tax-free comparison, above. The *ad valorem* margin, however, would be identical, at 11.1% ($11.50/$103.50).

[10] Continuing the example in footnote 9, if the United States price of the television were increased by the amount of Japanese commodity tax actually collected on the home market sale, as the ITA did in its preliminary determination, the adjusted USP would be $105 ($90 + $15). Under this approach, the absolute margin would be equivalent to the margin found in the tax-free comparison, $10 ($115 – $105), but the *ad valorem* margin would be reduced to 9.5% ($10/$105).

[11] Again using the example in footnote 9, if the home market price were reduced by the amount of the tax on the domestic sale, as the ITA did in its final determination, the adjusted home market price would be $100 ($115 – $15). The absolute and *ad valorem* margins, therefore, would be equivalent to their respective levels in the tax-free comparison, *i.e.*, $10 ($100 – $90) and 11.1% ($10/$90).

ment has not developed a reasonable method for isolating the cost-price relationship for individual adjustments.

Id.

In a subsequent determination in *Grand and Upright Pianos From the Republic of Korea* ("*Korean Pianos*"), 50 Fed. Reg. 37561 (Sept. 16, 1985), the ITA declared that its previous interpretation of § 1677a(d)(1)(C) to require the measurement of tax absorption in home market sales was incorrect. The ITA now concluded that Congress inserted the "pass-through" clause in § 1677a(d)(1)(C), as part of the Trade Act of 1974, to accommodate the effect possible future treaties or judicial decisions might have on the standards employed by the Treasury Department in administering the countervailing duty law, for the purpose of ensuring "harmonized tax treatment" between the Antidumping Act and the countervailing duty law. Because Treasury's practice of not regarding as an unfair subsidy the non-excessive rebate of final stage indirect taxes (such as the Japanese commodity tax) has since been upheld, the pass-through clause should be read as simply applying to the antidumping law the underlying assumption that final stage indirect taxes are fully shifted forward. *Id.* at 37562-65. The ITA further felt that to interpret § 1677a(d)(1)(C) otherwise would produce conflict with the complementary purpose of 19 U.S.C. § 16771(d)(1)(D) in a combined countervailing duty and antidumping case. *Id.* at 37565. Finally, the ITA compared differences in final stage tax liability to differences in material cost or credit expenses, and stated that it perceived "no economic justification for adjusting the home market-U.S. price differential by anything less than the actual amount of final stage taxes paid by the producers."[12] *Id.*

Standard of Review

Plaintiffs having brought these actions pursuant to 19 U.S.C. § 1516a(a)(2), the applicable standard of review is whether the challenged determination by the ITA is supported by substantial evidence on the record and is otherwise in accordance with the law.[13] 19 U.S.C. § 1516a(b)(1)(B).

Adjustment to Foreign Market Value

The ITA correctly acknowledged that the offsetting adjustment for the forgiveness of Japanese commodity taxes on merchandise exported to the United States is governed by 19 U.S.C.

[12] The ITA stated in *Korean Pianos* that it adjusted USP "for indirect taxes imposed upon home market merchandise which have not been collected upon exported merchandise by reason of its exportation to the United States." 50 Fed. Reg. a 37561. This language and the language quoted above would seem to indicate that the ITA's adjustment to USP, purportedly made pursuant to § 1677a(d)(1)(C), was not for the amount of tax rebated or not collected on the exported merchandise, but was rather for the amount of tax actually collected on home market merchandise—in other words, that the ITA employed the methodology it used in the preliminary determination in this case.

[13] The court rejects the government's suggestion in its motions for remand that the court should simply order a remand to the ITA without deciding the legal issues raised in plaintiffs' Rule 56.1 motions.

§ 1677a(d)(1)(C).[14] Hence, the first issue before the court is whether the ITA unlawfully departed from the requirements of that provision by subtracting from FMV the amount of commodity tax collected on home market merchandise [15] (irrespective of the "pass-through" issue, considered below).

While it has been said that a reviewing court should give "tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law", *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1582 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984), such deference must be restricted to issues left open by the statutes themselves. As the Supreme Court recently stated:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent * * *. If a court, employing traditional rules of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 n. 9 (1984) (citations omitted). *Accord Board of Governors of the Federal Reserve System* v. *Dimension Financial Corporation*, 106 S. Ct. 681, 686 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the

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[14] Joint intervenors, Matsushita *et al.*, contend that, notwithstanding the ITA's stated rationale, 19 U.S.C. § 1677a(b)(1)(C), by its terms, applies only to taxes "imposed by the country of exportation directly upon the exported merchandise", whereas Japan does not "impose" the commodity tax on exported merchandise, but "exempts" such merchandise from tax treatment. Hence, the intervenors argue, the ITA's adjustment to FMV for the tax collected on home market sales should be sustained as a circumstances of sale adjustment required under 19 U.S.C. § 1677b(a)(4)(B).

Congress clearly could not have intended an interpretation of § 1677a(d)(1)(C) along the lines advanced by Matsushita *et al.* At best, such an interpretation would frustrate the purpose of the adjustment by making its application turn not on whether the exported merchandise was selectively not taxed by the exporting country, but on how that country has *characterized* the non-taxation. At worst, it would make the provision an absurdity by demanding that the foreign tax for which the adjustment is made be "assessed" or "collected" on the exported merchandise, even though the adjustment expressly applies where taxes "have not been collected by reason of the exportation of the merchandise." It is evident that the "imposed" language merely signifies that the tax must be imposed on the *class or kind* of merchandise that has been exported. Thus, for example, if the Japanese commodity tax were not imposed on television receiving sets, no commodity tax adjustment would be made for Japanese televisions exported to the United States. *Cf., Lewyt Corp. v. Commissioner of Internal Revenue*, 349 U.S. 237, 240 (1954) (comparable interpretation of "imposed" in similar statutory context); *In re Robbins' Estate*, 47 N.W. 2d 889, 890 (Wis. 1951) (same).

[15] The government argues that regardless of whether the ITA's use of this methodology was lawful, it did not materially prejudice the interests of the complainants. This argument is difficult to reconcile with the government's request for a remand of this issue. In any case, the government is mistaken. The illustration presented in the government's brief in opposition to the Union's motion (at page 18, note 6) assumes that an adjustment which increases USP would be in the *same amount* as the ITA's adjustment which decreased FMV by the tax assessed on home market sales. Obviously, if this were the case, absolute margin levels would be unchanged and *ad valorem* margins would actually be reduced. However, because the illustration also assumes that the exported merchandise is being dumped (i.e., sold at a lower price than the taxable home market price), the respective adjustments would *not* be in the same amounts unless (a) the foreign tax were a "unit" or "flat-rate" tax (which is not true of the Japanese commodity tax on televisions), or (b) the upward adjustment to USP were in the amount of the tax collected on home market sales rather than the amount forgiven on export sales (which plaintiffs contend the ITA may not do). *See* note 10, *ante*. If the statutorily required adjustment is an addition to USP in the amount of the commodity tax forgiven on exports, as plaintiffs contend, then in instances where dumping would be found in the absense of taxes, that amount would be less than the amount by which the ITA decreased FMV in its final determination. The absolute margins in those instances would be increased. Because *ad valorem* margins would not change, only instances where the ITA previously found non-*de minimis* margins would be affected (assuming plaintiffs were to prevail solely on this issue).

clearly expressed intent of Congress."); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979).

The language of 19 U.S.C. § 1677a(d)(1)(C) clearly and unambiguously delineates the adjustment to be performed by the Commerce Department. Specifically, the provisions calls for an upward adjustment to USP (rather than a downward adjustment to FMV) in the amount of tax that would have been assessed on the exported merchandise had it been sold in the home market (rather than the amount of tax actually assessed on merchandise sold in the home market). While the final clause of the provision sets a "cap" on the amount of the adjustment, the statute gives no indication that the ITA has discretion to employ alternative methods of performing the adjustment.

The pertinent legislative history of this provision uniformly echoes Congress' unmistakable intent that the adjustment be an increase to the USP in the amount of tax rebated or not collected on the exported merchandise. *See S. Rep. No. 16*, 67th Cong., 1st Sess. 11-12 (1921); *H.R. Rep. No. 571*, 93d Cong., 1st Sess. 69-70 (1973); S. Rep. No. 249, 96th Cong., 1st Sess. 93-94 (1979); *H.R. Rep. No. 317*, 96th Cong., 1st Sess. 75 (1979). Moreover, as the ITA acknowledged, when the provision was first enacted as part of the Antidumping Act of 1921, Congress specifically considered and rejected the method of adjustment used in the ITA's final determination in this case.

Like the ITA's approach, antidumping legislation originally proposed in the House of Representatives had provided that the measure of FMV (referred to as "foreign home value") was *not* to include any excise taxes levied on merchandise sold in the foreign home market. *See Hearings on Anti-dumping Legislation Before the House Committee on Ways and Means*, 66th Cong., 1st Sess. 6 (1919). Customs officials strongly criticized this proposal as difficult to administer, and urged Congress to adopt a definition of FMV that would include such taxes and would thus correspond to "actual market value" used in both the Customs Administrative Act of 1890 and the Tariff Act of 1913 in the context of normal customs valuation for assessment of ordinary duties. *Id.* at 14-19. *See generally United States v. Passavant*, 169 U.S. 16 (1898). The House, nevertheless, adopted bills in 1919 and 1921 which defined FMV to exclude foreign excise taxes. *See* 59 Cong. Rec. 327, 351 (1919); 61 Cong. Rec. 254 (1921). The Senate Finance Committee, however, redrafted the House proposals and specifically rejected the House definition of FMV. The Senate committee instead defined FMV, consistent with ordinary dutiable value, to include taxes imposed on merchandise sold in the foreign home market. *See S. Rep. No. 510*, 66th Cong., 2d Sess. 2 (1920); *S. Rep. No. 16*, 67th Cong., 1st Sess. 2 1921). In addition, to prevent dumping margins from arising due to the forgiveness of such taxes on exports, the final Senate version

provided for an upward adjustment to USP ("purchase price" and "exporter's sales price") in

> the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

Id. These provisions of the Senate proposal survived the House-Senate conference unchanged and were passed into law with the enactment of the Emergency Tariff Act of 1921, Title II of which was the Antidumping Act of 1921. Sections 203, 204, 42 Stat. 12, 13 (1921). Although Congress enacted limitations to the adjustment in the Trade Act of 1974 (discussed below), the basic structure has remained unchanged.

The ITA, therefore, departed from the clear requirements of the statute (a) in its final determination, by making the adjustment a decrease to FMV rather than increase to USP, and (b) in both its preliminary and final determinations, by adjusting for the amount of tax actually assessed on home market merchandise rather than the amount of tax which would have been assessed on the merchandise exported to the United States had it been sold in the home market.

These departures by the ITA cannot be justified by reference to past administrative interpretation of § 1677a(d)(1)(C). Most significantly, the ITA has denied that a consistent methodology for calculating the adjustment has been employed in past determinations. *Korean Televisions, I,* 49 Fed. Reg. at 7623; *Taiwan Televisions,* 49 Fed Reg. at 7631. In any event, such a justification is not possible in situations where, as here, the agency acknowledges that its approach conflicts with the approach intended by Congress. 50 Fed. Reg. at 24279. *See also Korean Televisions I,* 49 Fed. Reg. at 7623; *Taiwan Televisions,* 49 Fed. Reg. at 7631; *Korean Televisions, II,* 49 Fed. Reg. at 50421. Furthermore, because the applicable Commerce Department regulation, 19 C.F.R. § 353.10(d)(1)(iii)[16], tracks the language of 19 U.S.C. § 1677a(d)(1)(C) almost *verbatim,* the court must conclude that the ITA's methodology in this case conflicts with the directives of that regulation, by the agency's own interpretation.

Intervening defendants, Matsushita *et al.,* seek to justify the ITA's approach by reference to what the ITA concluded is the fundamental purpose of the adjustment: to achieve a comparision of United States and foreign prices for the merchandise which is "tax neutral." The joint intervenors argue that the ITA's procedure of

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[16] 19 C.F.R. § 353.10(d)(1)(iii) (1981) provides:

Purchase price and exporter's sales price shall be adjusted by being—

(1) Increased by:

. . . . . .

(iii) The amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

reducing FMV by the amount of the commodity tax imposed on home market sales was reasonable and appropriate because it achieved the goal of tax neutrality better than the statutory adjustment to USP, and was based on information more readily obtained and verified. The intervenors further argue that if the ITA had adhered to the statute and increased USP by an amount estimated to be the tax forgiven on the exported merchandise, the agency would then have been required, in cases where that amount was less than the tax collected on home market sales, to make an additional "circumstances of sale" adjustment to FMV in the amount of the difference, pursuant to 19 U.S.C. § 1677b(a)(4)(B). Although the government, unlike Matsushita *et al.*, requests a remand rather than affirmance, it defends the ITA's position that the adjustment in § 1677a(d)(1)(C) was intended to achieve pure tax neutrality. The government suggests that if the ITA determines on remand that it is unable to obtain "satisfactory information" regarding the Japanese commodity tax base, the agency would be justified in employing a non-statutory methodology such as it employed in the prior determinations.

Even if the defendants' resort to the "fundamental purpose" of the legislation were availing in the face of the clear statutory directive, the court is unpersuaded that Congress did not intend the adjustment in § 1677a(d)(1)(C) to operate as it does. When Congress rejected the 1919 and 1921 House proposals to exclude foreign excise taxes from FMV in favor of the statutory adjustment to USP (discussed at 18–19, *ante*), it surely could have seen from simple calculations (such as those performed by the court in notes 9–11, *ante*) that the rejected approach would achieve a tax netural comparison in all cases, whereas the enacted approach is (purely) tax neutral only in cases where there is no pre-tax dumping.[17] The comments of the Senate Finance Committee, which drafted the enacted provision, on the operation of the adjustment were as follows:

> In order that * * * any excise tax which is refunded or not collected upon the exportation of the merchandise shall not constitute dumping, it is necessary also to add such items to the purchase price.
>
> * * * * * * *
>
> In order that * * * any excise tax which is refunded or not collected upon the exportation of the merchandise shall not constitute dumping, the term "exporter's sales price" is defined to include such items.

[17] The ITA seems to imply that Congress chose the latter approach only because Customs officials complained that the subtraction of foreign taxes from FMV was administratively "infeasible." *See* 50 Fed. Reg. at 24279. Such complaints, however, were obviously directed against *any* adjustment to offset foreign taxes; for the difficulties attendant with the subtraction from the home market price of foreign taxes actually paid would *a fortiori* be encountered in an adjustment which adds rebated or uncollected foreign taxes to purchase price and exporter's sales price.

S. Rep. No. 16, 67th Cong., 1st Sess. 12 (1921). These comments express the concern that dumping margins not arise *solely* because the exported merchandise is exempted from foreign taxation, which the statutory adjustment achieves. They do not show that Congress intended the adjustment to be purely tax neutral in cases where dumping is otherwise found to occur. Furthermore, in a 1957 report on the operation and effectiveness of the Antidumping Act, the Secretary of the Treasury specifically informed Congress that the statutory approach achieves tax neutrality only where there is no dumping.[18] Although the report proposed several statutory revisions, which became the source of the 1958 amendments to the Antidumping Act (including the "circumstances of sale" adjustment emphasized by the intervenors), the report did not recommend that the tax adjustment provision be revised; nor did it suggest that Treasury was dissatisfied with the provision's operation.[19]

To properly evaluate the operation of the USP adjustment in § 1677a(d)(1)(C), attention must be given not only to the administrative concern of achieving fair price comparisons, but also to the fundamental aim of the antidumping law to eliminate injurious less than fair value sales of merchandise exported to the United States. As previously noted, the statutory adjustment does achieve tax neutrality with respect to *ad valorem* margins, but operates to increase absolute margins in cases where dumping margins would be present in the absence of taxes. The amount of the increase is proportional to the size of the pre-tax dumping margin. Any "unfairness" to a foreign producer resulting from the statutory adjustment, therefore, is the direct outgrowth of that producer's injurious less than fair value pricing. Rather than pursue such practices and face the assessment of proportionally increased antidumping duties, the producer can avoid the duties by simply adjusting its prices (raising United States price or lowering home market price) to eliminate the pre-tax dumping margins. Because the adjustment is tax neutral when the pre-tax home market price does not exceed

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[18] The relevant remarks in the Secretary's report were as follows:

> [A]llowance shall be made, in calculating price to the United States market, for import duties of internal taxes, such as sales taxes, which are remitted by the country of export. In each case the amount remitted is added to the price to the United States market; and in calculating the home-consumption price the export duty or internal tax will similarly be included. *To the extent that the figures are the same*, and ordinarily they will not differ materially—*they will cancel out*.

"Report of the Secretary of the Treasury to the Congress on the Operation and Effectiveness of the Antidumping Act and Amendments to the Act Considered Desirable or Necessary," in *Hearings on Amendments to the Antidumping Act of 1921, As Amended Before the House Committee on Ways and Means*, 85th Cong., 1st Sess. 13 (1957) (emphasis added). The report was submitted to Congress as required by section 5 of the Customs Simplification Act of 1956, 70 Stat. 943, 948 (1956).

[19] In support of their contention that the statute is intended to achieve pure tax neutrality, the government and Matsushita *et al.* rely primarily on remarks made by William L. Gifford, Assistant Secretary of Treasury for Legislative Affairs, in a letter of June 3, 1973 to John M. Martin, Chief Counsel of the House Ways and Means Committee. Mr. Gifford therein stressed that "the failure to add such tax to the price of the merchandise to the United States price, if it is rebated or remitted upon exportation, would distort any price comparisons and unfairly create or increase the size of dumping margins." *Hearings Before the House Committee on Ways and Means on H.R. 6767*, 93d Cong., 1st. Sess. 2395 (1973). This remark was not directed to the issue of tax neutrality, but was made in response to a proposal which would have completely eliminated the adjustment to USP for remitted taxes while continuing to include the amount of such taxes in home market price. The administration, understandably, was concerned that such a proposal would *unfairly* create or increase margins of dumping.

the United States price, the statute provides an incentive, not present in the ITA's approach, for foreign producers to discontinue injurious dumping.

As the Supreme Court recently emphasized,

> The "plain purpose" of legislation * * * is determined in the first instance with reference to the plain language of the statute itself. * * * Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.

Board of Governors v. *Dimension Financial Corporation*, 106 S. Ct. at 688-89 (citation omitted). The methodology plainly commanded by § 1677a(d)(1)(C) embodies the degree of tax neutrality Congress sought to implement and may not be disregarded by the ITA on the ground that some other method would produce a "fairer" comparison, *see id.; Aaron* v. *SEC*, 446 U.S. 680, 695 (1980), or would be more "reasonable" or "efficient". *See United States* v. *H. Rosenthal Co.*, 609 F.2d 999, 1001-02 (C.C.P.A. 1979). Only Congress, not Commerce, may effect such a revision.

The intervenors' contention that the ITA's adherence to the terms of § 1677a(d)(1)(C) would necessitate an additional "circumstances of sale" adjustment under 19 U.S.C. § 1677b(a)(4)(B) [20] to reduce margins to their pre-tax levels is without merit. The antidumping law does not support the proposition that a tax differential generated by actual dumping constitutes an adjustable difference in the circumstances of sale under § 1677b(a)(4)(B). Such a construction would defeat the fair-value-pricing incentive inherent in the operation of § 1677a(d)(1)(C), the provision specifically addressed to the adjustment for remitted taxes. It would also defeat the tax-neutrality of § 1677a(d)(1)(C) with respect to *ad valorem* margins, by artificially *suppressing* such margins in cases where dumping is present.[21] Nothing in the language or legislative history of § 1677b(a)(4)(B) indicates that Congress intended such a result—even though, as noted above, the report of the Secretary of the Treasury which proposed the circumstances of sale adjustment also observed that the foreign tax adjustment to USP is tax neutral only in the absence of pre-tax dumping margins. The congressional reports to the 1958 amendments only cite such items as "differences in the terms of sale, credit terms, and advertising and selling costs" as examples of adjustable differences in the circumstances of

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[20] 19 U.S.C. § 1677b(a)(4)(B) (1982) provides:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or the fact that the United States Price is the same as the foreign market value) is wholly or partly due to—
>
> . . . . . .
>
> (B) other differences in circumstances of sale
>
> . . . . . .
>
> then due allowance shall be made therefor.

[21] This would provide foreign manufacturers or exporters with a means to circumvent the scrutiny of the antidumping law, in cases where *ad valorem* margins would otherwise be just above the *de minimis* level.

sale. *S. Rep. No. 1619,* 85th Cong., 2d Sess. 7 (1958); *H.R. Rep. No. 1261,* 85th Cong., 1st Sess. 7 (1957). The applicable ITA regulation, 19 C.F.R. § 353.15, likewise, lists these sorts of examples but makes no mention of the adjustment serving to offset margin increases arising from the operation of § 1677a(d)(1)(C). Clearly, there is no basis for the circumstances of sale adjustment advocated by the intervenors.[22]

Finally, the failure of the ITA to perform the adjustment to USP in accordance with § 1677a(d)(1)(C), by adding the uncollected commodity tax to purchase price and exporter's sales price, cannot be excused on the ground that the agency was unable to determine what the amount of the tax would be. Such an explanation is patently untenable, particularly where the foreign tax is simply an *ad valorem* tax calculated upon a statutorily defined price-base.

Article 11 of the Japanese Commodity Tax Law provides that the tax base for Class 2 commodities (which includes television sets) is an amount equal to the manufacturer's freely-offered wholesale price at the time of shipment from the factory. Hence, as this court observed in *Zenith Radio Corp.* v. *United States,* 9 CIT —, 606 F. Supp. 695, 698 n. 7 (1985), "[t]he Japanese Commodity Tax Law defines the taxable basis of the television sets in terms which are virtually identical to the terms of foreign market value." Because purchase price and exporter's sales price are defined so that determinations may be fairly compared with determinations of FMV, it would seem relatively simple to arrive at an appropriate basis for calculating the amount of commodity tax which was not collected on the exported merchandise.

The government points out that Article 13 of the Japanese Commodity Tax Law sets forth an alternative method for determining the tax base, using the manufacturer's published suggested retail price less a standard deduction to cover ordinary profits and expenses of sellers other than the manufacturer, freight charges, and the amount of the commodity tax. The government expresses uncertainty as to when Article 13 would come into play. Article 13 appears to be merely a permissible alternative method of calculating the commodity tax base which is available to manufacturers who apply in advance for such treatment. Article 13.2. It thus would not seem relevant to tax-base calculations for merchandise exported to the United States. Furthermore, Article 13 clearly seeks to construct a tax basis that is in principle comparable to the ex-factory wholesale price basis set forth in Article 11. The court, therefore, does not see Article 13 as a formidable obstacle.

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[22] The court does not imply that the circumstances of sale adjustment could not be extended to include any portion of the tax differential (reflected in the home market price) generated by bona fide differences in the circumstances of sale, to the extent that such items are not included in the tax base for the exported merchandise. The theory supporting such an adjustment would be that those items are excluded from a proper price comparison between the domestic and exported merchandise, and the tax on those items is part of the cost of those items.

The admitted fact that the ITA made no special inquiry into the operation of the Japanese Commodity Tax Law raises the suspicion that the agency's professed inability to calculate the adjustment was pretextual. The court expresses no opinion as to whether the information obtained in the previous administrative proceeding is sufficient for a proper calculation of the adjustment. The court merely holds that on remand the ITA must calculate the adjustment, in the first instance, by adding to USP the amount of Japanese commodity tax determined to have been rebated or not collected upon the merchandise exported to the United States by reason of its exportation, in accordance with the requirements of § 1677a(d)(1)(C).[23]

Assumption of Full Pass-Through

The second part of 19 U.S.C. § 1677a(d)(1)(C) provides that the amount of the adjustment may not exceed "the extent to which such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." In the challenged determination, the ITA acknowledged that this language directed it to ascertain the extent to which the commodity tax resulted in increased home market prices, and to limit by that amount the offsetting adjustment to USP. Nevertheless, the ITA assumed a full pass-through of the tax in all cases, asserting that this assumption was reasonable because "[t]o date, the Department has not developed a reasonable method for isolating the cost-price relationship for individual adjustments." In the subsequent *Korean Pianos* determination, however, the ITA concluded that the pass-through clause in § 1677a(d)(1)(C) was not intended to require the measurement of tax absorption, but instead was intended merely to facilitate harmony between the adjustment and the administration of the countervailing duty law. The issues confronting the court therefore are, first, whether the pass-through clause was intended to require the measurement of tax absorption, and if so, whether the ITA acted within its discretion by simply assuming a full pass-through.

The Japanese intervenors contend that the pass-through clause in § 1677a(d)(1)(C) does not call for the measurement of tax absorption because the statute states that the adjustment shall be made to the extent that the tax is added to "or included in" the home market price. The intervenors assert that "the total amount of the tax imposed is *always* 'included in' the resulting price." (Matsushita *et al.*, brief in opposition to Zenith's motion, at 25). This trivialized reading of the words "included in" must be rejected for the reasons that it would render the pass-through clause entirely su-

[23] The ITA may not perform the adjustment by increasing USP in the amount of tax paid on home market sales, as it did in the previous preliminary determination. Because this amount would clearly be excessive in cases where pre-tax dumping margins are present, it could not possibly constitute the "best information available" of what the amount of the adjustment should be.

perfluous and it conflicts with the explanation of the clause given by the House committee that drafted it. *Huffy Corp.* v. *United States*, 10 CIT —, Slip Op. No. 86-36 at 13-14 (Mar. 27, 1986). In support of their reading of "included in", Matsushita *et al.* advance a line of customs law valuation cases holding that certain costs such as taxes, freight charges and packing costs are "included in" the dutiable home market price. *See United States* v. *Zellerbach Paper Co.*, 28 C.C.P.A. 303, 309 (1941); *General Foods Corp.* v. *United States*, 22 Cust. Ct. 401, 405 (1949); *United States* v. *Passavant*, 169 U.S. 16, 22 (1898). These cases are plainly inapposite and do not in any event support the intervenors' interpretation. As the Customs Court explained in *General Foods, supra*, "[i]t is obvious that since the market value or price includes the cost of containers and coverings, the cost * * * intended by the statute to be included is the cost *to the purchaser*." (emphasis in original).

The ITA presents a far more elaborate and creative interpretation of the pass-through clause in *Korean Pianos, supra*. The ITA therein declares that Congress' overriding purpose for amending the tax adjustment provision in the Trade Act of 1974 was to achieve "harmonized tax treatment" between the Antidumping Act and Treasury Department administration of the countervailing duty law. The ITA attempts to assimilate the pass-through clause within that purpose and concludes that Congress intended the clause to be meaningful only if some future court decision or treaty were to require Treasury to measure tax absorption in countervailing duty determinations.

The major difficulty with this "future contingent" interpretation of the pass-through clause is that not a hint of it appears in the statutory language or the legislative history. The clause is worded and explained, rather, as placing an absolute, unconditional cap on the adjustment in all cases. At bottom, the ITA must seek refuge in its view that Congress intended its expressions concerning "harmonized tax treatment" to overshadow its straight-forward explanation of the operation and purpose of the pass-through clause.

As the legislative history clearly reveals, the 1974 amendment to the tax adjustment provision consisted of two distinct changes that were enacted for independent reasons. The first change was proposed by the administration in 1973 to remedy a conflict between this provision of the Antidumping Act and the Treasury Department's long-standing practice under the countervailing duty law of treating tax rebates to foreign exporters as unfair, countervailable subsidies unless the rebated tax was "directly related" to the product being exported or components thereof. Because the Antidumping Act broadly required an addition to purchase price and exporter's sales price of the amount of any taxes imposed in the country of exportration "upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise" which have been rebated or not collected by reason of the exporta-

tion of the merchandise to the United States, the Antidumping Act arguably sanctioned foreign tax practices which Treasury regarded as unfair under the countervailing duty law. Consequently, the administration proposed that the purchase price and exporter's sales price provisions of the antidumping Act be amended to require the addition of

> the amount of any taxes imposed in the country of exportation *directly upon the exported merchandise or components thereof,* which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

See Hearings Before the House Committee on Ways and Means on H.R. 6767, 93d Cong., 1st Sess. 55–57 (1973). The administration's analysis of this change was as follows:

> The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.

Id. at 135.

While Congress enacted the administration's proposal, it also added the qualifying clause:

> *but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country for exportation.*

Pub. L. No. 93–618, Title III, Ch. 2, § 321(b), (c), 88 Stat. 2045, 2046 (1975). This second change in the tax adjustment provision was not tied to the concern for "harmonized tax treatment." Rather, it was added because Congress had become aware that indirect taxes, including taxes imposed directly on merchandise, often were not fully shifted forward to purchasers; and Congress did not want the adjustment for such a tax to increase United States price calculations by an amount greater than the price increase which the tax generated in comparison home market sales.[24] The House Ways and Means Committee, which drafted the pass-through clause, explained this distinct purpose in its comments on the amendment to the tax adjustment provision. The committee stated:

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[24] As the ITA explained in *Korean Televisions I,* 49 Fed. Reg. at 7624:

> The differing treatment of direct vs. indirect taxes under GATT and U.S. law arose from the assumptions that indirect taxes were fully shifted forward to purchasers while direct taxes were absorbed by sellers. By the late 1960's, however, academic literature and U.S. government reports cast doubt on the veracity of these assumptions. It is clear that the Congress in 1974 was aware of these doubts. In light of the public debate, it is only reasonable to conclude that the Congress, in its addition to [§ 1677a(d)(1)(C)] of the "but only to the extent" language, intended that we measure absorption and limit the addition to the tax passed through.

This language was reiterated in *Taiwan Televisions,* 49 Fed. Reg. at 7632, and *Korean Televisions II,* 49 Fed. Reg. at 50421.

> The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.
>
> With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated. *Further, an adjustment for such tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased.*

H.R. Rep. No. 571, 93d Cong., 1st Sess. 69 (1973) (emphasis added).

The administration also acknowledged the distinct purpose of the pass-through clause added by the House. In a statement to the Senate Finance Committee, Ambassador William D. Eberle, special representative for trade, explained:

> The definitions of both "purchase price" and "exporter's sales price" are amended to harmonize the treatment of foreign tax rebates under the Antidumping Act with the standard of their treatment under the countervailing duty law. No adjustment for tax rebates to the advantage of the foreign exporter will be permitted unless the direct relationship between the tax and the exported product or its components can be demonstrated. For example, if the exported product benefited from a tax rebate on the mortgage on the plant that produced it, the rebate could not be used in the computations to reduce the dumping margin. *Moreover, an adjustment for a tax rebate will be permitted only to the extent such taxes are added to or included in the price of the merchandise when sold in the home market. To the extent the exporter absorbs indirect taxes in sales in the home market, no adjustment will be made to purchase price. The effect will be to increase the size of dumping margins under such circumstances.*

Hearings Before the Senate Committee on Finance on H.R. 10710, 93d Cong., 2d Sess. 310 (1974) (emphasis added).

The Senate Finance Committee adopted the House amendment, including the pass-through clause, without change, stating:

> The second amendment deals with the treatment of certain types of tax rebates in computing purchase price and would provide that foreign indirect taxes, rebated or remitted upon the export of the imported merchandise in question, will be added back to purchase price only if such indirect taxes are imposed directly upon the exported product or its components, *and then only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.* The present standard for the treatment of such tax rebates or remissions which is now contained in the act is significantly broader and requires the adding back to the purchase price of a wider range of taxes, to the advantage of the foreign manufacturer, than would be allowed under the proposed amendment. The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However, the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.

S. Rep. No. 1298, 93d Cong., 2d Sess. 172 (1974) (emphasis added).

The language in the House report concerning "harmonized tax treatment" (which is paraphrased in the Senate report) was lifted directly from the administration's comments on its 1973 proposal containing no cap provision. Just as Congress added the cap provision to the administration's proposal, Congress added its explanation of the cap provision to the administration's comments.[25] The "disharmony" Congress sought to cure, therefore, was addressed by the narrowing of the adjustment to taxes "imposed * * * directly upon the merchandise." Because the statute would now incorporate the "directly related" test, no margin-reducing adjustment would be made for tax rebates or remissions which Treasury regarded as unfair subsidies under the countervailing duty law. *Cf., American Express Co.* v. *United States*, 472 F.2d 1050 (C.C.P.A. 1973) (upholding Treasury's imposition of countervailing duties based on rebate of indirect taxes not directly related to merchandise being exported).

The ITA carries the "harmonization" theme too far when it declares that Congress could not have intended a requirement under the antidumping law that tax shifting be measured because "[i]n administering the countervailing duty law, Treasury did not measure the degree of tax shifting in individual cases involving final stage indirect taxes." 50 Fed. Reg. at 37563. Apart from the fact that Congress gave no indication that it intended the pass-through clause to be meaningful only as a future possibility, the House and

[25] Likewise, Ambassador Eberle's explanation of the 1974 amendment before the Senate Finance Committee, quoted above, employed the identical language concerning "harmonized tax treatment" that he previously used to explain the administration's 1973 proposal before the House Ways and Means Committee. *Hearings Before the House Committee on Ways and Means on H.R. 6767*, 93d Cong., 1st Sess. 362 (1973). The only change was the addition of the language explaining of the cap provision in the subsequent statement.

Senate reports both emphasized that the committees expressed neither approval nor disapproval of Treasury's practice under the countervailing duty law. The amendment directed the administering agency to limit the antidumping law adjustment by the amount of tax shifted forward to home market purchasers; it did not direct the agency to measure tax absorption in countervailing duty determinations, or otherwise declare that the full rebate by the country of exportation of taxes directly related to the exported merchandise constitutes an unfair subsidy.

It is true that one justification advanced for Treasury's practices under the countervailing duty law concerning tax rebates has been the assumption that final stage indirect taxes are fully passed onto the purchaser whereas other taxes are absorbed by the seller. *See American Express Co.* v. *United States*, 472 F.2d at 1058. Those practices, however, need not rest upon assumptions concerning tax incidence. As the Supreme Court emphasized in *Zenith Radio Corp.* v. *United States*, 437 U.S. 433, 456–57 (1978), the practice of imposing no countervailing duty for the non-excessive rebate of indirect taxes directly related to exported merchandise may be viewed as a reasonable means of avoiding the effect of double taxation, since those indirect foreign taxes are akin to excise and sales taxes imposed on goods consumed in this country. Clearly there is no contradiction in viewing the full rebate of an indirect tax imposed directly upon exported merchandise as a fair practice under the countervailing duty law, and yet limiting the adjustment for that rebate under the antidumping law to the amount by which the tax has increased the home market price. Antidumping duties—as opposed to countervailing duties—"are imposed on the basis of differences in value, *not* differences in cost." *Smith-Corona Group* v. *United States*, 713 F.2d 1575 (emphasis in original).

The ITA's argument in *Korean Pianos* that a meaningful interpretation of the pass-through clause in § 1677a(d)(1)(C) would conflict with the purpose of the adjustment in § 1677a(d)(1)(D) is transparently invalid. Section 1677a(d)(1)(D) provides that USP shall be increased by the amount of any countervailing duty imposed on merchandise to offset an export subsidy. The House Ways and Means Committee explained that the provision would assure that the tax rebates which subjected the merchandise to countervailing duties would not unfairly subject them to antidumping duties as well. *H.R. Rep. No. 571*, 93d Cong., 1st Sess. 70 (1973). The ITA asserts that in a combined countervailing duty and antidumping case, where USP is increased under § 1677a(d)(1)(D) by the amount of tax rebates or exemptions found to be an export subsidy, an increase to USP under § 1677a(d)(1)(C) by less than the full amount of the remaining portion (because a lesser amount was passed through to home market purchasers) would be "clearly contrary to Congress' purpose because it would lead to assessment of both antidumping and countervailing duties by virtue of the same tax re-

bates in a combined case." 50 Fed. Reg. at 37564. In fact, in the ITA's example no antidumping duties would flow from the portion of the tax rebates or exemptions found to be an export subsidy. Hence, there is no contradiction with Congress' purpose.

The House Ways and Means Committee, in the passage from its 1973 report quoted at 34–35, *ante*, could hardly have expressed its intention more clearly that the pass-through clause must be interpreted to limit the adjustment by the amount of tax *actually* passed through to home market purchasers. The report of the Senate Finance Committee states nothing to contradict or detract from that interpretation. The inescapable conclusion is that Congress intended the administering agency to perform tax absorption measurements for application in individual cases.[26]

Having acknowledged in the challenged determination that §1677a(d)(1)(C) directed it to measure tax absorption, the ITA considered and rejected the methodology for performing the measurement suggested by Zenith and the Unions and declared that it knew of no "reasonable" method for performing the measurement. The ITA then, without any determination of tax absorption, calculated the adjustment for the full amount of the tax, stating that "[a]bsent evidence that clearly demonstrates a manufacturer's commodity tax cost is not reflected in home market sales prices, the Department may reasonably conclude that cost and price are directly related." This statement is a fortified paraphrase of the Federal Circuit's holding in *Smith-Corona Group* v. *United States*, 713 F.2d at 1577 n. 26, that "absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related." The ITA's reliance on *Smith-Corona* is misplaced. *Smith-Corona* involved a challenge to an ITA regulation allowing the agency to base the circumstances of sale adjustment under §1677b(a)(4)(B) primarily on cost criteria. *See* 19 C.F.R. §353.15(d) (1980). In sustaining the regulation as it was applied in that case, the court emphasized that in §1677b(a)(4)(B) Congress expressly granted discretion to the administering authority to determine the extent of the adjustment. Hence, in the absence of evidence to the contrary, the statute permitted the ITA to assume a direct relationship between cost and price. 713 F.2d at 1575–77. In §1677a(d)(1)(C), by contrast, Congress has inserted the express requirement that the adjustment be made "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation."[27] In adding

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[26] Astonishingly, in *Korean Pianos*, after reciting the referenced passages from the House and Senate committee reports, the ITA remarks:

> [N]othing in either the statute or the above-quoted legislative history requires that the Department measure tax absorption in individual cases. Because Congress was aware of the problems inherent in measuring tax absorption, if Congress truly intended that the Department embark upon such a hazardous undertaking, it surely would have made its intent more clear.

50 Fed. Reg. at 37563.

[27] The applicable ITA regulation, 19 C.F.R. §353.10(d)(1)(iii), incorporates the precise language of the pass-through clause. *See* note 16, *ante*. In contrast to the circumstances of sale adjustment regulation, no regulation purports to authorize reliance on manufacturer's cost to determine the amount of tax added to or included in the home market price.

this requirement, Congress explained that "[t]o the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased." *H.R. Rep. 571, supra*, at 69. To permit the ITA to assume, without any evidentiary basis, that home market price always reflects the full amount of such taxes would effectively render the pass-through clause a nullity and would defeat the express will of Congress. As Judge Carman of this court recently remarked in *Huffy Corp.* v. *United States, supra* at 14:

> We must conclude that Congress recognized that not all taxes are passed on to the home market, and therefore required some showing that such a tax is passed on before its rebate could be the source of an adjustment. To support an adjustment for a tax rebate there must be substantial evidence in the record to support the conclusion that the tax was passed on to the home market.

(footnote omitted).[28] Decidedly, evidence revealing only the manufacturers' commodity tax costs does not constitute substantial evidence.[29]

Although § 1677a(d)(1)(C) requires the ITA to measure actual tax absorption, it leaves the precise method of performing this measurement to the discretion of the agency. However, the ITA may not place the burden on a private party to advance a method of measuring tax absorption which the ITA deems acceptable, in failure of which it performs no measurement whatsoever. Rather, the *agency* must find a methodology for measuring absorption which it considers satisfactory and must base its measurements upon substantial evidence.

The court leaves open whether the simple method of subtracting after-invoice discounts and rebates from gross invoice prices, suggested by Zenith and the Unions below, is sufficient, or whether an econometric approach is required. In prior determinations, the ITA has declared that an econometric measurement of tax absorption is "impossible", explaining:

> The degree of [tax] shifting depends upon, among other things, the demand for the product, actions of the monetary authori-

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[28] Although this holding in *Huffy* was not essential to the court's decision, the court finds Judge Carman's reasoning particularly persuasive.

[29] While the *Smith-Corona* holding permitting cost-based "circumstances of sale" adjustments is manifestly inapplicable to the foreign tax adjustment under § 1677a(d)(1)(C), the instant case is also distinguishable from *Smith-Corona* with respect to the evidence presented. Whereas the record in *Smith-Corona* contained no factual evidence tending to prove or disprove a direct cost-price relationship, the record below reveals numerous instances in which the sum of the commodity tax price plus the amount of the commodity tax exceeded the final price actually paid by home market purchasers (after receiving discounts, rebates and other allowances from the manufacturer). *See* R. Doc. 554 PUBLIC at 6-7. The evidence of these price discrepancies constitutes at least a *prima facie* showing that manufacturers' commodity tax costs were not fully reflected in home market sales prices. Accordingly, even if the *Smith-Corona* holding were somehow applicable, it would seem, in light of the caveat in footnote 26 of that opinion, that the ITA could not merely assume in the face of such a showing, with nothing further, that the tax was fully passed through to home market purchasers. *But see Timken Co.* v. *United States*, 10 CIT —, Slip Op. 86-17, at 56-61 (Feb. 20, 1976) (upholding cost-based circumstances of sale adjustment against evidentiary challenge).

> ties, the stage of the business cycle and the degree of competition among the producers of the product. In short, the Department would have to know the shape and position of the supply and demand curves for a product in the absence of tax to determine the price that would then exist. The Department would have to know these facts for each point in time at which a sale, chosen for comparison to a U.S. sale, occurred.

Korean Televisions I, 49 Fed. Reg. at 7624; *Taiwan Televisions*, 49 Fed. Reg. at 7632; *Korean Televisions II*, 49 Fed. Reg. at 50421. Plaintiffs have persuasively argued in their briefs before the court that the ITA has significantly overstated what is required; that the agency would only need estimates of the normal long-run elasticities of supply and demand for television sets in Japan during a time period including the one under review.[30] They point out that generally accepted economic theory holds that "the burden of a tax is divided between buyer and seller as the ratio of elasticity of supply to elasticity of demand in the relevant range of demand and supply schedules." R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 272 (4th ed. 1984).[31] In any event, whatever the measurement entails it is well established that an administrative agency lacks the authority to disregard a statutory obligation merely because the tasks required are difficult or complicated. *See, e.g., United States* v. *H. Rosenthal Co., supra; United Stattes ex rel. Kansas City Southern Ry Co.* v. *ICC*, 252 U.S. 178, 185–88 (1920); *Continental Steel Co.* v. *United States*, 9 CIT —, 614 F. Supp. 548, 554 (1985). *Appeal docketed*, No. 85–2805 (Fed. Cir, Sept. 24, 1985).

The court lastly turns to the final argument presented by the ITA in *Korean Pianos*. The petitioners therein had urged that the ITA "calculate the relative tax burdens of buyers and sellers in the home market by measuring the relative elasticity of supply and demand for pianos in Korea." 50 Fed. Reg. at 37561. This is the econometric approach discussed above. The ITA's final response to this proposal was as follows:

> Finally, the Department can perceive no economic justification for adjusting the home market-U.S. price differential by anything less than the actual amount of final stage taxes paid by the producers. We believe that the antidumping duty law is intended to remedy situations in which a foreign producer accepts a lesser return on his U.S. sales than on his home market sales. Where the costs of production and sale are identical in both markets, any difference in price will represent a difference in return. Where the costs of production and sale

[30] There is a substantial body of literature on how demand and supply elasticities may be measured. *See, e.g.*, R. Stern, *et al., Price Elasticities in International Trade: An Annotated Bibliograph* (1976); *The Therory and Empirical Analysis of Production* (M. Brown ed. 1967). Indeed, the International Trade Commission has estimated demand elasticities for several industries. See Office of Economic Research, USITC, *Foreign Trade Elasticities for Twenty Industries* (Jan. 1975).

[31] The same authors conclude (at 273) that "a product tax tends to fall on the consumer if demand is inelastic while supply is elastic, and on the producer when the opposite holds." Because the demand for television sets in Japan would naturally show some degree of elasticity, the ITA's assumption that the commodity tax is fully shifted forward to purchasers in all cases is unrealistic and unreasonable.

> differ between markets, any difference in price will represent a difference in return only after the price differential has been adjusted by the net amount of the differences in cost. A difference in final stage tax liability is just as much a difference in the cost of production and sale as any difference in material costs or credit expenses. Therefore, just as we have always adjusted the price differential by the amount of any difference in material costs and credit expenses, we believe we should also make such an adjustment for any difference in final stage tax liability.

Id. at 37564. Whereas the *Smith-Corona* decision sustained the ITA's discretion to assume as a practical matter in limited situations that differences in manufacturer's costs reflect differences in price or value, the ITA now brazenly leaps to a purely cost-based view of the antidumping law, wherein the effect of cost on price is not relevant even in principle. While this may be the antidumping law Commerce officials would like to see, it is not the antidumping law presently in place. As the Federal Circuit emphasized at length in *Smith-Corona*:

> The language of the statute * * * specifies that adjustments are to be made on the basis of differences in *price* or *value*. This approach is followed consistently throughout the antidumping law. Cost is generally relied upon only when value cannot readily be determined from price.
>
> Antidumping duties are imposed on the basis of differences in value, *not* differences in cost. * * * Thus, cost criteria alone will not redress the full margin of dumping to which Congress sought to attach an antidumping duty. Value *must* be considered under the statute.
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> * * * * * * * *
>
> The legislative history reflects a long felt and understandable congressional distrust of *cost* as the basis for the computation of dumping duties.
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> * * * * * * * *
>
> The Secretary may not * * * rely on cost to *the exclusion* of its effect on value.

713 F.2d at 1575–77 (emphasis in original).

It is the duty of the ITA to enforce and administer the provisions of the antidumping law as they have been written by Congress and interpreted by the courts. That Congress intentionally chose to base the calculation of dumping margins on differences in price or value, not differences in cost, is well settled. In 19 U.S.C. § 1677a(d)(1)(C), Congress' addition of the pass-through clause has foreclosed the administrative option of blindly assuming a full pass-through of the adjusted-for tax. Accordingly, on remand, after determining the amount of Japanese commodity tax rebated or not collected upon televisions exported to the United States, the ITA must determine the amount of commodity tax added to or included

in the home market price in comparison sales. These determinations must be based upon substantial evidence. The ITA must then calculate the adjustment in each case in the lesser of these two amounts.

CONCLUSION

To summarize, the ITA abused its discretion by failing to calculate the foreign indirect tax adjustment, provided in 19 U.S.C. § 1677a(d)(1)(C), as an addition to USP in the amount of Japanese commodity tax rebated or not collected upon the merchandise exported to the United States. The ITA further abused its discretion by failing to measure tax absorption in home market sales so as to limit the adjustment by the amount of tax passed through to home market purchasers. The agency's conclusion that a full pass-through occurred to in all cases is not supported by substantial evidence. Therefore, these actions are remanded to the ITA for recalculation of the adjustment in a manner consistent with this opinion.

In accordance with the foregoing, it is ORDERED:

1. That plaintiffs' respective motions, filed pursuant to Rule 56.1 of this court, are hereby granted.
2. That the cross-motion of defendant, United States, for remand is hereby granted in part in accordance with the terms of the foregoing opinion.
3. That the Final Results challenged herein are hereby reversed with respect to the ITA's determination of the adjustment for the Japanese commodity tax under 19 U.S.C. § 1677a(d)(1)(C).
4. That these actions are hereby remanded to the ITA for recalculation of the said adjustment in a manner consistent with the foregoing opinion.
5. That the ITA shall report the results of its recalculations and redeterminations to this court within 90 days after the date of entry of this order.

(Slip Op. 86-44)

UNITED STATES, PLAINTIFF *v.* STANLEY GORDON, DEFENDANT

Court No. 84-1-00074

OPINION

Decided April 25, 1986)

[Plaintiff's motion to compel discovery granted in part; motion for sanctions and to deem certain matters admitted denied.]

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch and *Velta A. Melnbrencis, Esq.*, Civil Division, Department of Justice, for plaintiff.

Fronfield S. deFuria (*Leo A. Hackett, Esq.*), for defendant.

RESTANI, *Judge:* Plaintiff-United States alleges that defendant-Stanley Gordon unlawfully introduced an automobile, attempted to introduce a second automobile, and aided or abetted in the introduction of a third automobile, into the commerce of the United States,[1] in violation of 19 U.S.C. §§ 1481, 1484, 1485 and 1592.[2] Accordingly, plaintiff seeks to have judgment entered against defendant for monetary penalties as provided for in 19 U.S.C. § 1592 (1982).[3] An action is also apparently pending in federal district court, in which plaintiff seeks to have a penalty imposed on this same defendant for his involvement in these same allegedly unlawful importations and attempted importation, pursuant to 19 U.S.C. § 1595a(b).[4] In connection with discovery in the case at bar, plaintiff has served defendant with a request for production of documents and things and a request for admissions, and has attempted to depose defendant. Defendant, asserting the fifth amendment privilege against compulsory self-incrimination, has failed to comply with the request for the production, has refused to respond

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[1] The three automobiles in question have been identified by plaintiff, respectively, as a Morgan 4/4, chassis No. B3352, manufactured in 1974; a Morgan Plus 8, chassis No. R8300, manufactured in 1977; and a Morgan automobile, chassis No. B3977, manufactured in 1977.

[2] Briefly, each automobile was allegedly fitted with a plaque falsely fixing the year of manufacture as 1966, which allegedly facilitated importation without compliance with certain requirements of the National Traffic and Motor Safety Act of 1966, the Clean Air Act, and pertinent regulations implementing the two acts.

[3] 19 U.S.C. § 1592 (1982) provides in relevant part:

(a) Prohibition
(1) General Rule
Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—
(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
(i) any document, written or oral statement, or act which is material and false, or
(ii) any omission which is material, or
(B) may aid or abet any other person to violate subparagraph (A).
(2) Exception
Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

* * * * * * *

(c) Maximum penalties
(1) Fraud
A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.
(2) Gross negligence
A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—
(A) the lesser of—
(i) the domestic value of the merchandise, or
(ii) four times the lawful duties of which the United States is or may be deprived, or
(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.
(3) Negligence
A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—
(A) the lesser of—
(i) the domestic value of the merchandise, or
(ii) two times the lawful duties of which the United States is or may be deprived, or
(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

[4] 19 U.S.C. § 1595a (1982) reads as follows:
§ 1595a. Forfeitures and other penalties
(a) Importation, removal, etc. contrary to laws of the United States
Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent tranportation of any article which is being or has been introduced, or attempted to be introduced into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.
(b) Penalty for aiding unlawful importation
Every person who directs, assists financially or otherwise, or is in any way concerned in any unlawfully activity mentioned in the preceding subsection shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.

substantively to the request for admissions and, beyond stating his present residence and address, has apparently refused to provide substantive answers to plaintiff's deposition questions. Before the court at this time is plaintiff's motion (1) to order defendant to (a) respond fully to plaintiff's first request for production; (b) respond fully to all questions posed by plaintiff at any deposition taken of the defendant; (c) reimburse plaintiff for actual out-of-pocket expenses in connection with the above-mentioned deposition and (2) to deem admitted the matters set forth in plaintiff's first request for admissions. The first issue to be addressed here is to what extent the fifth amendment privilege against self-incrimination may be raised in an action for penalties under 19 U.S.C. § 1592.

The fifth amendment to the United States Constitution states, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." Congress intended that section 1592 provide a civil remedial sanction. See *United States* v. *Murray*, 5 CIT 102, 105–06, 561 F. Supp. 448, 453 (1983); *United States* v. *Alcatex, Inc.*, 328 F. Supp. 129, 132–33 (S.D.N.Y. 1981). Defendant here may still be within the scope of the fifth amendment's self-incrimination clause, however, because the Supreme Court has interpreted the privilege against compulsory self-incrimination as applying in actions other than those labeled as criminal prosecutions. Constitutional protections afforded criminal defendants may apply, despite Congress' intent to create a civil remedy, if the applicable sanctions are "so punitive either in purpose or effect as to negate that intention." *United States* v. *Ward*, 448 U.S. 242, 248–49 (citing *Flemming* v. Nestor, 363 U.S. 603, 616–21 (1960)), *reh'g denied*, 448 U.S. 916 (1980). In addition, the privilege against compulsory self-incrimination may apply in an action that, although civil in form and not so punitive as to give rise to all criminal procedural safeguards, is "quasi-criminal" in nature. *Ward*, 448 U.S. at 251–54; *see United States* v. *United States Coin & Currency*, 401 U.S. 715, 721–22 (1971); *Lees* v. *United States*, 150 U.S. 476, 480–81 (1893); *Boyd* v. *United States*, 116 U.S. 616, 633–34 (1886). Further, the privilege may apply even in a strictly civil (non "quasi-criminal") action where the testimony sought could subject the person questioned to criminal liability. *See, e.g., Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973) (citing *McCarthy* v. *Arndstein*, 266 U.S. 34, 40 (1924)). In any case, the privilege may be invoked only if the threat of prosecution is "substantial and 'real,' and not merely trifling or imaginary." *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968) (citing *Rogers* v. *United States*, 340 U.S. 367, 374, *reh'g denied*, 341 U.S. 912 (1951); *Brown* v. *Walker*, 161 U.S. 591, 599–600 (1896)).

This court has previously concluded that section 1592 is not "so punitive as to 'transform what was clearly intended as a civil remedy into a criminal penalty." *Murray*, 5 CIT at 106, 561 F. Supp. at 453 (double jeopardy clause of fifth amendment not applicable in section 1592 action) (quoting *Rex Trailer Co.* v. *United*

States, 350 U.S. 148, 154 (1956)).[5] Thus, defendant is clearly not entitled to the litany of protections afforded criminal defendants. A determination that section 1592 is "quasi-criminal," however, would place defendant within the scope of the fifth amendment's privilege against compulsory self-incrimination. *See Ward*, 448 U.S. at 253–54 (considering whether action was so far criminal in nature to give rise to fifth amendment protection against compulsory self-incrimination despite inapplicability of such protections as those of sixth amendment and double jeopardy clause of fifth amendment) (citing *United States* v. *Regan*, 232 U.S. 37, 50 (1914) (fifth amendment privilege against compulsory self-incrimination broader than protections of article III and of sixth amendment)).

Defendant relies in large part on *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), wherein the Supreme Court held the fifth amendment privilege against compulsory self-incrimination applicable in a civil forfeiture action. The statute at issue in *U.S. Coin*, 26 U.S.C. § 7302, provides that it is unlawful to possess property intended for use in violating provisions of the internal revenue laws and that "no property rights shall exist in any such property." A forfeiture action was instituted, pursuant to this statute, following defendant's conviction for both failing to register as a gambler with the Internal Revenue Service and failing to pay the related gambling tax. The Court stated that "proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him*, though they may be civil in form, are in their nature ciriminal' for Fifth Amendment purposes." 401 U.S. at 718 (quoting, with emphasis added, *Boyd* v. *United States*, 116 U.S. 616, 634 (1886) (privilege against self-incrimination applicable in customs forfeiture action.)) In support of the conclusion that the statute in question did in fact target for forfeiture an individual's property "by reason of offences committed by him," the Court noted that remission was provided for in accordance with the customs laws. *U.S. Coin*, U.S. at 721 & n.8 (citing 26 U.S.C. § 7327). Thus, an "innocent owner" could seek remission from the Secretary of Treasury by proving that the " 'forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law . . . .' " *Id.* at 721 (quoting 19 U.S.C. § 1618). The Court was convinced, therefore, that the forfeiture statute in question was "intended to impose a penalty only upon those who are signficantly involved in a criminal enterprise." *Id.* at 721–22. As such, defendant could invoke the fifth amendment privilege against compelled self-incrimination.

The statutory provision for administrative remission referred to in *U.S. Coin* appears, along with section 1592, in Chapter 4 of Title

[5] *Murray* was decided under the language of section 1592 in effect prior to its amendment in 1978. Pub. L. No. 95-410, Title I, § 110(a), 92 Stat. 888, 893–97 (1978) (penalty of forfeiture replaced by varying monetary penalties). This amendment, however, is not of the type that would "transform" section 1592 into a criminal statute. If anything, the change makes section 1592 more akin to a purely civil statute. *See infra* discussion.

19 of the United States Code and is applicable to the imposition of a penalty under section 1592.[6] There are, however, several factors which distinguish the instant case from *U.S. Coin*. These distinguishing features become evident when *U.S. Coin* is read in the light of the Court's analysis in *United States* v. *Ward*, 448 U.S. 242, *reh'g denied*, 448 U.S. 916 (1980).

After determining that the statute in *Ward* was neither intended to impose a criminal sanction nor "so punitive either in purpose or effect to negate that intention," 448 U.S. at 248–249, the Court went on to consider whether the statute was "quasi-criminal," thereby affording defendant the privilege against compulsory self-incrimination.[7] In this analysis, the *Ward* Court first noted three factors distinguishing the case from *Boyd* v. *United States*, 116 U.S. 616 (1886). First, the penalty of forfeiture in *Boyd* "had absolutely no correlation to any damages sustained by society or the cost of enforcing the law," 448 U.S. at 254, whereas the monetary penalty in *Ward* was "much more analogous to traditional civil damages." *Id.* Second, as compared to the forfeiture provision in *Boyd*, which was part of the same statutory section as the provision for imprisonment, the civil and criminal remedies in *Ward* were in separate statutes enacted seventy years apart. *Id.* Third, while in *Boyd* there was the danger that the appellant's testimony could prejudice him in future criminal proceedings, the statute in *Ward* specifically barred the use of statutorily mandated disclosures from use in any future criminal actions, other than in actions for perjury or for giving a false statement. *Id.* Finally, and of greater significance to the *Ward* Court than the three factors distinguishing *Ward* from *Boyd*, the Court found "overwhelming evidence" of a Congressional intent to create "a penalty civil in all respects and quite weak evidence of any countervailing purpose or effect." *Id.* The Court declined, therefore, to extend to respondent the fifth amendment privilege against compulsory self-incrimination.

The distinctions made by the Supreme Court of *Ward* and *Boyd* are helpful in the case at bar. First, in 1978, Congress changed the remedy for violation of section 1592 from one of forfeiture to imposition of monetary penalties. Pub. L. No. 95–410, Title I, § 110(a), 92 Stat. 888, 893–97 (1978); *see* S. Rep. No. 778, 95th Cong., 2nd Sess. 18–19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2211, 2230–31; *United States* v. *One Red Lamborghini and One Black Lamborghini*, 10 CIT —, 625 F. Supp. 986, 989 & n.6 (1986), *appeal docketed*, 86–1015 (Fed. Cir. Mar. 17, 1986). Thus, like the statute in *Ward*, section 1592 now more closely resembles "traditional civil dam-

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[6] In addition to its applicability in *U.S. Coin*, remission under § 1618 may be sought by a person interested in property "seized under the provisions of this chapter, [chapter 4—Tariff Act of 1930]" or by a person "who has incurred, or is alleged to have incurred, any fine or penalty thereunder * * *." 19 U.S.C. § 1618 (1982 & Supp. II 1984).

[7] Under consideration in *Ward* was § 311(b)(6) of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(6). This section, which has since been amended, provided that "[a]ny owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of [the act] shall be assessed a civil penalty * * * of not more than $5,000 for each offense." *Id.*

ages" than do statutes, like those in *U.S. Coin* and *Boyd*, which provide for forfeiture. That the concerned statute provides for a monetary penalty rather than for forfeiture, however, is not enough to completely distinguish the holdings of *U.S. Coin* and *Boyd*. *See Lees* v. *United States*, 150 U.S. 476 (1893) (fifth amendment privilege against self-incrimination applicable under statute imposing fixed monetary penalty). Second, like *Ward*, and unlike both *Boyd* and *U.S. Coin* , the criminal and civil remedies here are contained in separate statutes. This too, as in *Ward*, is evidence that the civil penalty is not "quasi-criminal." As to the third factor, unlike the statute in *Ward*, section 1592 contains no use immunity to prevent a defendant from prejudicing himself with respect to a future criminal prosecution. Nonetheless, the court places little emphasis on this fact, because the threat of future criminal prosecution may justify assertion of the fifth amendment privilege against self-incrimination even in a strictly civil proceeding. *See, e.g., Lefkowitz*, 414 U.S. at 77. The question of whether section 1592 is "quasi-criminal" is separate and apart from the issue of whether defendant may incriminate himself under other criminal statutes.

The factor given most weight in *Ward*, Congress' intent to create a civil penalty, as opposed to the statute's "countervailing punitive *purpose or effect*," 448 U.S. at 254 (emphasis added), is instructive in the case at bar. Section 1592 can be said to have, to some degree, a punitive effect. First, the penalty imposed under section 1592 differs with the degree of scienter or culpability of the defendant. *See supra* note 3. This link between the degree of culpability and the penalty imposed is essential to retribution, a principle of punishment rather than of civil damages. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 338 (1983) (citing I. Kant, *The Philosophy of Law* 194–98 (W. Hastie Trans. 1887); C.W.K. Mundle, *Punishment and Desert* in *Philosophy of Punishment* 65, 71–74 (H. Acton ed. 1969)); *cf. Ward*, 448 U.S. at 256–57 (Blackmun, J., concurring) (in deciding whether to classify statute as "quasi-criminal," discounted importance of scienter as factor because it was not mentioned on face of statute). In addition, a defendant in a section 1592 action may be forced to pay the greatest penalty applicable under that provision even if his unlawful conduct did not result in the loss of any revenue to the United States. *See* 19 U.S.C. § 1592(c) (1982) (*supra* note 3) (penalty for fraud may equal domestic value of merchandise regardless of duties lost). Furthermore, under 19 U.S.C. § 1592(d) (1982), any actual duties owing remain owing, whether or not a penalty is assessed.[8] *Compare with Ward*, 448 U.S. at 256 (Blackmun, J., concur-

[8] The court notes, however, that punitive damages may be assessed in some purely civil suits in addition to compensatory damages, and that the amount of purely civil punitive damages, do not necessarily relate to the amount of injury suffered. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981) (punitive damages not intended to compensate injured party but rather to punish tortfeasor and deter similar conduct) (citing Restatement (Second) of Torts, § 908 (1979); W. Prosser, *Law of Torts* 9–10 (4th ed. 1971)).

ring) (civil and compensatory nature of statute evidence by provision that collected assessments be placed in revolving fund used to defray cleanup expenses); see Wheeler, 69 Va. L. Rev. at 338 (civil penalty based on harm caused is less likely to have punitive purpose than civil penalty based on culpability). The statute in question, therefore, appears to have, at least in part, a punitive "effect," whether or not Congress had that "purpose" in mind.

On the other hand, section 1592 has a remedial effect as well. Even prior to the 1978 amendment, this court pointed to the various costs of enforcing section 1592 and to the injury to the government of frustration of its policies through violations of the customs laws, and therefore characterized section 1592 forfeiture as a remedial measure akin to liquidated damages. *Murray*, 5 CIT at 106–07, 561 F. Supp. at 453 (quoting *Alcatex*, 328 F. Supp. at 132–33). This remedial function was bolstered by the amendment of section 1592 which, as noted, now links, under certain circumstances, the penalty imposed to the lawful duties of which the United States was deprived. That is, the maximum penalties vary in amount from the domestic value of the merchandise (for fraudulent violations), to the lesser of either a percentage of the domestic value of the merchandise or a multiple of the duties lost (for gross negligence and negligence).[9] 19 U.S.C. § 1592(c) (1982) (*supra* note 3).

Further, the legislative history makes clear that an important motivation for amending section 1592 was Congress' desire to alleviate the harsh consequences of the forfeiture penalty. The Senate report notes that a problem with the former section 1592 was that once having found a violation, the courts had no alternative but to order forfeiture. This penalty was thought too severe in many cases. S. Rep. No. 778 at 2, 1978 U.S. Code Cong. & Ad. News at 2213. Thus, the trier of fact may award penalties in an amount far below the maximum allowable, presumably based on any rational reason including the degree of damages sustained. By replacing forfeiture with varying monetary penalties, which are subject to reduction by the trier of fact and which, to varying degrees, will relate to damages, Congress has made section 1592 largely remedial, rather than "punitive," both in "purpose" and "effect."[10]

As in *Ward*, there is strong evidence of Congressional intent to create a civil remedial penalty and a relatively weak punitive purpose or effect. When coupled with the relevant distinctions made in

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[9] If a grossly negligent or negligent violation of the statute has no impact on the assessment of duties, the maximum penalty is measured by a percent of the dutiable value of the merchandise. 19 U.S.C. §§ 1592(c)(2), (3) (1982) (*supra* note 3).

[10] The remedial nature of § 1592 is also evidenced by its authorization, in limited circumstances, of seizure under subsection (c)(5). Seizure of the merchandise in question may be effected if there is reasonable cause to believe that a person has violated § 1592(a) and is insolvent or beyond the jurisdiction of the United States, or if other compelling reasons exist. If the merchandise is of the type which may be released into commerce, it is to be returned upon the making of a deposit. 19 U.S.C. § 1592(c)(5) (1982). Under this same provision, if the fine levied under § 1592(c) is not paid within the time specified by law the property may be "forfeited", although 19 U.S.C. § 1613(b) (1982 & Supp II 1984) calls for payback, after sale of such "forfeited" property, of any proceeds in excess of the penalty assessed. Thus, seizure and "forfeiture" here may be seen as part of the overall remedial scheme of § 1592, much like prejudgment attachment in other civil suits, rather than as a form of punishment for criminal conduct.

Ward of the statute at issue in *Boyd*, which distinctions have also been made with respect to section 1592, the court concludes that section 1592 is *not* "quasi-criminal."[11] Thus, defendant here can invoke the fifth amendment privilege against compulsory self-incrimination only if compelled testimony in the case at bar would threaten him with criminal prosecution in a separate action.

It is apparent that the only action in which defendant's testimony in the case at bar might be used against him is the suit, evidently pending in federal district court, brought by the United States under 19 U.S.C. §1592a(b) (1982).[12] (*supra* note 4). As plaintiff points out, the legislative history to section 1595a(b) indicates that this provision was intended as a civil penalty. *See* S. Rep. No. 2326, 83rd Cong. 2d Sess. 6-7, *reprinted in* 1954 U.S. Code Cong. & Ad. News 3900, 3905-06 (eliminating criminal sanction as "practical duplication" of 18 U.S.C. §545). The court's analysis of 19 U.S.C. §1592 earlier in this opinion makes clear, however, that this does not end the court's inquiry. The court must determine whether the statute is "quasi-criminal" for fifth amendment self-incrimination purposes. *See Ward*, 448 U.S. at 253-54. Obviously, if defendant has a fifth amendment privilege applicable to testimony sought to be used against him in a section 1595a(b) action, absent use immunity, that privilege would be meaningless if he could be forced to surrender it here.

In upholding the constitutionality of a forfeiture action brought pursuant to subsection (a) of section 1595a, the Court of Claims noted that this subsection triggers fourth amendment protections and the fifth amendment privilege against compelled self-incrimination. *Doherty* v. *United States*, 500 F.2d 540, 544 (Ct. Cl. 1974). Plaintiff challenges the applicability of this statement in *Doherty* to the case at bar on two grounds, neither of which the court finds persuasive. First, plaintiff notes that the privilege against self-incrimination was not raised in *Doherty* and, thus, that the court's statement regarding the privilege is dicta. Although this characterization may be technically correct, the accuracy of the court's statement is supported by Supreme Court precedent. In *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), the Court was confronted with a statute which, although in the context of a liquor control law, like section 1595a(a), called for the forfeiture of vehicles used to effect the illegal transportation of articles. It was clear to the Court that forfeiture under the law in question was "a pen-

[11] One might argue that §1592 should be analyzed in a piecemeal fashion, and that the fraud provisions are "quasi-criminal," while the negligence provisions are not. The court believes that, in order to determine Congressional intent, the statute must be viewed as a whole, inasmuch as Congress enacted the provisions together as part of one scheme for assessing civil penalties in certain circumstances.

[12] The court notes that defendant's alleged conduct is apparently actionable as a criminal offense under 18 U.S.C. §545 (1982). Defendant has entered into a plea bargain agreement covering criminal charges brought under §545 for two of the importations in question, however, and a §545 action for the third importation would be barred by the statute of limitations. *See* 18 U.S.C. §3282 (1982). Thus, defendant is in no danger of further prosecution under §545 and, therefore, cannot invoke the fifth amendment privilege based on potential prosecution under that statute. Civil forfeiture under §545 might be considered "quasi-criminal", but the statute of limitations has run on such an action, as well. 19 U.S.C. §1621 (1982).

alty for the criminal offense." *Id.* at 701. Following the lead of *Boyd, supra,* the Court held that the law was "quasi-criminal" and, as such, the exclusionary rule barred the admissibility, in the forfeiture proceedings, of evidence seized in violation of the fourth amendment. *Id.* at 700–02. Therefore, it is evident that *Doherty's* characterization of section 1595a(a), with respect to the fourth amendment, is accurate, and the court will impose no narrower construction on the fifth amendment privilege against compulsory self-incrimination. *See Boyd,* 116 U.S. at 634 (fourth amendment protections and fifth amendment self-incrimination clause found applicable to forfeiture action). Therefore, the court follows the view expressed in *Doherty* that the fifth amendment self-incrimination clause applies to section 1595a(a).

Plaintiff's second challenge to the relevance of *Doherty* to the case at bar is that the action currently pending in district court against defendant is for a monetary penalty under section 1595a(b) rather than for forfeiture under section 1595a(a). Plaintiff argues, in essence, that the applicability of the self-incrimination clause to section 1595a(a) would be based on the propositions of law governing forfeitures, and, therefore, has no bearing on an action for a monetary penalty under section 1595a(b). As noted earlier, however, the Supreme Court has held the fifth amendment privilege against compulsory self-incrimination applicable to a statute calling for a fixed monetary penalty. *Lees* v. *United States,* 150 U.S. 476 (1893).[13] Thus, that section 1595a(a) provides for forfeiture while section 1595a(b) provides for a monetary penalty is insufficient to distinguish the two provisions for purposes of applying the privilege against compulsory self-incrimination. Further, the relative severity of the respective penalties does not distinguish these two subsections as to the fifth amendment privilege. In fact, there is simply no way to tell, apart from the facts of a given case, whether the value of that which is forfeited under section 1595a(a) (anything from a donkey to a jet) will be greater or less than the monetary penalty imposed under section 1595a(b), which is determined exclusively by the value of the imported article(s). Furthermore, unlike section 1592, there is no provision for imposition of a lesser penalty by the court or jury. Thus, the trier of fact is precluded from considering the amount of damage suffered. Therefore, there appears to be no greater likelihood that the penalty imposed under section 1595a(b) will more closely approximate the costs of enforcement and the damage inflicted than will the penalty imposed under section 1595a(a).[14] Furthermore, the two subsections

[13] The Supreme Court's adherence to this view is supported by its opinion in *Ward.* Although the *Ward* Court held the privilege inapplicable to the statute in question in that case, its reasoning went far beyond an assertion that the statute called for a monetary penalty rather than for forfeiture. 448 U.S. at 253–54 (*see supra* discussion).

[14] The court notes that there is a difference between the relative scope of these sections. Section 1595a(a) calls for the forfeiture of that which is used in any way to import, conceal, harbor, etc., articles unlawfully introduced into the United States. 19 U.S.C. § 1595a(a) (1982) (*supra* note 4). By comparison, section 1595a(b) imposes a mon-

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of section 1595a work together to punish those involved in illegal importations. Thus, apparently, one who hides illegal merchandise in a vehicle could forfeit the vehicle and be liable for the value of the hidden merchandise as well. Both provisions are part of a single statutory scheme intended to address illegal conduct.

Finally, the conclusion reached in *U.S. Coin* that the statute in question imposed a penalty " '*by reason of offences committed by* [an individual],' " 401 U.S. at 718 (quoting, with emphasis added, *Boyd*, 116 U.S. 616, 634 (1886)), seems equally fitting to both subsections (a) and (b) of section 1595a. This conclusion is supported by the fact that, presumably, administrative remission under 19 U.S.C. § 1618 applies to section 1595a, where lesser degrees of scienter are involved, just as it applied to the statute in question in *U.S. Coin*. *See supra* note 5 and accompanying text. Unlike section 1592, section 1595a(b) raises no considerations which lessen the impact of this factor. The court is unable to discern any meaningful distinctions between the statute at issue in *U.S. Coin* and section 1595a, or between subsections (a) and (b) of section 1595a, with regard to the fifth amendment privilege against self-incrimination. The court must conclude, therefore, that section 1595a(b), like section 1595a(a), is a "quasi-criminal" sanction rather than a strictly civil remedial measure. As such, to the extent that defendant's testimony in the section 1592 action at bar presents a real and appreciable threat of prosecution under 19 U.S.C. § 1595a(b) (1982), defendant may invoke the privilege against compulsory self-incrimination.[15]

Plaintiff objects that, even if the fifth amendment privilege may be invoked in the case at bar, defendant has failed to raise it properly. A blanket refusal to comply with a request for production, to respond to questions raised at a deposition, or to respond to a request for admissions, is unacceptable. *See General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974). Rather, "[t]he privilege must be asserted with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify." *Id.* (citing *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951)). Accordingly, the court directs defendant to specify, as to each question or request to which he objects, "the grounds for objection, and, wherever possible without self-incrimination, to what degree a responsive answer might have a tendency to incriminate [him]." *Gatoil, Inc.* v. *Forest Hill State Bank*, 104 F.R.D. 580, 582 (D. Md. 1985)

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etary penalty, equal to the value of the imported article(s), on one who aids, or is in any way involved, in the unlawful conduct described in section 1595a(a). 19 U.S.C. § 1595a(b) (1982) (*supra* note 4). Certainly this difference in scope cannot be the basis for holding the self-incrimination clause inapplicable to section 1595a(b), the broader of the two provisions.

[15] The court finds it premature to address what inferences might be drawn in the § 1592 action at bar from defendant's assertion of the fifth amendment privilege in this strictly civil action. *See Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976) (prison disciplinary proceeding) (quoting 8 J. Wigmore, *Evidence* 439 (McNaughton rev. 1961) (fifth amendment does not preclude negative inference " 'where the privilege is claimed by a party to a civil cause' " (emphasis omitted)).

(citing *de Antonio* v. *Solomon,* 41 F.R.D. 447, 449–50 (D. Mass. 1966)). Plaintiff may then file a motion to compel discovery if there is any further dispute as to defendant's right to invoke the privilege against self-incrimination, in the light of this court's holding regarding the limited applicability of the privilege to the case at bar.

Finally, plaintiff has moved for reimbursement of expenses incurred in the unsuccessful attempt to depose defendant and to have deemed admitted the matters set forth in plaintiff's first request for admissions. Although defendant has overstated the scope of the fifth amendment privilege and has invoked the privilege in an improper form, his conduct, thus far, does not warrant these sanctions.

In conclusion, defendant may invoke the fifth amendment privilege against compulsory self-incrimination in this section 1592 action only to the extent that his testimony presents a real and appreciable threat of prosecution under section 1595a(b). In addition, to properly invoke the fifth amendment privilege, defendant must raise it in the manner described in this opinion.

(Slip Op. 86–45)

CARLISLE TIRE & RUBBER CO., DIVISION OF CARLISLE CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, DONG-AH TIRE IND. CO., LTD., DEFENDANT-INTERVENOR, HEUNG-AH TIRE IND. CO., LTD., DEFENDANT-INTERVENOR

Court No. 84-7-01058

Before DICARLO, *Judge.*

Plaintiffs move to set aside the Court's order substantially affirming a Department of Commerce determination that inner tubes from Korea were not sold at less than fair value. Plaintiffs allege that Commerce used conflicting weights to make merchandise and drawback adjustments. Defendant says weights are irrelevant to the drawback adjustment. The Court holds that under 19 U.S.C. § 1677a(d)(1)(B) Commerce must determine the weight of the tubes to correctly allocate duties imposed on raw materials imported into Korea to tubes exported from Korea to the United States.

Defendant argues that even if the drawback adjustment is excluded the resulting margins of approximately .45 percent are less than .5 percent *ad valorem* and therefore *de minimis.* The Court holds that there is no rule that margins less than .5 percent are *de minimis* since Commerce has not promulgated such a rule in accordance with the notice and comment provisions of the Administrative Procedures Act, 5 U.S.C. § 553. Commerce may disregard the drawback adjustment and find the margines of .45 percent *de minimis,* but it must explain on the record why such margins are *de minimis* in this case.

[The case is remanded.]

(Decided April 29, 1986)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson and *J. Eric Nissley),* for plaintiffs.
Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Department of Justice (*Sheila N. Ziff*) for defendant.

Dow, Lohnes & Albertson (William Silverman, John C. Jost, and Margaret B. Dardess), for defendant-intervenor Dong-Ah Tire Ind. Co., Ltd.

Arnold & Porter (Richard A. Johnson and Stephan E. Becker), for defendant-intervenor Heung-Ah Tire Ind. Co., Ltd.

Memorandum Opinion and Order

DiCarlo, *Judge:* Plaintiffs, domestic producers of inner tubes, have moved for relief from the Court's order of October 24, 1985, affirming, except as to verification of the weights of the merchandise exported by intervenor Dong-Ah Tire Ind. Co., Ltd. (Dong-Ah), a final determination by the Department of Commerce, International Trade Administration (Commerce) that inner tubes from the Republic of Korea (Korea) are being sold in the United States at not less than fair value. *Carlisle Tire & Rubber Co. v. United States*, 9 CIT —, 622 F. Supp. 1071 (1985). Commerce subsequently filed a report of the weighing of Dong-Ah's tubes during its on-site verification, in accordance with the Court's order.

The questions to be decided are:

(1) whether Commerce has established a rule that dumping margins of less than .5 per cent *ad valorem* are to be disregarded as *de minimis*; and

(2) (a) whether Commerce must have determined the weights of intervenors' merchandise exported to the United States when it adjusted the United States price of the merchandise to account for import duties imposed by Korea on raw materials which were rebated (referred to by the parties as "drawback adjustments"); and, if so,

(b) whether those weights are different than the weights of the same merchandise verified by Commerce to adjust the foreign market value of the merchandise to allow for differences in physical characteristics of the merchandise sold in the United States and Korea ("merchandise adjustments"); and, if so,

(c) whether Commerce may use both sets of weights in accordance with law.

Background

Plaintiffs sought reconsideration of the Court's affirmance of Commerce's determination on two points. First plaintiffs challenged Commerce's comparison of the imported inner tubes according to product category as "such or similar merchandise" under 19 U.S.C. §§ 1677(16) and 1677b(a)(1)(A) (1982 & Supp. II 1984). On December 27, 1985, the Court, in an unpublished memorandum opinion and order, denied that part of plaintiffs' motion, explaining that plaintiffs' arguments were addressed at 9 CIT at —, 622 F. Supp. at 1076 & n.7.

Second, plaintiffs said that (1) commerce used one set of tube weights, derived from weighing sample tubes, for purposes of making merchandise adjustments pursuant to 19 U.S.C.

§ 1677b(a)(4) and 19 C.F.R. § 353.16 (1984), and another, higher, set of tube weights, derived from invoices and packing documents, for making drawback adjustments pursuant to 19 U.S.C. § 1677a(d)(1)(B), (2) Commerce's use of different export tube weights for different purposes was not supported by substantial evidence or in accordance with law, and (3) the Court should order Commerce to use the higher drawback weights in making merchandise adjustments.

In its December opinion the Court held that defendant and intervenors had not sufficiently addressed plaintiffs' argument that Commerce used conflicting sets of weights for the same merchandise in making drawback adjustments. The Court directed defendant to address at oral argument whether a dumping margin greater than *de minimis* would result if Commerce lowered the drawback adjustment using the tube weights verified by Commerce for determining the merchandise adjustment.

Defendant moved to set aside the Court's order directing oral argument claiming that the tube weights issue was moot since Commerce determined that the complete elimination of the drawback adjustment would result in dumping margins of .453506 percent for intervenor Heung-Ah Tire Ind. Co., Inc. (Heung-Ah) and, .457188 percent for Dong-Ah. In its brief defendant argued that:

> the dumping margins are still below .5 percent and are thus *de minimis*. Since elimination of the adjustments for drawback would still result in *de minimis* margins, the issue raised by plaintiff concerning the use of a different set of data for making drawback adjustments is irrelevant.

Defendant's Motion for Order (1) Withdrawing Court Order Directing Oral Argument to be Held and (2) Entering Judgment, at 4. Commerce subsequently lowered the Heung-Ah margin to .440206 percent by eliminating the adjustment to United States price for Korean defense tax rebated for export sales and upwardly adjusting the United States price to account for duties and defense tax rebated on the inner tube valves.

Although plaintiffs had not objected to Commerce's use of the *de minimis* concept in Commerce's final determination, which found weighted average dumping margins of .03 percent for Heung-Ah and .01 percent for Dong-Ah, plaintiffs now argued that the new margins were not *de minimis*, and that the Commerce "rule" that margins less than .5 percent are *de minimis* is arbitrary and contrary to law.

At oral argument defendent declined to say what dumping margin would result if Commerce calculated drawback adjustment using the merchandise adjustment weights. Defendant said the drawback adjustment would not be recalculated without an order of remand. At the conclusion of oral argument the Court requested additional briefing on the *de minimis* issue.

The Court how holds that the action must again be remanded.

THE *De Minimis* ISSUE

Commerce has made no finding that margins of approximately .45 are *de minimis* in this investigation. Nevertheless, the Court agrees with counsel for defendant that if Commerce could validly apply a .5 percent *ad valorem* standard for determining whether a dumping margin is *de minimis*, judgment for defendant would be appropriate. But, the Court does not agree that Commerce can validly apply the .5 percent *de minimis* standard on this record.

Commerce may employ the *de minimis* concept. *See ASG Industries, Inc.* v. *United States*, 67 CCPA 11, 19, C.A.D. 1237, 610 F.2d 770, 776 (1979); *Carlisle Tire and Rubber Co.* v. *United States*, 1 CIT 352, 353-54, 517 F. Supp. 704, 706 (1981). In *Carlisle*, plaintiffs argued the even *de minimis* bounties and grants must be countervailed. Commerce found the aggregate subsidy to be .28 percent. The Court held that the *de minimis* doctrine applied in countervailing duty investigations. The Court did not discuss whether a fixed rate would be appropriate, or whether the .28 percent subsidy was *de minimis*, but the Court said that "a *de minimis* benefit is, by definition, of no significance whatever, * * *." 1 CIT at 354, 517 F. Supp. at 706.

When Commerce assumed jurisdiction over antidumping investigations in 1980, it published final regulations for administering the antidumping law after public notice and comment. Commerce responded as follows to the public comment that it promulgate a regulation making dumping margins of 1.5 percent or less *de minimis*:

> This suggestion was not adopted. While, under current practice, margins as high as 0.3 percent have been considered *de minimis*, no conclusions have yet been reached on whether a fixed standard for *de minimis* margins in antidumping investigations is appropriate and, if so, what that level should be. *If and when such a determination is made, appropriate changes in the regulations will be proposed.*

45 Fed. Reg. 8182, 8185-86 (1980) (emphasis added). Commerce apparently recognized that such a *de minimis* standard, when and if adopted, would be subject to public notice and comment.

So far as the Court is aware, Commerce has never proposed a rule, or even claimed, that a .5 percent test applies in all cases. However, Commerce did state in July, 1982:

> Since the Department assumed responsibility for administration of the countervailing duty law on January 2, 1980 it has consistently applied the *de minimis* principle and has not found to be countervailable any entries made on or after January 1, 1980, which are subject to aggregate net subsidy rates of less than 0.5 percent *ad valorem*. This consistent administrative practice recognizes that at some point a benefit becomes so small that it is of no significance.

Countervailing Duty Order in Float Glass from Belgium, 47 Fed. Reg. 32467, 32468 (1982).

Without deciding whether the antidumping law allows Commerce to promulgate a rule that a particular *ad valorem* percentage is *de minimis* in all cases, the Court holds that any such rule must be promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982) Commerce has not done this.

Under the APA, "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribed law or policy * * *." 5 U.S.C. § 551(4) (1982). The APA requires that when an agency issues a rule it must publish a notice of rulemaking in the Federal Register, "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b), (c).

The relevant exceptions to APA notice and comment are for "interpretive rules" and "general statements of policy." 5 U.S.C. § 553(b)(3)(A).

An "interpretive rule" under the APA does not create new law, rights, or duties. *General Motors Corp.* v. *Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 558–59 (D.C. Cir. 1983). Insofar as defendant claims the .5 percent threshold determines the rights and duties of parties to antidumping and countervailing duty proceedings before Commerce, the Court holds that the standard is not within the "interpretive rule" exception.

Nor is the .5 percent standard a "general statement of policy" under the APA. Courts have employed two criteria for distinguishing "rules" from "general statements of policy." A statement of policy is not a rule if (1) it acts only prospectively, and (2) it "genuinely leaves the agency and its decision-makers free to exercise discretion." *American Business Ass'n.* v. *United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). As applied by defendant in its brief, the .5 percent standard has present, not merely prospective, effect. Defendant does not argue that Commerce officials have discretion to find dumping where the margin is less than .5 percent.

The remaining exceptions to 5 U.S.C. § 553 are not relevant. A *de minimis* rule would not "clearly and directly" involve a "foreign affairs function" under section 553(a)(1), *see Mast Industries* v. *Regan*, 8 CIT 214, 596 F. Supp. 1567, 1580–83 (1984). Nor is the "good cause" exception, section 553(b)(B), applicable since there has been no finding by Commerce that the exception applies.

Since the .5 percent standard has not been promulgated in accordance with the notice and comment procedures of the APA, and

since it is not within any of the exceptions to those procedures, the Court holds that the standard is not a "rule".

Even though there is no "rule" that margins less than .5 percent are *de minimis*, Commerce may find that margins of approximately .45 percent are *de minimis* in this investigation. To do this Commerce must explain the basis for its decision. *See Motor Vehicle Manufacturers Ass'n. of the United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48–49 (1983); *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *SCM Corp.* v. *United States*, 84 Cust. Ct. 227, 236–37, C.R.D. 80–2, 487 F. Supp. 96, 103–104 (1980). *See Local 777, Democratic Union Organizing Comm.* v. *NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978).

Commerce has recognized that margins under .5 percent may not be *de minimis*. In 1981 Commerce, continuing previous Department of Treasury determinations in the case, found that a .37 percent subsidy on fasteners from Japan was not *de minimis* when compared wtih the duties on the merchandise, .7 and .2 percent *ad valorem*. *Certain Fasteners From Japan*, 46 Fed. Reg. 53484 (1981).

Small margins may be important. Duties on the tubes for tires other than bicycle tires, classifiable under item 772.60, Tariff Schedules of the United States, are currently 3.9 percent. The United States negotiated staged reductions in duty for the merchandise by as little as .1 percent per year during the period 1980–1986. *See* Proclamation No. 4707, 44 Fed. Reg. 72348, 72527 (1979). Should Commerce choose to disregard the drawback adjustment, it must explain why the resulting margins of approximately .45 percent are *de minimis* in this investigation.

Conflicting Tube Weight Determinations

Intervenors paid Korea duty and defense tax when they imported synthetic rubber and other raw materials into Korea. Some of the materials were used in the manufacture of the tubes in this case. Pursuant to Korean law intervenors were entitled to a rebate of the duty and tax imposed on the raw materials used in making the tubes when the merchandise was exported from Korea.

The parties disagree on the tube weights Korea used in assessing the rebate. Plaintiffs claim Korea assessed the rebate on the basis of higher invoice and packing list weights supplied by intervenors rather than lower weights Commerce verified in making merchandise adjustments. Intervenors argue that Korea calculated the rebate on the basis of lower tube weights. Commerce does not indicate which weights Korea used in calculating the rebate; in its final determination Commerce says only that a drawback adjustment was made. 49 Fed. Reg. at 26781.

Defendant argues that the tube weights are irrelevant to the drawback adjustment under the antidumping law. Defendant says Commerce need only verify the amount of rebate received by inter-

venors. The Court is concerned that the negative determination may have resulted from the use of conflicting sets of weights.

Under the antidumping law dumping margins for imported merchandise are calculated by comparing determinations of foreign market value and United States price. *See* 19 U.S.C. § 1673 (1982 & Supp. II 1984). Upward and downward adjustments are made to foreign market value and United States price pursuant to statutory provisions. To prevent dumping margins from arising because the exporting country rebates import duties and taxes for raw materials used in exported merchandise, the antidumping law provides for an offsetting adjustment in the calculation of United States price. Under section 1677a(d)(1)(B), United States price must be increased by "the amount of any import duties *imposed* by the country of exportation which have been rebated." (Emphasis added). This amount must be verified. 19 U.S.C. § 1677e(a).

Congress has not directed Commerce to adjust United States price merely by the amount of the rebate received by the foreign producer; Commerce must adjust the United States price by the amount of duty imposed by the home market government on raw materials rebated because of merchandise exported to the United States. *See Color Television Receivers From Korea; Final Results of Administrative Review of Antidumping Duty Order,* 49 Fed. Reg. 50420, 50428 (Comment 33). The Court knows of no way, and none has been proposed, for Commerce to correctly allocate duties "imposed" on the raw materials imported into Korea to the tubes exported from Korea to the United States that does not involve determining the weights of the tubes.

The Court holds that Commerce necessarily must make a finding as to the weights of the merchandise when it adjusts United States prices pursuant to section 1677a(d)(1)(B). The failure of Commerce to state those weights, which constitutes the factual basis for a determination under section 1677a(d)(1)(B), leaves the record in this investigation incomplete.

Although Commerce is given great latitude in interpreting statutes it administers, our appellate court has recently affirmed that an agency interpretation may not contravene the legislative intent. *American Lamb Co.* v. *United States,* No. 86-560, slip op. at 13 (Fed. Cir. Feb. 28, 1986). Accordingly, the Court remands the action for Commerce to state on the record the exported tube weights accepted as valid by Commerce, and how rebates to intervenors were allocated to the exported tubes for purposes of an adjustment under section 1677a(d)(1)(B).

The Court has previously held that Commerce acted within its discretion in weighing sample tubes to determine tube weights for making merchandise adjustments, 9 CIT —, 622 F. Supp. at 1081-83. But if the weights accepted by Commerce for the section 1677a(d)(1)(B) adjustment are different than the weights verified by Commerce for the merchandise adjustment, and the use of these

conflicting sets of weights results in a negative rather than affirmative determination, Commerce must choose one set of weights to use for both adjustments.

CONCLUSION

The case is remanded to Commerce. Should Commerce choose to disregard the drawback adjustment, it must explain why the resulting margins of approximately .45 percent are *de minimis* in this investigation.

If Commerce adjusts United States price under section 1677a(d)(1)(B), Commerce is directed to supplement the record setting forth the tube weights used in calculating that adjustment. If the weights used by Commerce in making that adjustment were different than the weights verified by Commerce for merchandise adjustment purposes, and the use of these conflicting sets of weights results in a negative rather than affirmative determination, Commerce must choose one set of weights to use for both adjustments, and recalculate one of the adjustments and the dumping margins.

Consistent with the foregoing, Commerce is directed to supplement the record and make any necessary redetermination of intervenors' weighted-average dumping margins within thirty days from the date of this opinion.

So ordered.

(Slip Op. 86-46)

RETAIL CLERKS INTERNATIONAL UNION, LOCAL 149F—FOOTWEAR DIVISION, PLAINTIFF *v.* RAYMOND J. DONOVAN, UNITED STATES SECRETARY OF LABOR, DEFENDANT

Court No. 81-11-01604

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff, on behalf of former employees of Prestige Shoe Company, moves for judgment on the agency record, contending that determination of the Secretary of Labor that the Prestige workers were not eligible for trade adjustment assistance benefits is unsupported by substantial evidence and not in accordance with law.

Held: Since the Secretary's methodology in reaching his determination was in accordance with law, and his conclusion supported by substantial evidence on the record, the plaintiff's motion is denied, and the action is dismissed.

[Judgment for the defendant; the action is dismissed.]

(Decided April 29, 1986)

Ira H. Weinstock, P.C., for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff*), for the defendant.

RE, *Chief Judge:* In this action, plaintiff, Retail Clerks International Union, Local 149F—Footwear Division, on behalf of the

former employees of Prestige Shoe Company (Prestige), seeks review of a final determination by the Secretary of Labor which denied certification of eligibility under the worker adjustment assistance program of the Trade Act of 1974, tit, II, § 221-249, 284, 19 U.S.C. § 2271-2321, 2395 (1982 & Supp. I 1983). The Secretary determined that the plaintiff's petition failed to satisfy the third eligibility requirement of section 222 of the Trade Act of 1974. 19 U.S.C. § 2272(3) (1982). Specifically, the Secretary found that the workers were not eligible for assistance because an increase in imports did not contribute importantly to Prestige's decline in sales or production, and, thus, to the separation from employment of Prestige's workers.

Plaintiff contests the Secretary's determination. Plaintiff contends that the Secretary's reliance on a customer survey, and the failure to take any testimony from Prestige officials or attorneys, renders the Secretary's decision arbitrary and unsupported by substantial evidence. In essence, plaintiff challenges the nature and extent of the Secretary's investigation.

After reviewing the administrative record and all pleadings and contentions, the Court holds that the Secretary's denial of certification is supported by substantial evidence, and is in accordance with the law. Hence, the determination of the Secretary is affirmed.

Administrative Proceedings

On August 29, 1980, plaintiff filed a petition with the Office of Trade Adjustment Assistance (OTAA) for certification of eligibility to apply for trade adjustment assistance benefits pursuant to section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a) (1982). The OTAA published a notice of the filing of the petition, and initiated an investigation. 45 Fed. Reg. 62,580 (1980).

The OTAA's investigation disclosed that all of the employees of Prestige were engaged in employment related to the production of women's casual shoes. These employees performed various tasks, such as designing, cutting, assembling, and packaging the shoes. Prestige produced some component parts, such as heels and soles, and purchased the remaining parts from independent suppliers. The shoes produced were primarily made of leather and vinyl uppers with rubber bottoms, and were assembled by a cementing process. The company was a wholly owned subsidiary of Frier Industries, Incorporated, but operated independently from other Frier Industries subsidiaries. It ended production of women's shoes on July 31, 1981.

The OTAA's investigation included a report on the women's nonrubber footwear industry. This report disclosed that imports of these goods fluctuated, with a net increase of 0.2 percent between 1976 and 1980. There was, however, a decline of 20.1 percent in imports of that type of footwear in 1980 compared to 1979. The OTAA investigation further revealed that domestic production decreased

2.4 percent between the years 1979 and 1980, due mainly to a reduced demand for women's nonrubber footwear.

On the basis of information supplied by the president of Prestige, the OTAA found that "virtually all" of Prestige's decline in sales between 1979 and 1980 was attributable to decreases in purchases by one major customer. A confidential survey disclosed that this customer had decreased its imports of women's footwear in 1980 compared to the previous year, while increasing its purchases of domestically produced shoes.

Based on these findings, the Secretary concluded that imports of women's footwear did not contribute importantly to the downturn in Prestige's sales, and the resulting separation of the firm's employees. Consequently, the Secretary denied plaintiff's petition for certification. 46 Fed. Reg. 42,542 (1981).

Plaintiff then sought administrative reconsideration of the Secretary's negative determination. Its claim was largely based on the fact that the Company had ceased its operations since the certification request was made, and that the Secretary had failed to inquire into the company's reasons for having ceased operations. The union asserted that Company officials had told workers in June 1981 that the Company had lost a substantial amount of business from a major customer as a result of imports. This was the same customer the OTAA had surveyed in its investigation.

In dismissing plaintiff's application for reconsideration, the OTAA explained that the request provided no new information which would furnish a basis for certifying the former employees of Prestige for assistance. The OTAA noted that the survey of Prestige's main customer revealed not only that this customer had decreased its imports but also that it had increased its domestic purchases of women's footwear. Based on these findings, the Secretary found no new grounds for reconsideration.

On November 25, 1981, plaintiff commenced this action by filing a letter complaint seeking judicial review of the Secretary's final determination. This action is now before the Court on the plaintiff's motion for judgment on the administrative record.

DISCUSSION

Under section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1976), the Secretary is to certify a group of workers as eligible to apply for adjustment assistance if it is determined:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an ap-

> propriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Trade Act of 1974 § 222, 19 U.S.C. § 2272 (Supp. I 1983).

The Secretary has interpreted section 222(3) of the Trade Act of 1974 in a uniform and consistent manner. Under this interpretation, trade adjustment assistance is authorized for workers if it can be established that an important causal nexus exists between increased imports and the workers' separation from employment. *Abbott* v. *Donovan*, 6 CIT 92, 101, 570 F. Supp. 41, 49 (1983). The term "contributed importantly" refers to the causal nexus, and suggests a direct and substantial relationship between increased imports and the decline in sales and production. *See Estate of Finkel* v. *Donovan*, 9 CIT —, —, 614 F. Supp. 1245 1251 (1985); *Abbott* v. *Donovan*, 8 CIT 237, 240, 596 F. Supp. 472, 475 (1984).

The Secretary denied petitioner's claim for certification for failure to satisfy the third eligibility criterion. This determination was based on the finding that increased imports did not contribute importantly to the decline in sales or production at Prestige, or to the separation from employment of the workers.

Plaintiff maintains that the court must set aside the Secretary's denial of certification because the OTAA's findings were flawed and insufficient. More specifically, plaintiff challenges the OTAA's method of investigation. Plaintiff contends that the customer survey did not permit the OTAA adequately to evaluate the reasons for Prestige's decline in sales and eventual closing. Plaintiff also asserts that the OTAA's failure to take any testimony from Company officials and attorneys renders the Secretary's decision arbitrary and unsupported by substantial evidence.

Section 284(b) of the Trade Act of 1974, 19 U.S.C. § 2395(b) (1982) empowers this court to review a decision by the Secretary which denies a petition for certification of eligibility for trade adjustment assistance benefits. Judicial review is available to ensure that the determination by the Secretary is supported by substantial evidence contained in the administrative record, and is in accordance with law.

The OTAA, as the Secretary's designate pursuant to section 248 of the Trade Act of 1974, 19 U.S.C. § 2320 (1982), is authorized to conduct an investigation of plaintiff's petition. Trade Act of 1974 § 221(a), 19 U.S.C. § 2271(a) (1982). While the OTAA has a duty to investigate, the nature and extent of the investigation are matters that properly rest within the sound discretion of the administrative officials. *Woodrum* v. *Donovan*, 4 CIT 46, 51, 544 F. Supp. 202, 206 (1982), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984).

The use of the customer survey as an investigative method has been approved by the courts in several cases. *Cherlin* v. *Donovan*, 7 CIT 158, 585 F. Supp. 644 (1984); *United Glass and Ceramic Workers of North America* v. *Marshall*, 584 F.2d 398 (D.C. Cir. 1978);

Local 167, International Molders and Allied Workers' Union v. *Marshall*, 643 F.2d 26 (1st Cir. 1981). While the courts have characterized the survey method as "not a very sophisticated test," they have, nevertheless, held that the technique is a reasonable means of ascertaining the existence of a causal nexus between increased imports and a firm's lost sales, and the resulting separation of its employees. *Local 167, supra*, 643 F.2d at 30 (quoting *United Glass & Ceramic Workers, supra*, 584 F.2d at 405).

As this court explained in *Cherlin* v. *Donovan*:

> [A]dministrative officials must have the necessary flexibility to discharge their official responsibilities under the worker adjustment assistance program. While the court may identify flaws in the methodology used by the Secretary, it is not the court's function to substitute its own method of analysis for that of the Secretary. Rather, the court will substantially defer to the Secretary's "chosen technique, only remanding a case if that technique is so marred that the Secretary's finding is arbitrary or of such nature that it could not be based on 'substantial evidence.'"

Cherlin, 7 CIT at 162, 585 F. Supp. at 647 (quoting *United Glass & Ceramic Workers, supra*, 584 F. 2d at 405). In this case the plaintiff has not offered any sound justification for disregarding the OTAA's customer survey as a reasonable and proper means of assessing the impact of imports on Prestige.

As noted, the investigation revealed that one major customer accounted for nearly all of Prestige's decline in sales between 1979 and 1980. Thus, on these facts, it was not improper for OTAA to survey only this major customer. Although Prestige's sales to this customer dropped dramatically from 1979 to 1980, the customer's response to the survey clearly indicated that this customer decreased its import purchases between 1979 and 1980, while increasing its purchases of casual women's shoes from domestic sources. Thus, there is no question that there is substantial evidence on the record to support the Secretary's finding that imports did not contribute importantly to the worker separations at Prestige.

The plaintiff's contention that the Secretary's failure to take testimony from company officials to explain the closing of the company's operations was improper is without merit. Although this court has the authority to remand a case to the Secretary to take new evidence, the court will exercise this power only when "good cause" is shown. *See* 19 U.S.C. § 2395(b) (1982).

Section 284(b) of the Trade Act of 1974 provides in pertinent part:

> (b) The findings of fact by the Secretary of Labor * * * if supported by substantial evidence, shall be conclusive; but the court, for good cause shown; may remand the case to such Secretary to take further evidence * * *.

19 U.S.C. § 2395(b) (1982). As this court explained in *Abbott* v. *Secretary of Labor*, 3 CIT 54 (1982), this statute, in conjunction with 28 U.S.C. § 2640(c) (1982), requires that this court review the Secretary's determination on the basis of the administrative record, and prohibits the introduction of new evidence in this court. 3 CIT at 55. As the *Abbott* court noted, the rule that judicial review of administrative action must be based on the administrative record, and that the reviewing court may not receive new evidence is a well-settled principle of administrative law. *Id.* (citing *Cincinnati, N.O. & Tex. Pac. Ry.* v. *ICC*, 162 U.S. 184 (1896); *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963)). Nevertheless, the statute expressly provides that, "for good cause shown," the action may be remanded to the Secretary for the purpose of receiving new evidence. 19 U.S.C. § 2395(b) (1982). The Secretary may then make new or modified findings on the basis of the new evidence. *Id.* Thus, in the *Abbott* case, in accordance with this provision, the court remanded the action to the Secretary to supplement the record with the proferred evidence. 3 CIT at 55.

In the present case, the court must determine whether the plaintiff has shown "good cause" for remanding the action to take further evidence. It is the determination of the Court the plaintiff has not demonstrated good cause for remand.

In July 1981, an OTAA official spoke directly with the President of Prestige, who provided information pertaining to the company's sales and market. This information indicated that the company's decline in sales was largely attributable to one customer's decreased purchases. The information received from this customer indicated that the Prestige sales were lost to *domestic*, not import, competition. There is no reason to believe that the customer supplied incorrect information to the OTAA. Nor is there reason to believe that Prestige officials would have better information about this customer's purchases than the customer itself. Thus, the OTAA had no obligation to seek out indirect information about sales losses from Prestige officials, when it had received direct and reliable information from the customer itself.

Conclusion

After a thorough review of the record, the contentions of the parties, and the applicable law, the Court has concluded that the Secretary's investigation was not so marred that his determination was arbitrary, or not in accordance with law. The record reveals that the customer survey provided the Secretary with a sufficiently accurate picture of the factors accounting for the significant majority of Prestige's lost sales. These sales, the record reveals, were lost to domestic, not import, competition.

Accordingly, it is the determination of the court that the Secretary of Labor's denial of certification is supported by substantial evidence, and is in accordance with the trade adjustment assistance

provisions of the Trade Act of 1974. The final determination of the Secretary is, therefore, affirmed, and plaintiff's action is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/60	Carman, J. April 15, 1986	Mattel, Inc.	82-8-01184	Item 737.22 16.8% or 16.1%	Item A774.55 Free of duty Item 774.55 7.7%	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
C86/61	Carman, J. April 15, 1986	Mattel, Inc.	83-12-01718	Item 737.22 17.5% or 16.8% Item 737.24 15.4%	Item A774.55 Free of duty Item 774.60 8.5%	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
C86/62	Carman, J. April 15, 1986	Mattel, Inc.	85-4-00584	Item 737.24 14.8% or 14.1%	Item A774.55 Free of duty	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
C86/63	DiCarlo, J. April 15, 1986	Eiseman-Ludmar Co.	82-7-00928, etc.	Item 798.00 9%, 8.4% or 7.9% by similitude	Item 703.35 $2.33 per dozen + 3.4%, $2.13 per dozen + 3.1%, $1.92 per dozen + 2.8%	Eisenman-Ludmar Co. v. U.S., decided April 8, 1985	New York Fur felts, and similar articles
C86/64	DiCarlo, J April 1[illegible] 1986	Izod Outerwear	81-9-01299, etc.	Item 380.84 $0.25 per lb. plus 27.5%	Item 376.56 16.5%	Izod Outerwear v. U.S., S.O. 85-72	New York Men's 100% nylon jackets, style No. 8932
C86/65	DiCarlo, J April 15, 1986	Izod Outerwear	83-12-01757, etc	Item 379.95 $0.25 per lb. + 27.5%, or $0.21 per lb. + 27.5%	Item 376.56 15% or 13.5%	Izod Outerwear v. U.S., S.O. 85-72	New York Men's 100% nylon jackets, style No. 8932

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/66	Restani, J. April 16, 1986	Alfa-Laval Inc.	83-12-01778, etc.	Item 661.35 4.2% or 4%	Item 870.40 Free of duty	Customs Service ruling dated Sept. 27, 1983	Buffalo Bulk milk coolers or farm tanks
C86/67	Restani, J. April 16, 1986	Applied Motion Products	83-9-01363	Item 682.25 10.3%	Item 682.30 5.3%	Agreed statement of facts	Los Angeles Stepper motors
C86/68	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01837	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., *aff'd*, 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/69	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01838	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., *aff'd*, 708 F.2d 715 (Fed. Cir. 1983)	Boston, Leather
C86/70	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01839	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., *aff'd*, 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
C86/71	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01844	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S. *aff'd*, 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/37	Re, C.J. April 14, 1986	Alexander's Inc.	74-1-00133	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	New York Not stated
V86/38	Re, C.J. April 14, 1986	Mitsui & Co.	73-8-02365	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	San Francisco Mobile Los Angeles New York Philadelphia Boston San Juan Savannah Not stated
V86/39	Re, C.J. April 15, 1986	Mitsui & Co.	74-5-01419	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	San Juan New York Mobile Detroit Los Angeles Portland Cleveland Philadelphia Not stated
V86/40	Aquilino, J. April 15, 1986	C. Itoh & Co.	79-9-01477	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	New York Not stated

ABSTRACTED VALUATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/41	Watson, J. April 16, 1986	Providence Import Co.	R60/8827	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Baltimore Rugs
V86/42	Watson, J. April 16, 1986	Toyomenka, Inc	R63/4647, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/43	Watson, J. April 16, 1986	Transamerican Import & Export Co.	R61/4287, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles, New York Transistor radios together with their accessories and parts; an entirety
V86/44	Watson, J. April 16, 1986	Transamerican Import & Export Co.	R61/15412, etc	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/45	Watson, J. April 16, 1986	Transamerican Import & Export Co.	R61/18100 etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/46	Re. C.J. April 17, 1986	Marubeni America Corp.	74-7-01781	Export value	CIF resale unit prices less any included ocean freight and marine insurance and without any percentage additions	Agreed statement of facts	New York Binoculars
V86/47	Watson, J. April 17, 1986	Bemo Shipping Co.	267192A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
V86/48	Watson, J. April 17, 1986	Benj Wolf Co.	227722A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk scarves, etc.

V86/49	Watson, J. April 17, 1986	Bunge Corp.	215224A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Seattle Wool hooked rugs
V86/50	Watson, J. April 17, 1986	Bunge Corp.	276197A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Wool hooked rugs
V86/51	Watson, J. April 17, 1986	C.M. Import & Export Corp.	R61/2678, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; an entirety
V86/52	Watson, J. April 17, 1986	Eclair Scarf Corp.	275061A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk and rayon scarves
V86/53	Watson, J. April 17, 1986	Gosho Trading Co.	R58/20919, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/54	Watson, J. April 17, 1986	International Importers, Inc.	R61/4250, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/55	Watson, J. April 17, 1986	J.C. Penney Corp.	R60/154000, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Wilmington Brassieres, gloves and oval tubing mats
V86/56	Watson, J. April 17, 1986	S.E. Laszlo	262996A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
V86/57	Watson, J. April 17, 1986	S.E. Laszlo	R58/25912, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
V86/58	Watson, J. April 17, 1986	Mercury Radio & Battery Corp.	R64/6423, etc.	Export value	Appraised unit value less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety

ABSTRACTED VALUATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/59	Watson, J. April 17, 1986	Mitsui & Co.	R63/6536, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; an entirety
V86/60	Watson, J. April 17, 1986	Morris Struhl, Inc.	R59/8654, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Stainless steel flatwear
V86/61	Watson, J. April 17, 1986	Nichimen Co.	R63/869, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles New York Sewing machine heads
V86/62	Watson, J. April 17, 1986	Nichimen Co.	R63/3946, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; an entirety
V86/63	Watson, J. April 17, 1986	Nichimen Co.	R63/6517, etc.	Export value	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts, an entirety
V86/64	Watson, J. April 17, 1986	Nomura (American) Corp.	R64/2035, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Seattle Transistor radios together with their accessories and parts; an entirety
V86/65	Watson, J. April 17, 1986	Rugby Int'l Corp.	R65/14659	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Tube mats
V86/66	Watson, J. April 17, 1986	S. Shamash & Sons, Inc.	R58/22454 etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics, etc.
V86/67	Watson, J. April 17, 1986	S. Shamash & Sons, Inc.	R58/23315, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics

V86/68	Watson, J. April 17, 1986	S. Shamash & Sons, Inc.	R58/23748, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
V86/69	Watson, J. April 17, 1986	Toyobo N.Y. Inc.	R59/5086, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Wool cloth
V86/70	Watson, J. April 17, 1986	W.J. Byrnes & Co.	R59/11763, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk fabrics, etc.

Appeals to the U.S. Court of Appeals for the Federal Circuit

Philipp Brothers, Inc. v. United States, 10 CIT —, Slip Op. 86-16 (Feb. 14, 1986), *appeal docketed,* No. 86-1122 (Fed. Cir. April 14, 1986).

Yuri Fashions Co. v. United States, 10 CIT —, Slip Op. 86-33 (March 24, 1986), *appeal docketed,* No. 86-1126 (Fed. Cir. April 14, 1986).

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

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20/21

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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 20 MAY 28, 1986 No. 21

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General Notices

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T 17.6/3-4:

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 86-96)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates for exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
April 1, 1986	$0.006899
April 2, 1986	.006821
April 3, 1986	.006775
April 4, 1986	.006752
Israel shekel:	
April 1-4, 1986	N/A
South Korea won:	
April 1-2, 1986	.001127
April 3, 1986	.001126
April 4, 1986	.001125
Taiwan N.T. dollar:	
April 1, 1986	.025760
April 2, 1986	.025767
April 3, 1986	.025773
April 4, 1986	.025780

(LIQ-03-01 S:COM CIE)

Dated: April 4, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-97)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates for exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
April 7, 1986	$0.006656
April 8, 1986	.006873
April 9, 1986	.006878
April 10, 1986	.006878
April 11, 1986	.006964
Israel shekel:	
April 7-11, 1986	N/A
South Korea won:	
April 7, 1986	.001125
April 8, 1986	.001124
April 9-10, 1986	.001125
April 11, 1986	.001126
Taiwan N.T. dollar:	
April 7, 1986	.025786
April 8, 1986	.025793
April 9, 1986	.025800
April 10, 1986	.025813
April 11, 1986	.025826

(LIQ-03-01 S:COM CIE)
Dated: April 11, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-98)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below.

The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
April 14, 1986	$0.006911
April 15, 1986	.006911
April 16, 1986	.007052
April 17, 1986	.007130
April 18, 1986	.007163
Israel shekel:	
April 14–18, 1986	N/A
South Korea won:	
April 14, 1986	.001126
April 15–16, 1986	.001125
April 17–18, 1986	.001126
Taiwan N.T. dollar:	
April 14, 1986	.025853
April 15, 1986	.025860
April 16, 1986	.025867
April 17, 1986	.025880
April 18, 1986	.025887

(LIQ-03-01 S:COM CIE)

Dated: April 18, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-99)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and other concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
April 21, 1986	$0.007138
April 22, 1986	.007220

April 23, 1986	.007225
April 24, 1986	.007194
April 25, 1986	.007202
Israel shekel:	
April 21-25, 1986	N/A
South Korea won:	
April 21-22, 1986	.001127
April 23-25, 1986	.001128
Taiwan N.T. dollar:	
April 21-25, 1986	.025893

(LIQ-03-91 S:COM CIE)

Dated: April 25, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-100)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
April 28, 1986	$0.007294
April 29, 1986	.007283
April 30, 1986	.007289
Israel shekel:	
April 28-30, 1986	N/A
South Korea won:	
April 28, 1986	.001127
April 29, 1986	.001128
April 30, 1986	.001127
Taiwan N.T. dollar:	
April 28, 1986	.025900
April 29, 1986	.025907
April 30, 1986	.025913

(LIQ-03-01 S:COM CIE)
Dated: April 30, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-101)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

France franc:	
April 4, 1986	$0.132100
Ireland pound:	
April 4, 1986	1.2250
Portugal escudo:	
April 4, 1986	.005952

(LIQ-03-01 S:COM CIE)
Dated: April 4, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-102)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

France franc:	
April 7, 1986	$0.131170
Republic of South Africa rand:	
April 8, 1986	.49100
April 11, 1986	.49390

(LIQ-03-01 S:COM CIE)

Dated: April 11, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-103)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
April 17, 1986	$0.063898
April 18, 1986	.064164
Belgium franc:	
April 17, 1986	.022124
April 18, 1986	.022017
Denmark krone:	
April 17, 1986	.122249
April 18, 1986	.121877
Germany deutsche mark:	
April 17, 1986	.450857
April 18, 1986	.450857
Ireland pound:	
April 17, 1986	1.3730
April 18, 1986	1.3712
Italy lira:	
April 17, 1986	.000658
Netherlands guilder:	
April 17, 1986	.399840
April 18, 1986	.399202

Republic of South Africa rand:	
April 14, 1986	.49150
April 16, 1986	.49900
April 17, 1986	.50500
April 18, 1986	.50000
Switzerland franc:	
April 17, 1986	.541419
April 18, 1986	.538503

(LIG-03-01 S:COM CIE)

Dated: April 18, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-104)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
April 21, 1986	$0.064558
April 22, 1986	.064746
April 23, 1986	.064779
April 24, 1986	.064599
April 25, 1986	.065509
Belgium franc:	
April 21, 1986	.022139
April 22, 1986	.022232
April 23, 1986	.022306
April 24, 1986	.022272
April 25, 1986	.022512
Denmark krone:	
April 21, 1986	.122474
April 22, 1986	.122812
April 23, 1986	.123047
April 24, 1986	.122790

April 25, 1986	.124224
Finland markka:	
April 21, 1986	.200803
April 22, 1986	.200521
April 23, 1986	.201613
Germany Deutsche mark:	
April 21, 1986	.453206
April 22, 1986	.454030
April 23, 1986	.455373
April 24, 1986	.454339
April 25, 1986	.459559
Ireland pound:	
April 21, 1986	1.3775
April 22, 1986	1.3775
April 23, 1986	1.3795
April 24, 1986	1.3790
April 25, 1986	1.3990
Italy lira:	
April 21, 1986	.000660
April 22, 1986	.000662
April 23, 1986	.000664
April 24, 1986	.000662
April 25, 1986	.000669
Japan yen:	
April 23, 1986	.005905
April 24, 1986	.005917
April 25, 1986	.005949
Netherlands guilder:	
April 21, 1986	.401365
April 22, 1986	.402091
April 23, 1986	.403470
April 24, 1986	.402576
April 25, 1986	.407166
New Zealand dollar:	
April 21, 1986	.57300
April 22, 1986	.56950
April 23, 1986	.57600
April 24, 1986	.58320
April 25, 1986	.57950
Republic of South Africa rand:	
April 21, 1986	.50000
April 22, 1986	.49900
April 23, 1986	.49500
Spain peseta:	
April 25, 1986	.007189
Switzerland franc:	
April 21, 1986	.540541
April 22, 1986	.542005

April 23, 1986	.544366
April 24, 1986	.543183
April 25, 1986	.550055

(LIQ-03-01 S:COM CIE)
Dated: April 25, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-105)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
April 28, 1986	$0.065746
April 29, 1986	.065317
April 30, 1986	.065660
Belgium franc:	
April 28, 1986	.022630
April 29, 1986	.022512
April 30, 1986	.022635
Denmark krone:	
April 28, 1986	.124572
April 29, 1986	.124031
April 30, 1986	.124688
Finland markka:	
April 28, 1986	.202840
April 29, 1986	.202020
April 30, 1986	.202429
Germany deutsche mark:	
April 28, 1986	.462000
April 29, 1986	.459559
April 30, 1986	.461894
Ireland pound:	
April 28, 1986	1.4030

April 29, 1986	1.3985
April 30, 1986	1.4044
Italy lira:	
April 28, 1986	.000672
April 29, 1986	.000669
April 30, 1986	.000671
Japan yen:	
April 28, 1986	.005983
April 29, 1986	.005958
April 30, 1986	.005967
Netherlands guilder:	
April 28, 1986	.409082
April 29, 1986	.407498
April 30, 1986	.409752
New Zealand dollar:	
April 28, 1986	.58450
April 29, 1986	.58370
April 30, 1986	.58430
Norway krone:	
April 28, 1986	.144770
April 29, 1986	.144331
Spain peseta:	
April 28, 1986	.007241
April 29, 1986	.007219
April 30, 1986	.007239
Sweden krona:	
April 28, 1986	.142806
April 30, 1986	.142714
Switzerland franc:	
April 28, 1986	.552944
April 29, 1986	.549300
April 30, 1986	.551572
United Kingdom pound:	
April 28, 1986	1.5550
April 29, 1986	1.5520
April 30, 1986	1.5510

(LIQ-03-01 S:COM CIE)

Dated: April 30, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

Performance Review Boards: Appointment of Members

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces the appointment of the members of the U.S. Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4313(c)(4). The purpose of the PRB's is to review senior executive employees' performance and make recommendations regarding performance and performance awards.

DATE: The Performance Review Boards become effective on May 15, 1986.

FOR FURTHER INFORMATION CONTACT: Jerry L. Padalino, Director, Office of Human Resources, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 1134, Washington, D.C., (202) 377-9205.

SUPPLEMENTARY INFORMATION: There are two Performance Review Boards in the U.S. Customs Service as follows:

1. The Performance Review Board to review Senior Executives rated by the Commissioner and Deputy Commissioner is composed of the following members:

Stephen E. Higgins, Director, Bureau of Alcohol, Tobacco and Firearms;
Mitchell A. Levine, Assistant Commissioner, Comptroller, Financial Management Service;
John W. Mangels, Director, Office of Operations, Department of Treasury;
Larry B. Sheafe, Assistant Director (Investigations), U.S. Secret Service; and
Richard Wassenaar, Assistant Commissioner (Criminal Investigations), Internal Revenue Service.

2. The Performance Review Board to review all other Senior Executives is composed of the following members:

William P. Rosenblatt, Assistant Commissioner, Office of Enforcement, U.S. Customs Service;

William Green, Assistant Commissioner, Office of Internal Affairs, U.S. Customs Service;
Eugene H. Mach, Assistant Commissioner, Office of Inspection and Control, U.S. Customs Service;
Michael H. Lane, Assistant Commissioner, Office of Commercial Operations, U.S. Customs Service;
James W. Shaver, Assistant Commissioner, Office of International Affairs, U.S. Customs Service;
D. Lynn Gordon, Acting Comptroller, U.S. Customs Service;
Jerry L. Padalino, Director, Office of Human Resources, U.S. Customs Service;
William J. Griffin, Regional Commissioner, Northeast Region, U.S. Customs Service;
James R. Grimes, Regional Commissioner, South Central Region, U.S. Customs Service;
Donald F. Kelly, Regional Commissioner, New York Region, U.S. Customs Service;
Edward F. Kwas, Regional Commissioner, Southeast Region, U.S. Customs Service;
William Logan, Regional Commissioner, Southwest Region, U.S. Customs Service;
Richard McMullen, Regional Commissioner, North Central Region, U.S. Customs Service; and
Quintin L. Villanueva, Jr., Regional Commissioner, Pacific Region, U.S. Customs Service.

Dated: May 9, 1986.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, May 15, 1986 (51 FR 17849)]

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19 CFR Part 175

Receipt of Domestic Interested Party Petition Concerning Eligibility of Mexican Inner Tubes for GSP Duty-Free Treatment

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs has received a petition submitted on behalf of several domestic interested parties with respect to a Customs ruling that certain inner tubes imported from Mexico would be eligible for duty-free treatment under the Generalized System of Preferences (GSP). The petitioner contends that the inner tubes do not qualify for GSP duty-free treatment because the threshold Customs determination that the imported material from which the inner tubes are produced undergoes a substantial transformation into a separate and distinct article of commerce which, in turn, is used as a constituent material in producing the final article which is imported into the U.S., is incorrect. The petitioner believes that duty

should be assessed on the inner tubes under the appropriate provision of the Tariff Schedules of the United States. This document invites comments with respect to the correctness of the determination of GSP-eligibility.

DATE: Comments must be received on or before July 14, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Myles B. Harmon, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a domestic interested party petition has been filed with respect to a decision in which Customs ruled that certain inner tubes imported from Mexico would be eligible for duty-free treatment under the Generalized System of Preferences (GSP).

Under the GSP program established pursuant to title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.), certain articles imported directly from a beneficiary developing country (BDC) may be eligible for duty-free treatment if considered the growth, product, manufacture or assembly of the BDC, and if the sum of the cost or value of materials of the BDC, plus the direct costs of processing performed in the BDC, is not less than 35 percent of the appraised value of the article at the time of its entry into the U.S. The GSP program is implemented by §§ 10.171-10.178, Customs Regulations (19 CFR 10.171-10.178). Pursuant to § 10.177(a)(2), Customs Regulations (19 CFR 10.177(a)(2)), materials of which a GSP-eligible article is comprised, if not wholly the growth, product, or manufacture of a BDC, must be substantially transformed in the BDC into a new and different article of commerce in order for those materials to be considered to be produced in the BDC so that their cost or value may be counted toward the 35 percent value-content requirement. In other words, for the cost of materials from a non-BDC to be counted toward the 35 percent value-content requirement, the materials first must be substantially transformed into a new and different intermediate article of commerce and then must be used in the production of a new and different final article of commerce which is imported into the U.S.

On August 8, 1984, Customs issued ruling 071703 (C.S.D. 85-12, 19 Cust. B. and Dec. No. 7 at 22, February 13, 1985), which stated that when finished vulcanized rubber tubes were produced in

Mexico, a BDC, from material known as masterbatch which was imported from a non-BDC, there was a substantial transformation of the masterbatch into a new and different intermediate article of commerce, unvulcanized tubes. Therefore, the cost or value of the masterbatch could be counted toward the GSP 35 percent value-added requirement when the final product, finished vulcanized rubber tubes, were imported into the U.S. The conclusion that the unvulcanized tubes were a separate and distinct article of commerce from the masterbatch and from the finished vulcanized rubber tubes was based upon review of the Explanatory Notes to the international Customs Cooperation Council Nomenclature (CCCN) and the future international Harmonized System (HS) of tariff classification. Because Customs determined that the unvulcanized tubes were separate and distinct articles of commerce, the value of the masterbatch was permitted to be counted toward the 35 percent value-added requirement. Accordingly, the inner tubes imported from Mexico would be eligible for duty-free treatment under the GSP.

On December 24, 1985, a petition was submitted on behalf of several domestic interested parties who are manufacturers and producers in the U.S. of a class or kind of merchandise similar to the merchandise which is imported from Mexico. The petitioner claims that the processing in Mexico of masterbatch material imported from a non-BDC into finished inner tubes does not involve the production of a new and different intermediate article of commerce before the final article is produced. Uncured or unvulcanized tubing is not an intermediate constituent material, as Customs ruled, because it has no practical commercial viability. Trade in unvulcanized tubing suitable for making inner tubes is not possible as the short shelf-life of the tubing does not permit maintenance of commercial inventories.

The petitioner also contends that the international classification provisions relied upon in Customs decision do not support the conclusion reached inasmuch as the Explanatory Note to the CCNN referenced in the decision is concerned with a different product than tubing used in the manufacture of inner tubes.

For these reasons, the petitioner believes that the requirement in § 10.177(a)(2), Customs Regulations, is not satisfied and the cost or value of the masterbatch, imported to Mexico from a non-BDC, may not be counted toward the GSP value-content requirement.

COMMENTS

Pursuant to § 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on this issue. The domestic interested party petition, as well as all comments received in response to this notice, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4,

Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This notice is published in accordance with § 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 30, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 15, 1986 (51 FR 17746)]

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

Procedural Handbook
Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10007.

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 20 JUNE 4, 1986 No. 22

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 113

Proposed Customs Regulations Amendment Relating to Carrier Liabilities for Unlawful Lading, Exportation or Disposition of Export-Controlled Merchandise

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide for the assessment of liquidated damages under the international carrier's bond for unlawfully lading, exporting, or disposing of merchandise which is subject to the export control laws. Under the new bond provision, Customs would demand the redelivery of merchandise which has been seized or detained for violations of the export control laws. Customs would also demand the redelivery of merchandise which has been exported and is subsequently discovered or suspected to be in violation of the export control laws, but which is still in the carrier's possession on the date of the demand for redelivery. Failure to comply with these demands would result in the assessment of liquidated damages in an amount equal to three times the value of the merchandise that is not redelivered. This amendment is necessary for more effective enforcement of the export control laws.

DATE: Comments must be received on or before July 21, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Elaine Colley, Entry Procedures and Penalties Division (202-566-8317) or William Lawlor, Carriers Drawback and Bonds Division (202-566-5856), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Export Administration Regulations contained in title 15, Code of Federal Regulations, Parts 368 through 399 (15 CFR Parts 368–399), and the International Traffic in Arms Regulations found in title 22, Code of Federal Regulations, Parts 120 through 130 (22 CFR Parts 120–130), provide for sanctions in the event that export-controlled merchandise is exported or attempted to be exported without a valid license issued by either the Department of Commerce or the Department of State. Among these sanctions are the issuance of monetary penalties against those responsible for the illegal attempted or completed exportation, seizure and forfeiture of the merchandise involved, and subsequent denial of export privileges. In addition, title 22, United States Code, § 401 (22 U.S.C. 401), provides for the seizure and detention of any vessel, vehicle or aircraft which is being used or attempted to be used or has been used in an illegal exportation of munitions of war or other export-controlled merchandise. Also, title 18, United States Code, § 549 (18 U.S.C. 549), provides for criminal penalties for unlawfully removing any merchandise from Customs custody.

Customs has been delegated the authority to enforce the Export Administration Regulations and the International Traffic in Arms Regulations pursuant to 15 CFR 386.8 and 22 CFR 127.4, respectively. Under this authority Customs may demand, pursuant to 15 CFR 386.9, the redelivery or retention of merchandise which is known or suspected to be in violation of the export control regulations.

Customs also has the authority to enforce the export control regulations by virtue of the authority granted the Secretary of the Treasury, pursuant to 22 U.S.C. 401, to seize and forfeit illegal exportations of war materials and other articles, as well as the conveyances used to export the articles. Also, under § 113 of the Export Administration Amendments Act of 1985 (P.L. 99–64), effective July 12, 1985, Customs was given additional authority to enforce the export control regulations.

Customs has been enforcing the export control laws and regulations under its Operation Exodus program. This enforcement effort has necessarily depended, to a large extent, upon the cooperation of the exporting carriers in (1) not exporting or otherwise disposing of merchandise which Customs has placed under seizure or detention pending a determination as to whether a valid export license covering the merchandise has been issued and (2) redelivering to Customs or retaining merchandise which has been exported and is subsequently found or suspected to be in violation of the export control laws. During the past two years, however, Customs has become aware that some carriers are exporting detained or seized merchandise, despite the presence of warning labels on the merchandise indicating that it is under Customs seizure or detention, and despite notification to the carrier management of the detention or seizure. There have also been instances where carriers have not

complied with Customs demand to redeliver or retain already exported merchandise subsequently found or suspected to be in violation of the export control laws, even though it is still in the carriers' possession.

Although the carriers' action may subject the conveyance to seizure and forfeiture under 22 U.S.C. 401 for its use in the illegal exportation, Customs views this as a drastic remedy which would entail much time and resources expended in effecting the seizure. Instead, it is believed that seeking liquidated damages under the international carrier's bond for exportations in violation of the export control laws, would be more expeditious, effective, and less of a drain upon Customs resources. Also, this sanction is within Customs control and can be used for every transgression, whereas a seizure action would require the U.S. Attorney to institute legal proceedings which is very time consuming.

The provisions of the international carrier's bond are contained in § 113.64, Customs Regulations (19 CFR 113.64). In § 113.64, however, there is no existing provision setting forth liquidated damages for illegal exportations of export-controlled merchandise. Customs has the authority to enact such a provision by virtue of § 623(a), Tariff Act of 1930, as amended (19 U.S.C. 1623(a)), which provides that "In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce." Pursuant to 15 CFR 386.8 and 22 CFR 127.4, Customs is authorized to enforce the export control laws and regulations. Under the authority of 19 U.S.C. 1623(a), Customs may therefore require a bond to assure compliance with these laws and regulations.

PROPOSAL

Accordingly, Customs proposes to amend Part 113, Customs Regulations (19 CFR Part 113), to include a provision in the international carrier's bond that sets forth liquidated damages for illegal exportations under the export control laws. It is proposed to add a new paragraph (e) to § 113.64 (19 CFR 113.64), that would require the carrier to redeliver to Customs, within 30 days after a demand for redelivery: (1) illegally disposed of, laded or exported merchandise that has been placed under seizure or detention; and/or (2) merchandise which has been exported and is subsequently found or suspected to be in violation of the export control laws, but which is still in the carrier's possession. The demand for redelivery would be made within 20 days of Customs discovery of the unlawful or suspected unlawful disposition or exportation. Any demand under proposed paragraph (e) would specify the terms and conditions of

compliance. If the carrier fails to comply with the redelivery notice, it would be liable for liquidated damages in an amount equal to three times the value of the merchandise that is not redelivered.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 113

Carriers, exports, bonds.

PROPOSED AMENDMENT

It is proposed to amend Part 113, Customs Regulations (19 CFR Part 113), as set forth below.

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 would continue to read as follows:

AUTHORITY: 19 U.S.C. 66, 1623, 1624, Subpart E also issued under 19 U.S.C. 1484.

2. It is proposed to amend § 113.64 by adding a new paragraph (e), to read as follows:

§ 113.64 International Carrier Bond Conditions.

* * * * * * *

(e) *Unlawful disposition, lading or exportation.* (1) Principal agrees that it will not allow seized or detained merchandise, marked with warning labels of the fact of seizure or detention, to be placed on board a vessel, vehicle or aircraft for exportation or to be otherwise disposed of without written permission from Customs, and that if it fails to prevent such placement or other disposition, it will redeliver the merchandise to Customs within 30 days, upon demand made within 20 days of Customs discovery of the unlawful placement or other disposition.

(2) Principal agrees that it will act, in regard to merchandise in its possession on the date the redelivery demand is issued, in accordance with any Customs demand for redelivery made within 20 days of Customs discovery that the merchandise was or may have been exported in violation of the export control laws.

(3) Obligors agree that if the principal defaults in either of these obligations, they will pay, as liquidated damages, an amount equal to three times the value of the merchandise which was not redelivered.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 8, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 22, 1986 (51 FR 18801)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 86-47)

BONANZA TRUCKING CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA ET AL., DEFENDANTS

Court No. 86-03-00350

MEMORANDUM

[Plantiff's application for injunction granted; defendants' motion for judgment on agency record denied.]

(Decided May 1, 1986)

Soller, Singer & Horn (Carl R. Soller, Margaret H. Sachter and *William C. Shayne)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Paula N. Rubin)* for the defendants.

AQUILINO, *Judge:* The plaintiff New York corporation seeks to set aside and enjoin a decision of the defendant Commissioner of Customs to revoke its licenses to cart bonded merchandise and to operate a container station. In addition to opposing the equitable relief requested by the plaintiff, the defendants have interposed a motion for judgment on the administrative record pursuant to the CIT Rule 56.1.

BACKGROUND

Bonanza Trucking Corporation's licenses [1] were issued by the Customs Service on May 29, 1969 and on August 2, 1976, respectively. The applications for both licenses had been submitted by the company's president, Angelo Ferrugia.

In or about May 1984, a multi-count indictment was returned in the United States District Court for the Eastern District of New York, charging Mr. Ferrugia with obstruction of justice, perjury and tax evasion. As of August 30, 1984, Mr. Ferrugia resigned as an officer of Bonanza, and he transferred all of his stock to his

[1] *See* administrative record document ("RD") F-2.

brother Salvatore. The company's counsel notified the Customs Service of this resignation and transfer of ownership in a letter dated September 12, 1984 and which transmitted copies of the corporate documents. *See* RD F-3. Thereafter, a jury found Mr. Ferrugia guilty of one violation of 18 U.S.C. § 1503 and of one violation of 18 U.S.C. § 1623(a). On November 8, 1984, judgment of conviction was entered, imposing fines of $5,000 and five years' probation on each count. *See* RD F-4.

After having apparently conducted an internal investigation of the facts and circumstances of the criminal proceeding, Customs, over the signature of its Area Director, JFK Airport Area, issued a letter to Bonanza stamped May 8, 1985 and stating:

> * * * Pursuant to § 112.30 of the Customs Regulations (19 C.F.R. 112.30), the District (Area) Director of Customs may revoke or suspend the license of a cartman if the holder of such a license or an officer of a corporation holding such a license is convicted of a felony (19 C.F.R. 112.30(a)(5)).
>
> Accordingly, I propose to revoke your license for the following reason:
>
> CHARGE: Violation of § 112.30(a)(5) of the Customs Regulations which provide in pertinent part for revocation if an officer of a corporation holding a cartman's license is convicted of a felony.
>
> SPECIFICATION: On May 2, 1984, Angelo Ferrugia, the President and sole owner of Bonanza Trucking Corp., was indicted by a Federal Grand Jury on 25 counts covering perjury, obstruction of justice and tax evasion. On September 20, 1984 Angelo Ferrugia was found guilty of perjury, in violation of 18 U.S.C. 1023(a) [*sic*] and obstruction of justice in violation of 18 U.S.C. 1503. Although we received the letter of resignation of Angelo Ferrugia dated August 30, 1984, Mr. Ferrugia has continued to act as a de facto officer of Bonanza Trucking Corp. after his resignation * * *. RD B.

A second, similar letter was sent the same day, revoking Bonanza's license to operate the container station. *See* RD A. Both letters informed the company of its right to appeal.

In a letter dated May 14, 1985 [RD C], Bonanza requested a hearing pursuant to 19 C.F.R. §19.48(b) on the revocation of its container-station license. A second letter dated May 14th [RD D] requested a hearing pursuant to 19 C.F.R. §112.30 on the revocation of the license to cart. Both letters called for production of any documents supporting the allegations made in the May 8 notices of revocation.

The requests for a hearing were granted, but Customs refused to produce any documents prior thereto on the ground that

> there is no requirement that the government produce evidence to support its case against the license holder. In addition, it would not be in the interest of justice for the government to voluntarily submit evidence to the license holder and not have

the opportunity to make a similar request of the license holder. RD E.

The Customs District Director, St. Louis, Missouri, was appointed hearing officer, and the parties appeared before him on June 20, 1985.

At the hearing, the Service's Assistant Regional Counsel called two witnesses, namely, Anthony M. Liberta, who, as JFK Area Director, has revoked Bonanza's licenses, and the probation officer responsible for post-sentence supervision of Angelo Ferrugia. Nine exhibits were also presented by the Service, to wit, The Journal of Commerce's *1985 Transportation Telephone Tickler* listing of Bonanza Trucking Corp. and correspondence with the company's office manager on that listing [RD F-1]; the licenses; the September 12, 1984 letter and enclosed corporate documents; the judgment of conviction; excerpts from the transcript of the trial of Mr. Ferrugia in the distict court [RD's F-5, F-6, F-7]; and the transcript of the imposition of his sentence [RD F-8].

Bonanza's counsel at the hearing (and now before this court) was not Angelo Ferrugia's lawyer during his lengthy trial. At the hearing on June 20th, counsel, who apparently was unfamiliar with the trial transcript and who has not been afforded an opportunity to review the selected excerpts beforehand, objected to their introduction into evidence (on the ground of non-relevance). *See, e.g.,* RD F, pp. 30-31. The objection was overruled,[2] as was a similar objection to reliance on the sentencing transcript. *See id.* at 33. On cross-examination, Mr. Liberta indicated that, prior to this issuance of the license revocations, he had received and reviewed a report of the Customs internal investigation. *See id.* at 35, 45. When Bonanza's counsel requested that this document be produced, he was overruled,[3] as was his request that the witness be directed to at least name the author of the report. *See id.* at 41. At the end of the attempted cross-examination, the hearing officer rejected counsel's effort to reserve the right to recall Mr. Liberta in view of the inability to prepare any defense in advance. *See id.* at 55-56.

The probation officer's testimony was based on notes he took in connection with periodic visits with Angelo Ferrugia. Bonanza's counsel requested an opportunity to review the notes in conjunction with his cross-examination; the request was denied. *See id.* at 66-67. Finally, at the close of the Customs presentation, the company's counsel asked that the hearing be adjourned to enable him to prepare a defense. That request was also denied. *See id.* at 75-76.

On November 19, 1985, the hearing officer forwarded his report to the Commissioner of Customs on the proceeding on June 20th, recommending affirmance of the license revocations essentially for the following reasons:

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[2] *See* RD F, pp. 31-32.
[3] *See id.* at 36-37.

1. Angelo Ferrugia was convicted of the felonies of perjury * * * and obstruction of justice * * * on September 20, 1984.

2. Although documents were submitted to Customs on September 14, 1984, which stated Angelo Ferrugia resigned as president and director of the corporation (dated August 30, 1984) and transferred his stock ownership in the corporation (dated August 28, 1984) more substantial evidence shows that Angelo Ferrugia continues to run and own Bonanza Tucking Corporation. The evidence includes Angelo Ferrugia's sworn testimony in the public record as of September 10, 1984, that he runs and owns Bonanza Trucking. The claimed new president and owner as cited in the documents of August 30, 1984, testified on September 11, 1984, that he works for Angelo and is not involved in running the company.

3. Since Angelo Ferrugia is a de facto officer of the corporation running the container station and the cartmen's operation, it is fair and appropriate that he and the company be held to the full impact of the requirements and regulations. RD H, p. 11.

* * * * * * *

7. Bonanza Trucking Corporation, through their attorney, chose not to present any evidence or witnesses to refute the charges even through they asked for a hearing and were present for a hearing. Bonanza Trucking Corporation's attorney's claim that Customs cannot revoke Bonanza's license and privilege to operate because Angelo Ferrugia signed a letter of resignation as president prior to the time of conviction is not valid. RD H, p. 12.

In a letter dated March 7, 1986 to the JFK Area Director, the Commissioner stated his decision to revoke Bonanza's licenses "based on the recommendation of the hearing officer * * * and the evidence presented at the hearing". RD J.

Upon receipt of the decision, plaintiff commenced this case, obtaining a temporary restraining order[4] upon order to show cause. The complaint pleads five causes of action under the Administrative Procedure Act on allegations essentially that (1) Angelo Ferrugia was not an officer of Bonanza at the time of his conviction, (2) the Customs Service did not prove that he was an officer, (3) the revocation of the container-station license was a denial of due process, (4) the Commissioner of Customs should have disqualified himself, and (5) Bonanza was not given an opportunity to comply with the Service's regulations before revocation.

On April 14, 1986, counsel for both sides presented oral argument in open court in support of their respective positions. The defendants concede jurisdiction of this court under 28 U.S.C. § 1581(i).[5]

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[4] This order of March 18, 1986 has continued in effect on consent of the defendants.

[5] *Compare* plaintiff's Verified Complaint, para. 1 *with* defendants' Answer, para. 1.

DISCUSSION

As indicated above, pages 3–4, the hearing on June 20, 1985 was requested and held pursuant to Sections 19.48 and 112.30 of Title 19, C.F.R.,[6] both of which provide for the right of cross-examination. For example, subsection (d)(2) of 19 C.F.R. §112.30 states:

> *Conduct of hearing.* The holder of the license may be represented by counsel at the revocation or suspension hearing. All evidence and testimony of witnesses in such proceeding, including substantiation of charges and the answer thereto, shall be presented with both parties having the right of cross-examination * * *.[7]

At the June 20 hearing, the JFK Area Director conceded that revocation of Bonanza's license to cart was a "very serious" matter. RD F, p. 53. In *Bell* v. *Burson*, 402 U.S. 535 (1971), the Supreme Court stated:

> * * * Once licenses are issued * * * their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licenses. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.[8]

Federal agency action in the form of revocation of a security clearance was under review in *Greene* v. *McElroy*, 360 U.S. 474 (1959), wherein the Court reminded the government:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of * * * testimony * * *. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." *This Court has been zealous to protect these rights from erosion.* It has spoken out not only in criminal cases but also *in all types of cases where administrative and regulatory actions were under scrutiny.*[9]

The Supreme Court has also held that it is "equally fundamental that the right to notice and an opportunity to be heard 'must be

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[6] *See* RD H (transmittal letter from hearing officer to Commissioner of Customs (Nov. 19, 1985)).
[7] *See also* 19 C.F.R. 19.48(C).
[8] 402 U.S. at 539, citing *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).
[9] 360 U.S. at 496–97 (footnote and citations omitted; emphasis added).

granted at a meaningful time and in a meaningful manner'." *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972), quoting from *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

This Court of International Trade has stayed the revocation of a Customs license where the holder thereof has been denied a meaningful opportunity to be heard. *See, e.g., Barnhart* v. *United States Treasury Department*, 7 CIT 300, 588 F. Supp. 1432 (1984). The record in this case clearly reflects the denial of such an opportunity, commencing with the assertion of Customs before the hearing, *supra* page 4, that the Service was not required to produce any evidence in support of its case for revocation. When the Service then sought to adduce proof at the hearing, its main witness identified the report of the internal investigation as the key to the evidence he relied on in reaching his decision to revoke, namely, the excerpts from the criminal trial transcript and the subsequent sentencing transcript. In the face of this testimony, the Customs counsel nevertheless vigorously opposed producing a copy of the report, or even the name of its author, to the other side,[10] and the hearing officer sustained the objection. When the Service's other witness indicated he could not testify other than by referring to his notes, they were not ordered produced. When Bonanza's attorney sought an adjournment to prepare a rebuttal to the Service's evidence, the hearing officer denied the application without stating any reason for his ruling. *See* RD F at 76.

Of course, procedural irregularities in administrative proceedings must be prejudicial to a party in order to justify judicial intervention. *E.g., United States* v. *Priority Products, Inc.*, 9 CIT —, Slip Op. 85–81, at 5 (Aug. 5, 1985), citing *Melamine Chemicals, Inc.* v. *United States*, 8 CIT 105, 592 F. Supp. 1338 (1984); *American Motorists Insurance Co.* v. *United States*, 5 CIT 33 (1983); *John V. Carr & Son, Inc.* v. *United States*, 69 Cust. Ct. 78, C.D. 4377, 347 F. Supp. 1390 (1972), *aff'd*, 61 CCPA 52, 496 F.2d 1225 (1974).

This court concludes that it was clearly prejudicial in this case for Customs to withhold from opposing counsel its report of the facts and circumstances of Bonanza's operations, especially since the record indicates that that report prompted the license revocations. In fact, on this point, the government's situation is similar to its situation in *Greene* v. *McElroy*, *supra*, where it was obvious that confidential reports has been relied on in revoking the security clearance and yet they were never made available to the holder of the clearance during the administrative process. *See* 260 U.S. at 479. The Court in *Greene* reversed the revocation, and the same remedy is mandated here. *Cf. Barnhart* v. *United States Treasury Department*, *supra*.

Furthermore, this is yet another case which proves the importance of meaningful cross-examination. Angelo Ferrugia's trial in

[10] *See* RD F at 35–41.

1984 for perjury was based on testimony he gave to a grand jury in 1981. Understandably, this testimony was read to the petit jury by the prosecution. At the subsequent administrative hearing, some of the 1981 testimony contained in the September 1984 transcript [11] was presented by counsel for Customs without warning to opposing counsel or the hearing officer of the time discrepancy. *See* RD F at 25–32. Indeed, the Service's attorney attempted to create the impression that 1981 was 1984 as follows:

> This [RD F–5] * * * contains statements after Mr. Angelo Ferrugia had resigned on the 30th and it has statements * * * in the transcript as to Angelo—in Angelo Ferrugia's own words himself, what his role was or what his role is running the business of Bonanza Trucking Corporation * * *. RD F at 28.

This attempt was successful.

While the record before this court does not show Angelo Ferrugia testified at his trial in 1984, the report sent to the Commissioner of Customs and quoted above, page 6, clearly shows that the hearing examiner believed that he had testified, to wit:

> * * * The evidence includes Angelo Ferrugia's sworn testimony in the public record as of September 10, 1984, that he runs and owns Bonanza Trucking.[12] * * *

Moreover, the subsequent decision of the Commissioner relied on this erroneous, if not tainted, finding, which, of course, is central to the issue of whether the Bonanza licenses are subject to revocation pursuant to 19 C.F.R. § 19.48(a)(3) and § 112.30(a)(5),[13] respectively. In any event, neither Bonanza's counsel nor the hearing officer appears to have recognized the fundamental discrepancy, either during the hearing [14] or thereafter. Indeed, at first, defendants' counsel herein sought to rely on the same erroneous implication that Angelo Ferrugia had actually testified in September 1984.[15] This "oversight" was corrected in their reply brief,[16] wherein the defendants now argue that Bonanza's counsel had "actual notice of the nature of these portions of the transcript," [17] that on summation he was silent as to them and their probative value and that this silence resulted in a waiver of any right to argue that the hearing officer misunderstood their nature.

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[11] *See* RD F–5 at 239, 298, 308–10, 315 (Sept. 10, 1984); RD F–6 at 362, 374 (Sept. 11, 1984).

[12] RD H, p. 11. *See id.* at 9 ("Angelo Ferrugia testified he is the full owner of Bonanza Trucking and he has no partners") and 10 ("the sworn testimony of Angelo at the trial invalidates belief that he is not president in fact"; "Angelo's own trial testimony shows he has no intent of stopping running the company").

[13] Both regulations permit revocation if an officer of a corporation holding the license is convicted of a felony.

[14] During her closing argument on June 20, 1985, the Customs counsel made a passing reference to Angelo Ferrugia's grand jury testimony which was read into the record [*see* RD F at 78], though that reference skipped over critical page 289 of the trial transcript.

[15] *See* Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction and in Support of Defendant's Motion for Judgment on the Administrative Record, p. 15.

[16] Defendant's Opposition to Plaintiff's Motion for Judgment on the Agency Record and Reply to Plaintiff's Response to Defendants' Cross-Motion for Judgment on the Agency Record and Plaintiff's Motion for a Preliminary Injunction, p. 8.

[17] *Id.* at 9.

The record before this court does not support this thesis. Rather, as indicated above, the record shows that plaintiff's counsel was not Angelo Ferrugia's lawyer, that he was not otherwise familiar with the transcript of the trial, that the Customs counsel refused to provide him with the selected excerpts in advance of the hearing, that he objected to their introduction at the hearing,[18] which was overruled, and that he was not permitted to prepare a case in rebuttal. Finally, the hearing officer did indeed misunderstand their nature.

The defendants are correct in their contention that this court's review of their record is pursuant to 28 U.S.C. § 2640(d), which is tied to the Administrative Procedure Act, 5 U.S.C. § 706. However, that statute requires the court to set aside agency action which is found to be without observance of procedure required by law.

As shown above, the procedure required by law in the administrative process under review herein was meaningful cross-examination, which the court finds was denied plaintiff Bonanza Trucking Corporation. Since the agency action must therefore be set aside, defendants' motion for judgment on the agency record must be denied. The court need not and does not reach other issues raised by the parties.

Judgment will enter accordingly.

(Slip Op. 86-48)

LEATHER'S BEST, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-4-00504-S

OPINION

[Defendant's motion for partial summary judgment denied.]

(Decided May 1, 1986)

Mandel & Grunfeld (Steven P. Florsheim) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, and *Barbara M. Epstein*, Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff Leather's Best challenges the determination of the United States Customs Service (Customs) that merchandise imported by plaintiff in 1982 should be classified under item 121.61 of the Tariff Schedules of the United States (TSUS), as other finished leather, not fancy. Plaintiff claims the merchandise is properly classified under TSUS item 121.65, as other finished leather, fancy. As such, plaintiff claims the merchandise is entitled to duty-free treatment for purposes of the Generalized System of Preferences (GSP). 19 U.S.C. §§ 2461-2465 (1982); TSUS General

[18] Certainly, his acceptance of opposing counsel's representation as to page numbers [*see* RD F at 25] is of no moment, especially in view of EC 7-14 of the Lawyer's Code of Professional Responsibility to the effect that a government lawyer in an administrative proceeding has the responsibility to develop a full and fair record.

Headnote 3(c). Currently before the court is defendant's motion for partial summary judgment, in which defendant seeks dismissal of plaintiff's claim under the GSP. CIT Rule 56. Defendant contends that plaintiff has failed to fulfill one of the conditions precedent to obtaining GSP treatment, and that, as a result, the court should dismiss the claim.

Customs will only consider a claim for an exemption from duty on the ground that the GSP applies if six conditions, specified in the regulations, are met. 19 C.F.R. § 10.172 (1982). One of these requirements is evidence of the country of origin, or the waiver of Customs thereof. *Id.* § 10.173. In a case involving merchandise valued in excess of $250, the importer or consignee of the shipment is generally required to file a Certification of Origin Form A (Form A) at the time of entry.[1] *Id.* § 10.173(a)(1). The Form A "shall be signed by the exporter of the merchandise in the country from which it is directly imported, certified by the designated governmental authority in that country, and properly completed." *Id.* Alternatively, Customs may waive the Form A requirement under certain circumstances. *Id.* § 10.173(a)(5). In its motion to amend its answer, however, defendant states that it "has determined that it is unwilling to waive the submission by plaintiff of the certificates of origin * * *." Motion to Amend Answer at 1 (Mar. 13, 1986).[2] Plaintiff was informed of this decision on February 10, 1986. Absent this waiver, plaintiff is required to produce a Form A as a prerequisite to GSP duty-free treatment. 19 C.F.R. § 10.172. *See also Audiovox Corp.* v. *United States,* 8 CIT 233 598 F. Supp. 387, 389 (1984) (filing of Form A as a "condition precedent" to GSP treatment), *aff'd,* 764 F.2d 848 (Fed. Cir. 1985); *Harwood Manufacturing Co.* v. *United States,* 7 CIT 288, Slip Op. 84–57 at 8 (May 30, 1984) (same), *modified,* 8 CIT 173, Slip Op. 84–104 at 3 (Sept. 19, 1984) (same); *House of Ideas, Inc.* v. *United States,* 2 CIT 68, 72 (1981) (same).

It is uncontested that in this case no Forms A have been submitted. Collective Exhibit A. As defendant has noted, generally a Form A must be filed "in connection with the entry." 19 C.F.R. § 10.173(a)(1). Defendant, however, overstates the consequences of a failure to file in a timely manner when it further claims that plaintiff's failure to file Forms A as of this point in the proceedings prohibits it from raising the GSP claim. Both parties cite the regulation regarding late filing of free entry documents. 19 C.F.R. § 10.112 (1982). This provision allows a party to file a Form A "before * * * liquidation becomes final," provided that "failure to file it was not due to willful negligence or fraudulent intent." *Id.*

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[1] The parties are apparently in accord that the subject merchandise is valued in excess of $250.

[2] The court notes that the decision of Customs to waive the production of a Form A should be positive when the appropriate district director "is otherwise satisfied that the merchandise qualifies for duty-free entry under the Generalized System of Preferences." 19 C.F.R. § 10.173(a)(5). The court interprets Customs' use of the word "unwilling" as an inability on the part of the district director to be so satisfied, rather than as a refusal to be so satisfied. The latter would be contrary to the spirit and letter of the regulatory scheme.

Plaintiff correctly notes in its response that inasmuch as the liquidation in this case will not become final until after the court renders its judgment, plaintiff is not foreclosed from attempting to submit the forms until that time. In the past, this court has allowed submission of Forms A as late as the time of trial. *Harwood Manufacturing, supra.* Plaintiff's ability to submit the forms at such a late date will, of course, be limited by its ability to demonstrate that the failure to file them previously was not due to willful negligence or fraudulent intent. *Harwood Manufacturing,* 8 CIT at 174, Slip Op. 84-104 at 4; *see Mattel, Inc.* v. *United States,* 67 CCPA 74, 76 624 F.2d 1076, 1078 (1980); *Green Giant Co.* v. *United States,* 79 Cust. Ct. 61, 70, C.D. 4715 (1977). Plaintiff contends that it is currently attempting to acquire the Forms A from Argentina, the country of origin, and has submitted an affidavit and exhibits to support this claim.

The court concurs with plaintiff's position that defendant's motion to dismiss the GSP claim for failure to submit the requisite Forms A is premature at this stage in the proceedings. Under 19 C.F.R. § 10.112, plaintiff may file the Forms A at any time before the liquidations are final unless it has acted in an inexcusably dilatory manner. Furthermore, plaintiff's supporting affidavit indicates that whether the failure to file at the time of entry was due to willful negligence or fraudulent intent is an unresolved question of fact.[3] As such, it cannot be decided against plaintiff in a motion for summary judgment. So ordered.

(Slip Op. 86-49)

NEC AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-6-00799S

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

[Defendant's motion to compel discovery granted in part and denied in part.]

(Dated May 2, 1986)

Glad & Ferguson (*Edward N. Glad,* on the motion), for plaintiff.
Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Saul Davis,* on the motion), for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the Customs invoice as "paging receivers."

The merchandise was classified by the Customs Service as "other solid-state (tubeless) radio receivers" under item 685.24 of the

[3] *Inter alia,* plaintiff alleges that it relied on Customs' waiver of the Form A requirement in similar situations.

Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty at a rate of 8.8 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 685.70, TSUS, as "indicator panels or other sound or visual signalling apparatus," dutiable at a rate of 3.5 per centum ad valorem.

Pursuant to Rule 37 of the Rules of this Court, defendant has moved for an order compelling discovery. Specifically, defendant requests that plaintiff be ordered to provide responses to defendant's interrogatories, and to produce certain documents. Defendant also requests that it be permitted to depose plaintiff's expert witnesses.

Plaintiff opposes defendant's motion. Plaintiff contends that it has "satisfactorily and adequately" answered defendant's interrogatories. In addition, plaintiff states that the documents which defendant has requested need not be produced because none of the requested documents are under plaintiff's control. Finally, plaintiff opposes the deposition of its three expert witnesses because "to permit defendant to depose plaintiff's witnesses would unduly delay the trial of this case and would place undue expenses on plaintiff."

At the outset, it is helpful to note that the imported merchandise in this case is identical in every respect to the merchandise at issue in *NEC America, Inc.* v. *United States,* 8 CIT 184, 596 F. Supp. 466 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985). Hence, both parties have the benefit of a prior judicial decision which deals with identical merchandise, and the same provisions of the TSUS.

In *NEC America, Inc.* v. *United States,* this court considered the issues presented in this case, and held that the presumption of correctness that attaches to the government's classification had not been overcome. Hence, the paging receivers were held to be properly classified as "other solidstate (tubeless) radio receivers," under item 685.24, TSUS. *See* 596 F. Supp. at 472. Upon appeal to the United States Court of Appeals for the Federal Circuit, the appellate court affirmed on the basis of this court's decision. 760 F.2d 1295 (Fed. Cir. 1985).

In its memorandum in opposition to defendant's motion, plaintiff states that the present action "is a retrial brought on by plaintiff ony because plaintiff feels that the trial court erred in the first [NEC] case * * *." It is well-established that, in customs classification cases, "a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties." *Schott Optical Glass, Inc.* v. *United States,* 750 F.2d 62, 64 (Fed. Cir.), *rev'g,* 587 F. Supp. 69 (Ct. Int'l Trade 1984); *see United States* v. *Stone & Downer Co.,* 274 U.S. 225 (1927).

Defendant contends that plaintiff has failed to answer adequately a number of questions contained in defendant's interrogatories.

Rule 33 of the Rules of this Court governs the availability and scope of written interrogatories. Rule 33 requires that

> [e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objections shall be stated in lieu of answer.

Rule 37 allows a party, upon reasonable notice to the other parties, to apply for an order compelling discovery if a party fails to answer an interrogatory submitted under Rule 33. For the purposes of a Rule 37 motion, "an evasive or incomplete answer is to be treated as a failure to answer." U.S.C.I.T.R. 37(a)(2).

It is well established that "interrogatories shall be answered directly and without evasion." 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2177, at 559 (1970 & Supp. 1985). An answer to an interrogatory must be responsive and complete in itself, and should not refer to the pleadings, depositions, documents, or other interrogatories. *See, e.g., International Mining Co.* v. *Allen & Co.*, 567 F. Supp. 777, 787 (S.D.N.Y. 1983); *J.J. Delaney Carpet Co.* v. *Forrest Mills, Inc.*, 34 F.R.D. 152, 153 (S.D.N.Y. 1963); 4A J. Moore, *Moore's Federal Practice* ¶ 33.25 [1] (1983).

Defendant has identified several questions which it claims that plaintiff has failed to answer. Ultimately, of course, the Court decides whether plaintiff has satisfactorily and adequately answered an interrogatory. *See Martin* v. *Easton Publishing Co.*, 85 F.R.D. 312, 316 (E.D. Pa. 1980).

An examination of the answers that plaintiff has provided shows that, in almost every instance, plaintiff answered by referring defendant either to the testimony or the exhibits of the first *NEC America* case. Defendant objects to several answers which merely give a general reference to the prior testimony of plaintiff's witness, Michael J. McLaughlin. Defendant states that, although it has reviewed the record, it was nonetheless "unable to ascertain the precise factual basis [for plaintiff's answers]." Since the answers which refer solely to prior testimony are unresponsive, they must, for the purposes of a Rule 37 motion, be treated as a failure to answer. Hence, the Court properly may order plaintiff to provide answers that specifically state or quote the portion of the record upon which plaintiff relies for its answers.

Defendant has also asked plaintiff to provide information pertaining to the identity and expected testimony of plaintiff's expert witnesses. This information is governed by Rule 26(b)(4), which provides that:

> (A)(*i*) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

U.S.C.I.T. R. 26(b)(4)(A)(*i*).

Plaintiff has identified three witnesses whom it expects to call at trial. It has also given the subject matter on which each expert is expected to testify, and the opinions of these experts. In essence, the witnesses will testify that, to fall within the common meaning of a solid-state (tubeless) radio receiver, the imported product must have a tuner and an audio amplifier.

Plaintiff, however, has not provided a summary of the grounds for each opinion. Accordingly, as required by the Rules of this Court, plaintiff is directed to give an appropriate summary of the grounds for each witness's opinion.

In defendant's second set of interrogatories, plaintiff was asked to provide information pertaining to the background of its experts. This information may be useful in cross-examination, and is discoverable under Rule 26, since it is considered relevant to the expert's qualifications and identity. *See e.g., Clark* v. *General Motors Corp.*, 20 F.R. Serv. 2d 679, 683–84 (D. Mass. 1975); *United States* v. *IBM Corp.*, 66 F.R.D. 215, 218–19 (S.D.N.Y. 1974). Plaintiff objects to this request, and asserts that the information is "a matter of public record." However, the fact that the requested information may be in the public domain does not automatically render the interrogatories objectionable. *See Rogers* v. *Tri-State Materials Corp.*, 51 F.R.D. 234, 245 (N.D. W. Va. 1970). It is likely that plaintiff has a current *curriculum vitae* and list of published writings for each of its witnesses, or can easily obtain them. Surely, then, it is a minimal burden for plaintiff to provide the requested information. Accordingly, plaintiff is directed to provide defendant with the complete professional background of its expert witnesses, as well as a list of all publications that they have authored or co-authored which pertain to pagers or radio receivers.

Defendant also contends that it should be permitted, under Rule 26(b)(4)(A)(*ii*), to depose plaintiff's expert witnesses regarding opinions held and facts known and obtained in anticipation of litigation. That Rule permits the court, upon motion, after interrogatories have been served pursuant to Rule 26(b)(4)(A)(*i*), to order "further discovery by other means." U.S.C.I.T. R. 26(b)(4)(A)(*ii*).

Plaintiff has identified three witnesses that it will call at trial: Michael J. McLaughlin, Arthur F. Peters, and Rudolf F. Graf. Mr. McLaughlin, who testified at the first trial, is an employee or plaintiff and, therefore, is not subject to the protection of Rule 26(b)(4)(A). *See, e.g., Kansas-Nebraska Natural Gas Co.* v. *Marathon Oil Co.*, 109 F.R.D. 12, 15 (D. Neb. 1985); *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Drydock Co.*, 68 F.R.D. 397, 406 (E.D. Va. 1975).

Rule 26 permits the court, upon motion, to order further discovery of experts to be called at trial, as the court may deem appropriate. Hence, it is within the sound discretion of the Court to allow defendant to depose plaintiff's experts. *See, e.g., Herbst* v. *ITT*

Corp., 65 F.R.D. 528, 530–31 (D. Conn. 1975); *United States* v. *John R.-Piquette Corp.*, 52 F.R.D. 370, 371–72 (E.D. Mich. 1971). Plaintiff's chief objection to allowing the deposition of either Mr. Peters or Mr. Graf, is that "defendant is not willing to pay the full expert witness fee." The Rules of this Court, however, provide that unless manifest injustice will result, "the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery * * *." U.S.C.I.T. R. 26(b)(4)(C). Defendant, in its proposed order, has indicated that it will pay the experts the equivalent of the fee that plaintiff has agreed to pay them. Hence, plaintiff has not shown a persuasive or appropriate reason why defendant's motion should not be granted. Accordingly, the Court orders that defendant shall be permitted to depose plaintiff's experts and shall be required to pay the experts a reasonable fee for time spent responding to discovery.

Finally, defendant requests plaintiff to identify each present or former employee of plaintiff who was involved or participated in the preparation of papers or testimony given by plaintiff's parent corporation, Nippon Electric Co., Ltd., during the International Trade Commission's investigation of "High Capacity Pagers from Japan." The defendant's purpose for this request is to ascertain whether statements made before the agency are admissible under Rule 801(d) of the Federal Rules of Evidence, as admissions of a party. *See United States* v. *McKeon*, 738 F.2d 26, 31–33 (2d Cir. 1984). Plaintiff responded that the information was in the public record. Although this may be true with respect to the identity of persons who gave testimony, it is not true as to persons who were involved with the preparation of the papers submitted to the agency. The Court, therefore, orders plaintiff to provide the requested information.

The Court has considered defendant's remaining requests, and finds them either without merit or satisfied by plaintiff's memorandum. Therefore, upon reading and filing defendant's motion to compel responses to defendant's interrogatories, defendant's request for production of documents, and for depositions of plaintiff's experts; plaintiff's memorandum in opposition to defendant's motion; upon all other papers; and after due deliberation, it is hereby

ORDERED that, within 30 days of the date of entry of this Order, plaintiff shall supplement its responses to defendant's interrogatories as follows:

1. Plaintiff shall specify the reasons for plaintiff's contention that the pagers respond only to a digital signal;

2. Plaintiff shall detail with specificity the function of each component of the imported merchandise;

3. Plaintiff shall provide a summary of the grounds of each opinion of the expert witnesses that plaintiff intends to call at trial;

4. Plaintiff shall provide the complete professional background of its expert witnesses, and shall provide a list of any published writings that they have authored or co-authored which pertain to pagers, radio receivers, or other devices that perform the functions of selectivity, detection, and amplification of radio waves;

5. Plaintiff shall identify each present or former employee of plaintiff who was involved in the preparation of papers filed, submissions made, and testimony given by Nippon Electric Co., Ltd. (NEC), during the International Trade Commission's investigation of "High Capacity Pagers From Japan," Investigation No. 731-TA-102; it is further

ORDERED that defendant shall be permitted to depose plaintiff's witnesses in all matters relevant to this case, in accordance with Rule 30 of the Rules of this Court; it is further

ORDERED that plaintiff shall provide defendant within 30 days of the date of this Order with a copy of its fee arrangements with Mr. Peters and Mr. Graf; and it is further

ORDERED that, upon receipt of appropriate bills from Mr. Peters and Mr. Graf, after their depositions, defendant's counsel expeditiously shall process those bills with the United States Department of Justice, Washington, D.C., for payment to the named deponents. So ordered.

(Slip Op. 86-50)

PLS INTERNATIONAL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-2-00189

Before DICARLO, *Judge.*

[Defendant's motion is denied.]

(Decided May 2, 1986)

Vecchio & Schulz Co., L.P.A. (*William J. Schulz*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Florence M. Peterson*) for defendant.

DICARLO, *Judge:* Defendant moves pursuant to Rule 12(e) of the Rules of this Court for an order requiring plaintiff to file an amended complaint. Plaintiff has not responded to the motion.

Rule 12(e) permits a party to "move for a more definite statement" if a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Defendant contends that it cannot adequately respond to the complaint without knowing the classification which plaintiff claims is proper.

Defendant also says plaintiff has failed to set forth information requested in the Appendix to the Rules of this Court, which provides in part:

(c) Classification: If the contested customs decision involves the classification of merchandise, the complaint should also set forth:

* * * * * * *

(2) the tariff description and the paragraph or item number of the statute, including all modifications and amendments thereof, under which the merchandise is claimed to be properly subject to classification, and the rate of duty claimed to be applicable * * *.

In its complaint plaintiff alleges that:

(6) Said [closed-circuit television inspection system] components were imported on or about December 16, 1983, and were classified under Item 685.1060/5.1% Tariff Schedule of the United States (19 U.S.C. §1202). Subsequent to its importing, the components were reclassified as being dutiable under Item 712.0500/17.5% Tariff Schedule of the United States (hereinafter referred to as TSUS). Said reclassification resulted in an increase in duty, the responsibility for payment of which fell on the Plaintiff.

(7) Said reclassification was improper. The imported components do not comprise a complete commercial entity, but instead must be assembled with additional components to form a complete article of commerce.

* * * * * * *

(10) For the Second Count of its Complaint, the Plaintiff realleges and incorporates all of the allegations contained in Plaintiff's One through Nine of the First Count of its Complaint as if fully rewritten herein and goes on further to state that on June 23, 1983, the U.S. Customs Service issued a ruling letter (refer to CLA-2-06:S:C:D6:5=60-283 805843) wherein it was set out that if the Plaintiff were to import separate entities for its [merchandise] said entities would not be classified under Item 712.05/17.5%, TSUS, but would rather be classified under a completely different Item, at a much lower ad valorem rate.

(11) The Plaintiff has satisfied the conditions of the ruling letter in its transaction, and detrimentally relied on the statements contained within said ruling letter, when it imported the components at issue herein.

(12) Said components were imported on or about December 16, 1983, and were classified under Item 685.1060/5.1%, TSUS. Subsequent to the importing, they were reclassified as being dutiable under Item 712.0500/17.5%, TSUS, in direct contravention of the U.S. Customs Service ruling letter.

While using terminology not usually found in complaints challenging United States Customs Service classifications, plaintiff does allege that classification of the merchandise under item 712.05, Tariff Schedules of the United States (TSUS), is erroneous, and that the merchandise should be classified under item 685.10, TSUS. Therefore the Court need not and does not address whether relief

under Rule 12(e) is appropriate if a plaintiff does not allege in the complaint its proposed alternative classification. *Cf. Terumo Corp.* v. *United States,* 10 CIT ——, Slip Op. 85–86, at p. 4 (August 23, 1985); *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878 (Fed. Cir. 1983), *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984).

The Court finds that the complaint is not so vague or ambiguous that defendant cannot reasonably be required to respond, and that the complaint is in compliance with the relevant parts of the Appendix to the Rules of the Court.

The motion is denied. So ordered.

(Slip Op. 86–51)

ALHAMBRA FOUNDRY, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND SOUTH BAY FOUNDRY, ET AL., INTERVENORS

Court No. 83–4–00500

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Defendant's motion for vacatur of remand granted and judgment entered for Defendant sustaining the Department of Commerce's final affirmative countervailing duty determination and order.]

(Decided May 5, 1986)

Simonelli & Hall (*Michael H. Hall* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer* on the motion) for the defendant.

Brownstein, Zeidman & Schomer (*David Amerine* and *Irwin Altschuler* on the motion) for the intervenor.

After reviewing a final affirmative countervailing duty determination brought before this Court by plaintiff's motion under Rule 56.1 of the Court, the Court affirmed the determination of the United States Department of Commerce, International Trade Administration (ITA) regarding twelve of the challenges asserted by plaintiffs and remanded the case regarding the remaining three challenges. Defendant now moves for vacatur of that part of this Court's decision of December 30, 1985, remanding the case to the ITA. Plaintiffs oppose defendant's motion for vacatur of the remand, while intervenors have filed a memorandum supporting the motion.

In Slip Op. 85–130, the Court remanded the case for further clarification and determination regarding the following issues:

> (1) the calculation of FONEI (Fund for Industrial Development) and FOGAIN (Fund for the Guarantee of Medium and Small Industry) benefits;
>
> (2) the calculation of the benefit of the state tax exemption received; and

(3) the exchange rates used by the ITA in calculating the net benefit used.

Subsequent to the remand order, the ITA completed its first annual administrative review pursuant to 19 U.S.C. § 1675(a)(1982). As the results of this review will serve as the basis for the actual duty assessment on any unliquidated entries covered by the final determination, as well as for the cash deposits of estimated duties for future entries, defendant contends that the results of the remand would have no practical effect since they will never be used for duty assessment nor for deposits of estimated duties. In short, argues defendant, "there are no entries, present or prospective, which can be affected by any change that may be found upon remand." Defendant's Brief 3.

In *Silver Reed America, Inc.* v. *United States*, 9 CIT —, Slip Op. 85–51 (May 1, 1985), the Court was faced with an analogous situation in which it had remanded an antidumping determination for reconsideration of a level of trade adjustment. But as subsequently completed administrative reviews govern the rates of final duty assessment and future estimated duty deposits, the Court concluded that recalculation of the dumping margins in the final less than fair value determination would have no effect. The Court stated:

> Following an antidumping order, actual duty assessment is based upon an administrative review, either an "early determination" under 19 U.S.C. § 1673e(c) or periodic review determination pursuant to 19 U.S.C. § 1675(a). The results of such administrative reviews serve as the basis for actual duty assessments with regard to the entries covered by the particular determination and as the basis for cash deposits of estimated duties for future entries.

Id. at 6. Further, administrative review determinations are subject to judicial review under 19 U.S.C. § 1516(a)(2). The Court went on to hold, then, that "under the statutory framework here, judicial review must be based upon the administrative record of the particular proceeding resulting in the challenged determination." [1] *Id.* at 7.

Just as in *Silver Reed*, a remand in this action would serve no purpose. The Court in Slip Op. 85–130 sustained the ITA's determination regarding twelve of the fifteen challenges of plaintiffs. Reversal of the ITA on any of the remaining three issues could do no more than reflect an increase in the amount of net bounties or

---

[1] With the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 611(a)(2)(A), 98 Stat. 3031, Congress inserted into the periodic review provision the condition that such a review be requested:

> At least once during each 12-month period beginning on the anniversary date of a countervailing duty order * * *, an antidumping duty order * * *, or the notice of the suspension of an investigation, the administering authority, *if a request for such a review has been received and* after publication of such a review * * *, shall—
>
> (A) review and determine the amount of any net subsidy,
>
> (B) review, and determine * * * the amount of any antidumping duty, and
>
> (C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended * * *.

19 U.S.C. § 1675(a)(1)(A)–(C) (1982 & Supp. II 1984) (emphasis added).

grants bestowed by the Mexican government (which increase may or may not be reflected in the record of the more recent administrative review). The ITA's affirmative final determination and order thus remains in full force and effect.

CONCLUSION

For the foregoing reasons, the Court grants defendant's motion for vacatur of that part of this Court's decision of December 30, 1985, in Slip Op. 85–130 which remanded the case to the ITA, and orders that final judgment be entered sustaining the validity of the final affirmative countervailing duty determination and order on iron-metal construction castings from Mexico.

(Slip Op. 86–52)

WEAR ME APPAREL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–4–00448

Before DICARLO, *Judge.*

Defendant moves to dismiss action challenging exclusion of merchandise for lack of jurisdiction. Defendant argues that since plaintiff exported merchandise to a foreign trade zone, the Court no longer has jurisdiction over the action.

Held: The merchandise lost its status as excluded merchandise after it was released from Customs custody and exported to foreign trade zone. Since the merchandise covered by the protest was exported, the protest was abandoned and an action challenging the denial of the protest cannot be maintained.

[Defendant's motion is granted.]

(Decided May 12, 1986)

Grunfeld, Desiderio, Lebowitz & Silverman (*Michael P. Maxwell*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Florence M. Peterson*) for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Defendant moves to dismiss this action challenging the exclusion of merchandise for lack of jurisdiction. The question presented is whether the Court has jurisdiction over a challenge to the exclusion of merchandise after the importer has removed the merchandise from the customs territory of the United States to a foreign trade zone. The Court holds that it does not have jurisdiction and grants defendant's motion to dismiss.

In December 1980 Customs refused to allow plaintiff to enter merchandise for consumption under plaintiff's visas and the merchandise was sent to a Customs bonded warehouse. In April 1981 plaintiff commenced an action pursuant to 28 U.S.C. § 1581(a) (1982) contesting the denial of its protest. Approximately one year later plaintiff filed its complaint demanding that the merchandise

be held classifiable under the quota categories for which it had obtained visas.

In February 1985 Customs gave notice that the merchandise which had been stored in the Customs bonded warehouse for more than five years would be sold at public auction. Customs action was taken in accordance with 19 C.F.R. §§ 127.14(a) and 144.5(a) (1985), which require that such merchandise be sold at public auction if not withdrawn within five years.

Plaintiff did not attempt to preserve jurisdiction by moving under the All Writs Act, 28 U.S.C. § 1651(a) (1982), for an injunction prohibiting public auction of the merchandise in the Customs bonded warehouse pending the Court's determination. *Cf. Alberta Gas Chemicals, Inc.* v. *United States*, 85 Cust. Ct. 122, C.R.D. 80-13, 496 F. Supp. 1332 (1980). Instead, plaintiff withdrew its merchandise for export by transferring the merchandise to a foreign trade zone as "zone-restricted merchandise." *See* 19 C.F.R. § 146.25 (1985).

Defendant specifically argues that the Court lacks jurisdiction because the action is moot. Plaintiff concedes that the action is moot with respect to two entries which were entered under visa waivers and liquidated. With respect to the merchandise in the foreign trade zone, plaintiff theorizes that if the Court were to enter an order ruling as to the proper classification of such merchandise for quota purposes, it would then seek a ruling by the Foreign Trade Zone Board that return of the zone-restricted merchandise to Customs territory for domestic consumption was in the public interest. Zone-restricted merchandise can be transferred from a foreign trade zone to the customs territory only when the Foreign Trade Zone Board rules that the public interest would be served by such a transfer. 19 U.S.C. § 81c (1982 & Supp. II 1984); 19 C.F.R. § 146.47 (1985).

In its complaint, plaintiff alleges jurisdiction under 28 U.S.C. §§ 1581(a) and 1581(i)(3)-(4). Generally section 1581(i) does not provide jurisdiction where an action is properly brought under another jurisdictional provision. *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 182-83, 687 F.2d 467, 471 (1982). Jurisdiction is exercised under section 1581(i) where "it would be inappropriate for the Court to require the exhaustion of administrative remedies" under section 1514(a). *United States Cane Sugar Refiners' Ass'n* v. *Block*, 3 CIT 196, 202, 544 F. Supp. 883, 887, *aff'd*, 69 CCPA 172, 683 F.2d 399 (1982); *see United States* v. *Uniroyal, Inc.*, *supra*. Since the exhaustion of administrative remedies under section 1514(a) was appropriate in this case, the action was not properly brought under 28 U.S.C. § 1581(i).

Section 1581(a) is the proper jurisdictional provision for bringing this action to contest the denial of a protest under 19 U.S.C. § 1514(a)(4), which provides for review of Customs decisions relating to "the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of

the customs laws * * *." The merchandise was excluded by Customs after Customs refused entry and while the merchandise remained in the Customs bonded warehouse.

Under the Foreign Trade Zone Act, 19 U.S.C. § 81a–u (1982 & Supp. II 1984), merchandise is deemed exported once it is transferred from customs territory to a foreign trade zone:

> [A]rticles which have been taken into a zone from customs territory for the sole purpose of exportation, * * * or storage shall be considered to be exported for the purpose of—
>
> (1) the draw-back, warehousing, and bonding, or any other provisions of the Tariff Act of 1930, as amended, and the regulations thereunder * * *.

19 U.S.C. § 81c(a). "For purposes of the entry of foreign merchandise * * * a foreign trade zone is not considered to be a part of the customs territory of the United States." *Hawaiian Independent Refinery* v. *United States*, 81 Cust. Ct. 117, 118, C.D. 4777, 460 F. Supp. 1249, 1251 (1978).

Under these circumstances the Court does not have jurisdiction under 28 U.S.C. § 1581(a). Plaintiff's protest and complaint challenge the exclusion of merchandise. The Court holds that the merchandise lost its status as excluded merchandise after it was released from Customs custody and exported to a foreign trade zone. When the merchandise was exported plaintiff's protest was abandoned and this action contesting the denial of the protest could no longer be maintained. *See Hooker Electrochemical Co.* v. *United States*, 16 Cust. Ct. 223 (1946). Since the Court lacks jurisdiction, the Court need not address plaintiff's argument that it would benefit from a determination as to the proper classification of plaintiff's merchandise for quota purposes.

Judgment will be entered accordingly. So ordered.

ABSTRACTED VALUATION DECISIONS

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held value	Basis	Port of entry and merchandise
V86/71	Watson, J. April 22, 1986	Dingeistedt & Co.	209291A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk and rayon scarves
V86/72	Watson, J. April 22, 1986	Eli E. Albert Inc.	R58/2850, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Gloves
V86/73	Watson, J. April 22, 1986	Englishtown Corp.	R61/10132	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Stainless steel flatware
V86/74	Watson, J. April 22, 1986	Frank P. Dow Co.	R60/12067	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Binoculars
V86/75	Watson, J. April 22, 1986	Frank P. Dow Co.	R60/12168	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Binoculars
V86/76	Watson, J. April 22, 1986	G.C. Murphy Co.	R61/20069, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Gloves
V86/77	Watson, J. April 22, 1986	George E. Bardwill & Sons	R58/11745, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Tablecloths and napkins

V86/78	Watson, J. April 22, 1986	Island Spun Inc.	R59/17262, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Ladies' wool sweaters
V86/79	Watson, J. April 22, 1986	J.M. Rodgers Co.	271780A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Cotton velveteen, etc.
V86/80	Watson, J April 22, 1986	S.E. Laszlo	R59/8605, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Binoculars
V86/81	Watson, J. April 22, 1986	S. Shamash & Sons, Inc.	R59/1131, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
V86/82	Watson, J April 22, 1986	S. Shamash & Sons, Inc.	R59/4426, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
V86/83	Watson, J. April 22, 1986	S. Shamash & Sons, Inc.	R58/25143, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk fabrics
V86/84	Watson, J. April 22, 1986	Toyobo N.Y., Inc.	R59/11141	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Cotton cloth
V86/85	Watson, J. April 22, 1986	W.J. Byrnes & Co.	R59/14889, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Silk fabrics
V86/86	Watson, J. April 23, 1986	Salim S. Dweck	R61/8868, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Cotton bedspreads, etc.

ABSTRACTED VALUATION DECISIONS—Continued

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held value	Basis	Port of entry and merchandise
V86/87	Watson, J. April 23, 1986	Gimbel Bros. Inc.	272043A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk and rayon scarves, etc.
V86/88	Watson, J. April 23, 1986	Gosho Trading Co.	R58/14895, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Cotton grey broadcloth, etc.
V86/89	Watson, J. April 23, 1986	Gosho Trading Co.	R59/9689, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; an entirety
V86/90	Watson, J. April 23, 1986	S.E. Laszlo	281563A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
V86/91	Watson, J. April 23, 1986	Liberty Slax Inc.	R59/17951	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Cotton trousers
V86/92	Watson, J. April 23, 1986	Reliance Intercontinental Corp.	R58/7750, etc.	Export value	Appraised unit values less 7.5% net pkd.	Agreed statement of facts	New York Gloves
V86/93	Watson, J. April 24, 1986	J.M. Rodgers Co.	R58/4827, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Porcelain dinnerware
V86/94	Watson, J. April 24, 1986	Marshall Co.	279890A, etc.	Export value	F.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, or Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Honolulu Binoculars

V86/95	Watson, J. May 8, 1986	Balfour, Guthrie & Co.	R62/1574, etc.	Export value	Appraised values as shown on entry documents, less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Canned tuna
V86/96	Watson, J. May 8, 1986	Bunge Corp.	R60/17399, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Tube mats
V86/97	Watson, J. May 8, 1986	Continental Merchandise Co.	R62/4586, etc.	Export value	Appraised values shown on entry papers less amounts listed on invoices as "design charges" included in appraised values	Panation Trade Co. v. U.S., A.R.D. 181 (1965)	New York Cigarette lighters
V86/98	Watson, J. May 8, 1986	Cornet Stores	R59/1792, etc.	Export value	Appraised values shown on entry documents, less 7.5% thereof net, packed	Agreed statement of facts	Los Angeles Rayon, silk
V86/99	Watson, J. May 8, 1986	International Importers, Inc.	R60/12959, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago and Honolulu Transistor radios together with their accessories and parts, an entirety
V86/100	Watson, J. May 8, 1986	Nichimen Co.	R63/3438, etc.	Export value	Appraised unit values less 7.5% thereof net, pkd.	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts, an entirety
V86/101	Watson, J. May 8, 1986	Nomura (America) Corp.	R65/2088	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Houston Transistor radios together with their accessories and parts, an entirety
V86/102	Watson, J. May 8, 1986	Transcontinental Com. Co.	R62/135, etc.	Export value	Appraised unit values less 7.5% thereof, net pkd.	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety
V86/103	Watson, J. May 8, 1986	Trans-Ocean Import Co.	R60/15931, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs

ABSTRACTED VALUATION DECISIONS—Continued

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held value	Basis	Port of entry and merchandise
V86/104	Watson, J. May 8, 1986	William A. Rogers Inc.	R61/10149, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts, an entirety
V86/105	DiCarlo, J. May 8, 1986	Mitsubishi International Corp.	82-5-00613	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	San Francisco Footwear
V86/106	Rao, J. May 9, 1986	The Singer Co.	77-9-02856	Export value	Appraised values shown on entry papers less 28.5% with the exception of Singer Model 2045 Needle Appraised values on Singer Model 2020 and 2021 Needles, less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. United States, 735 F.2d 1340 (1984)	Boston Industrial sewing needles
V86/107	Rao, J. May 9 1986	The Singer Co.	79-10-01582	Export value	Appraised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Nashville Industrial sewing machine needles
V86/108	Rao, J. May 9, 1986	The Singer Cjo.	79-12-01952	Export value	Appraised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Boston Industrial sewing machine needles
V86/109	Rao, J. May 9, 1986	The Singer Co.	81-5-00616	Export value	Appraised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Boston Sewing machine needles
V86/110	Rao, J. May 9, 1986	The Singer Co.	82-1-00121	Export value	Appraised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., 735 F.2d 1340 (1984)	Boston Sewing machine needles

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

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Appeal to the U.S. Court of Appeals for the Federal Circuit

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Valuation: V86/111 Through V86/162

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 142

(T.D. 86-106)

Customs Regulations Amendment Relating to Entry Numbers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect recent changes in the assignment and format of entry numbers used by the international trade community in submitting entry documentation for processing by the Customs Service. The public was informed of changes to the entry number procedures by documents published in the Federal Register in 1985. However, the regulations were not amended. After a further review of the matter, it has been determined that the new entry number procedures should be included in the regulations. This amendment is one of the numerous initiatives Customs has undertaken relating to the development of a comprehensive integrated Automated Commercial System. When fully implemented, the changes will ensure entry processing efficiency.

EFFECTIVE DATE: October 1, 1986.

FOR FURTHER INFORMATION CONTACT: Richard J. Bonner, Duty Assessment Division (202-535-4141), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Customs has undertaken numerous initiatives relating to the development of a comprehensive integrated Automated Commercial System (ACS). When fully developed, this system will provide an efficient means for accomplishing the current and future entry processing needs of Customs, other government agencies, and the international trade community. Currently, many formal entries received by Customs are prepared on computers. More international

trade businesses are planning to use computers as part of automating the preparation of import documentation.

To ensure entry processing efficiency for both Customs and entry preparers, changes in the assignment and format of entry type codes and entry number are desirable.

Accordingly, by notice published in the Federal Register on January 13, 1984 (49 FR 1740), Customs proposed new procedures for both entry type codes and entry numbers and invited interested parties to submit comments. Although comments were received on both procedures, Customs published a final rule as T.D. 85–5 in the Federal Register on January 11, 1985 (50 FR 1499), which concerned only the changes to entry type codes. Those comments relating to the entry number proposal were still being analyzed. That analysis has been completed and the final changes to the entry numbers are the subject of T.D. 85–112, published in the Federal Register on July 8, 1985 (50 FR 27816). That document amended Part 142, Customs Regulations, by removing §142.3a.

However, after further review of the matter, Customs has determined that the new entry number procedures should be included in Part 142, Customs Regulations (19 CFR Part 142), relating to the entry process. Accordingly, this document adds a new § 142.3a, Customs Regulations (19 CFR 142.3a) to reflect these new changes. In addition, the document establishes a new effective date of October 1, 1986, which supercedes the original effective date of October 1, 1985, which appeared in T.D. 85–112. Compliance with the original effective date was waived by Customs in order to allow brokers and importers additional time to implement the new entry number procedures.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of § 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601, *et seq.),* it is hereby certified that the changes set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 142

Customs duties and inspection, Imports.

AMENDMENT TO THE REGULATIONS

PART 142—ENTRY PROCESS

1. The authority citation for Part 142, Customs Regulations (19 CFR Part 142), continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624.

2. Part 142 is amended by adding a new § 142.3a to read as follows:

§ 142.3a Entry Numbers.

(a) *Placement on Customs Forms.* The importer or broker shall place an 11 character entry number on the entry and corresponding entry summary documentation. For documentation prepared on data processing equipment, the number shall be printed directly on the form. For manually prepared documentation, the number shall be pre-printed in a machine readable format specified by Customs. The same number shall not be used for more than one entry transaction.

(b) *Format.* The following format, including hyphens, must be used when showing the entry number:

XXX-NNNNNNN-N

XXX represents an entry filer code assigned by Customs, NNNNNNN is a unique number which is assigned by the broker or importer, and N is a check digit computed from the first 10 characters based on a formula provided by Customs.

(1) *Assignment of Entry Filer Code.* Customs will assign a unique 3 character (alphabetic, numeric, or alpha numeric) entry filer code to all licensed brokers filing Customs entries. Customs will assign an entry filer code to certain importers filing Customs entries based on importer entry volume, frequency of entry filing, and other considerations. The broker or importer shall use this assigned code as the beginning three characters of the number for all Customs entries, regardless of where the entries are filed.

(2) *Entry Filer Assigned Number.* For each entry, the broker or importer shall assign a unique 7 digit number. This number shall not be assigned to more than one transaction.

(3) *Check Digit.* The broker or importer is responsible for ensuring that the check digit is computed by data processing equipment.

(c) *Misuse of the Entry Filer Code.* The district director may refuse to allow use of an assigned entry filer code if it is misused by the importer or broker.

(d) *Alternative Procedure.* If an importer does not have an assigned entry filer code, or if the district director, in accordance

with paragraph (c) of this section refuses to allow use of an assigned entry filer code, the importer or broker shall obtain forms with a Customs assigned pre-printed machine readable entry number with a computed check digit. These forms will be available for sale by Customs and must be obtained and used before the merchandise may be released from Customs custody.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: May 14, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 28, 1986 (51 FR 19166)]

U.S. Customs Service

General Notice

Application for Recordation of Trade Name: "THE BALTIMORE LUGGAGE COMPANY"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "THE BALTIMORE LUGGAGE COMPANY" used by The Baltimore Luggage Company, a corporation organized under the laws of the State of Rhode Island, located at 1919 Annapolis Road, Baltimore, Maryland 21230.

The application states that the trade name is used in connection with the following merchandise manufactured in Taiwan: vinyl luggage; nylon luggage; vinyl attaches; leather attachés; jute luggage; attachés; and luggage carts.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before August 1, 1986.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Beatrice Moore, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: May 27, 1986.

MARILYN G. MORRISON,
Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, June 2, 1986 (51 FR 19809)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-692)

TODD SHIPYARDS CORP., APPELLANT *v.* UNITED STATES, APPELLEE

Michol O'Connor, Haight, Gardner, Poor and Havens, of Houston, Texas, argued for appellant. With him on the brief were *James J. Sentner, Jr.* and *Gary L. Blum*.

Florence M. Peterson, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

Appealed from: U.S. Court of International Trade.

Judge RESTANI.

(Appeal No. 86-692)

TODD SHIPYARDS CORP., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided May 22, 1986)

Before MARKEY, *Chief Judge*, NIES and ARCHER, *Circuit Judges*.

NIES, *Circuit Judge*.

Todd Shipyards Corporation appeals from the final judgment of the United States Court of International Trade, which granted the United States' motion for summary judgment in Case No. 83-12-01754. We affirm.

OPINION

We have carefully considered each of Todd's arguments; however, it has failed to establish any error in the court's holding that the United States Customs Service correctly classified Todd's "Big T" as a "floating dock" under item 696.50 of the Tariff Schedules of the United States. We affirm on the basis of Judge Restani's opinion.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/72	Watson, J. May 12, 1986	Texport	84-9-01244	Item 389.62 13% + 16¢ per lb.	Item 735.20 6.32%	Newman Importing Co. v. U.S., C.D. 4648	Houston Sports equipment
C86/73	Newman, S.J. May 12, 1986	Novatronics of Canada, Ltd.	82-8-01150	Item 682.25 11%	Item 682.30 5.6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/74	Newman, S.J. May 12, 1986	Novatronics of Canada, Ltd.	83-3-00444	Item 682.25 10.3%	Item 682.30 5.3%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/75	Newman, S.J., May 12, 1986	Novatronics of Canada, Ltd.	83-3-00445	Item 682.25 10.3%	Item 682.30 5.3%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/76	Newman S.J. May 12, 1986	Novatronics of Canada, Ltd.	83-5-00710	Item 682.25 10.3%	Item 682.30 5.3%	Agreed Statement of facts	Buffalo-Niagara Falls Motors
C86/77	Newman, S.J. May 12, 1986	Novatronics of Canada, Ltd.	83-6-00803	Item 682.25 10.3%	Item 682.30 5.3%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/78	Newman, S.J. May 12, 1986	Novatronics of Canada, Ltd.	83-8-01138	Item 682.25 12.5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors.
C86/79	Restani, J. May 13, 1986	FAG Bearings Corp.	82-4-00467	Item 680.39 Various rates	Item 680.33 5.8% and 5.6%	FAG Bearings Ltd. v. U.S., S.O. 85-52	Detroit Combination ball/roller bearings integral shafts
C86/80	Aquilino, J. May 14, 1986	Sonic Products, Inc.	83-10-01494	Item 740.35 Various rates	Item 688.86 5.3%	U.S. v. Texas Instruments, Inc., 673 F.2d 1375	New York Watch bands
C86/81	Carman, J. May 16, 1986	Mattel, Inc.	84-9-01241	Item 737.24 14.8%	Item A774.55 Free of duty	Mattel, Inc v. U.S., S.O. 84-133	Los Angeles Base stands and leg holders

ABSTRACTED VALUATION DECISIONS

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held value	Basis	Port of entry and merchandise
V86/111	Watson, J. May 12, 1986	Morris Struhl, Inc.	R58/15341	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
V86/112	Watson, J. May 12, 1986	Providence Import Co.	R58/10902	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
V86/113	Watson, J. May 13, 1986	Domast, Inc.	R60/20965, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts, an entirety
V86/114	Watson, J. May 13, 1986	Lafayette Radio Electronics Corp.	R61/20045	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Binoculars
V86/115	Watson, J. May 13, 1986	Lafayette Radio Electronics Corp.	R62/6840	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Transceiver
V86/116	Watson, J. May 13, 1986	Hov Li	R62/10929, etc.	Export value	F.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed or, Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Tube rugs, etc.

V86/117	Watson, J. May 13, 1986	Mitsui & Co.	R63/2301, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety
V86/118	Watson, J. May 13, 1986	Mitsui & Co.	R63/4746	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Philadelphia Sewing machine heads
V86/119	Watson, J. May 13, 1986	Mitsui & Co.	R65/15283	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts, an entirety
V86/120	Watson, J. May 13, 1986	National Silver	R68/14441, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Boston Flatware
V86/121	Watson, J. May 13, 1986	Nichimen Co.	R60/21896, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety
V86/122	Watson, J. May 13, 1986	Nichimen Co.	R63/1315, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles Sewing machine heads
V86/123	Watson, J. May 13, 1986	Providence Import	R59/9964, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Rugs
V86/124	Watson, J. May 13, 1986	Providence Imp. Co.	R63/638, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Houston Tube mats
V86/125	Watson, J. May 13, 1986	Rugby Int'l Corp.	R65/12082	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Tube mats
V86/126	Watson, J. May 13, 1986	Transamerican Import & Export Inc.	R61/10209, etc.	Export value	Appraised unit values less 7.5% therof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts, an entirety
V86/127	Watson, J. May 13, 1986	Bloomfield Industries	R63/8206	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles Flatware

ABSTRACTED VALUATION DECISIONS—Continued

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held value	Basis	Port of entry and merchandise
V86/128	Watson, J. May 15, 1986	B.P.M. International Ltd.	R63/4802, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; an entirety
V86/129	Watson, J. May 15, 1986	C.J. Tower & Sons of Buffalo, Inc.	R64/3339, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Buffalo Transistor radios together with their accessories and parts; an entirety
V86/130	Watson, J. May 15, 1986	Durlacher & Co.	290025A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs
V86/131	Watson, J. May 15, 1986	The Englishtown Corp.	R61/6059, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appaised values	Agreed statement of facts	New York Stainless steel flatware
V86/132	Watson, J. May 15, 1986	Imperial Tile Corp.	R64/7578	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles Tiles
V86/133	Watson, J. May 15, 1986	Karl Schroff & Assoc.	R63/4651, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/134	Watson, J. May 15, 1986	Karl Schroff & Assoc.	R63/7646	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/135	Watson, J. May 15, 1986	Mercury Radio & Battery Corp.	R63/7694, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Batteries

V86/136	Watson, J. May 15, 1986	Mitsui & Co.	R64/24181, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; an entirety
V86/137	Watson, J. May 15, 1986	Nichimen Co.	262605A	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Solid silk square
V86/138	Watson, J. May 15, 1986	Nomura (America) Corp.	R64/7441, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Seattle Transistor radios together with their accessories and parts; an entirety
V86/139	Watson, J May 15, 1986	Rugby Int'l Corp.	R66/22512, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Seattle Tube mats
V86/140	Watson, J. May 15, 1986	Starlight Trading, Inc.	R58/6555, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk articles
V86/141	Watson, J. May 15, 1986	Transamerica Electric Int'l Co.	R65/23583, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/142	Watson, J. May 15, 1986	Transamerica Electric Int'l Co.	R66/5483, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/143	Watson, J. May 15, 1986	Trans American Elec. Int'l Co.	R66/6682, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/144	Watson, J. May 15, 1986	Trans-Ocean Import	R67/6946	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Portland Rugs

ABSTRACTED VALUATION DECISIONS—Continued

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held value	Basis	Port of entry and merchandise
V86/145	Watson, J. May 16, 1986	C.M. Import & Export Corp.	R61/2620, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; an entirety
V86/146	Watson, J. May 16, 1986	Daiiche Bussan Kaisha	R58/26070, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Fabric
V86/147	Watson, J. May 16, 1986	Nichimen Co.	R64/18077	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	San Francisco Sewing machine heads
V86/148	Watson, J. May 19, 1986	American Customs Brokerage Co.	R64/2352	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Honolulu Transistor radios together with their accessories and parts, an entirety
V86/149	Watson, J. May 19, 1986	Durlacher & Co.	279426A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs
V86/150	Watson, J. May 19, 1986	Durlacher & Co.	281398A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs
V86/151	Watson, J. May 19, 1986	Gosho Trading Co.	R66/19920, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Chicago Tiles
V86/152	Watson, J. May 19, 1986	H.W. Ebert Co.	R59/1580, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety

V86/153	Watson, J. May 19, 1986	Nichimen Co.	R62/1408, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety
V86/154	Watson, J. May 19, 1986	Nichimen Co.	R62/3823, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Houston Transistor radios together with their accessories and parts, an entirety
V86/155	Watson, J. May 19, 1986	Starlight Trading Inc.	276282A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk handkerchiefs, etc.
V86/156	Watson, J. May 19, 1986	Starlight Trading Inc.	295180A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk rayon scarfs
V86/157	Watson, J. May 19, 1986	Starlight Trading, Inc.	297408A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk/rayon scarfs
V86/158	Watson, J. May 19, 1986	Transamerican Import & Export Co.	R61/8437	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts, an entirety
V86/159	Watson, J. May 19, 1986	Transamerican Import Export Inc.	R61/15409, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts, an entirety
V86/160	Watson, J. May 19, 1986	Universal Transcontinental Corp.	R64/3234, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety

ABSTRACTED VALUATION DECISIONS—Continued

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuation	Held value	Basis	Port of entry and merchandise
V86/161	Re, C.J. May 7, 1986	Yoshida Int'l Inc.	75-1-00320, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S., C.D. 4739	Chicago New York Not stated
V86/162	Watson, J. May 7, 1986	Texas Instruments Inc.	83-5-00653	Constructed value	45.687 of entered value	Agreed statement of facts	Houston Semiconductor devices

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

Procedural Handbook
Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10007.

ORDER FORM

Enclosed is $_____(check or money order) made payable to Clerk, United States Court of International Trade for____ copy or copies of the Procedural Handbook.

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U.S. GOVERNMENT PRINTING OFFICE : 1986 O - 155-617

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

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20/24

Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Parts 10, 178

(T.D. 86-107)

Customs Regulations Amendments Relating to Caribbean Basin Initiative and Generalized System of Preferences

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Caribbean Basin Economic Recovery Act ("CBERA") implements an economic recovery program for nations of the Caribbean and Central America. The Act provides for the waiver of duties until September 1995 on most products imported from Caribbean and Central American countries designated as beneficiary countries.

Title V of the Trade Act of 1974 authorized the President to establish a Generalized System of Preferences ("GSP") which permits the duty-free entry of eligible merchandise arriving directly from designated "beneficiary developing countries."

On January 5, 1984, interim Customs Regulations were published as T.D. 84-14 in the Federal Register (49 FR 852) to implement the CBERA. A final rule was published as T.D. 84-237 in the Federal Register on December 7, 1984 (49 FR 47986). However, based upon public comments received in response to the solicitation of comments provision of the January 5, 1984, interim regulations, the documentation requirements of the rule were modified by T.D. 84-238 which was published in the Federal Register on December 7, 1984 (49 FR 47995), as interim regulations. In addition, to ensure that the documentary requirements of the Caribbean Basin Initiative ("CBI") and the GSP did not detract from one another and to avoid unnecessary confusion among parties using these programs, the GSP documentary requirements were modified by that document to conform them to the CBI documentary requirements, except for the requirement of foreign government certification of the GSP Certificate of Origin Form A. A notice of proposed rulemaking was published in the Federal Register on December 7, 1984

(49 FR 48003), which proposed to modify the requirement of foreign government certification.

This document contains the final rule with respect to the documentation requirements and eliminates mandatory foreign government certification except for those beneficiary countries with which the U.S. Customs Service has a bilateral enforcement agreement.

DATE: This rule is effective on July 9, 1986.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: William L. Marchi, Duty Assessment Division (202-535-4134); Legal Aspects: Myles B. Harmon, Classification and Value Division (202-566-2938); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title V of the Trade Act of 1974 authorized the President to establish a Generalized System of Preferences ("GSP") which permits the duty-free entry of eligible merchandise arriving directly from designated "beneficiary countries." To implement the provisions of the GSP, on December 31, 1975, Customs published regulations as T.D. 76-2 in the Federal Register (40 FR 60047).

Subtitle A, Title II, Pub. L. 96-47, the Caribbean Basin Economic Recovery Act (the "Act"), commonly referred to as the Caribbean Basin Initiative ("CBI"), implements an economic recovery program for nations of the Caribbean and Central America announced by the President on February 24, 1982, in an address to the Organization of American States.

The Act provides for the waiver of duties until September 30, 1995, on most products imported from Caribbean and Central American countries designated as beneficiary countries. Beneficiary countries must meet several criteria before the President is authorized to designate them as eligible under the CBI. Further, certain products cannot be declared duty-free. Under other provisions of law, duty-free treatment can be withdrawn for articles imported in such quantities as to cause injury to a competing U.S. industry. A rule of origin specifies under what conditions articles will be considered products of a beneficiary country, and, therefore, entitled to duty-free entry.

Pursuant to Presidential Proclamation 5133, dated November 30, 1983 (48 FR 54453), the President designated the countries and territories or successor political entities set forth in the Annex to the Proclamation as "beneficiary countries", thus conferring duty-free treatment for all eligible articles from those beneficiary countries. This action, was effective with respect to all articles that were entered, or withdrawn from warehouse for consumption, on or after

January 1, 1984, and on or before September 30, 1985. Presidential Proclamation 5142 of December 29, 1983 (49 FR 341), and Presidential Proclamation 5308 of March 14, 1985 (50 FR 10927), amended Presidential Proclamation 5133 and the Annex to the Proclamation to extend the benefits of the Act to certain additional Caribbean and Central American nations.

To implement the duty-free aspects of the CBI, Customs published interim regulations as T.D. 84-14 in the Federal Register on January 5, 1984 (49 FR 852). The interim regulations provided for a 60-day public comment period which was subsequently extended by a notice published in the Federal Register on March 8, 1984 (49 FR 8600), to May 4, 1984. A final rule was published as T.D. 84-237 in the Federal Register on December 7, 1984 (49 FR 47986).

Numerous commenters on the interim rule submitted observations and proposals for amendments to the interim CBI regulations. A particularly large number of comments were received on § 10.198 of the interim Customs Regulations amendments (19 CFR 10.198), which concerned the documentary evidence of country of origin and required the submission of a declaration of the manufacturer or exporter together with an endorsement thereof by the importer or consignee. In light of the comments received, it was apparent that some changes should be made in this regard. However, after consideration of the comments and proposals submitted, Customs was of the opinion that none of the commenters had presented a proposal which would represent a proper solution to the documentary evidence issue. Since both the GSP regulations and the CBI interim regulations contain documentary requirements which assist in the determination of eligibility of merchandise for the two programs, it was decided to modify the documentary requirements of the interim CBI regulations and submit the modification, which differed from both the initial interim CBI regulatory provision and the various proposals put forth by the commenters, for further public comment. Further, to ensure that the documentary requirements of the CBI and GSP did not detract from one another and to avoid unnecessary confusion among parties using these programs, the GSP documentary requirements, except for the requirement for foreign government certification of the GSP Certificate of Origin Form A, were modified to conform them to the CBI documentary requirements. That document was published as T.D. 84-238 in the Federal Register on December 7, 1984 (49 FR 47995).

The proposal to change the requirement for foreign government certification of the GSP Certificate of Origin Form A was published in the Federal Register on December 7, 1984 (49 FR 48003). A discussion of the comments received on this notice and the other documentary requirements is set forth below.

Discussion of Comments

Documentation Requirements

Three commenters responded to the interim CBI and GSP regulations setting forth the new requirements for country of origin documentation. Some comments related only to the CBI texts, some concerned only the GSP texts, and others were directed to both the CBI and GSP texts.

With regard to the comments directed solely to the CBI texts, none of the commenters disagreed with the interim decision to use the Certificate of Origin Form A in place of the declaration/endorsement as evidence of country of origin. However, two commenters were of the opinion that the regulation should require certification of the CBI Form A by a designated beneficiary country government official as in the case of the GSP. The reason given for this proposal was that the beneficiary country government officials are in a better position to determine the relevant facts than are foreign manufacturers or exporters.

As concerns the comments directed only toward the GSP provisions, one commenter suggested that the GSP regulations should not be aligned on the CBI provisions since the GSP has worked well in the past and the Congress did not indicate a need for any changes when consideration was given to the extension of the GSP program. This commenter further argued that the requirements to maintain records in the exporting country for 5 years and to submit more documentation (*i.e.*, the declaration), if requested, are both burdensome and not in line with the original intent of the GSP program. Another commenter argued that the GSP provision should be amended to allow the manufacturer, rather than the exporter, to prepare the supporting declaration if the exporter has inadequate knowledge of the operations of, and no financial ownership in, the manufacturer. Under this proposal the manufacturer would prepare the declaration and provide it to the exporter who would submit it to Customs.

Two commenters submitted comments regarding both the CBI and GSP interim regulatory provisions. One recommended that a statement be required on the Form A indicating whether the CBI or GSP origin criteria were used, so that the exporter would thereby acknowledge that there are differences in the origin rules under the two programs. Another commenter stated that the prior recordkeeping requirements were sufficient to protect the revenue and that it is burdensome and unfair to penalize U.S. importers (*i.e.*, by making the imported merchandise dutiable) because of the failure of the foreign firm to supply the requested information since the importer has little, if any, control over the diligence of the foreign producer or exporter in adhering to Customs recordkeeping requirements. One commenter argued that the CBI/GSP requirement for submission of the supporting declaration should be deleted

based on the following considerations: (1) The 5-year record retention requirement is extreme, (2) the failure of the exporter to comply with Customs belated request for the declaration creates an uncontrollable exposure for the importer since, once the exporter receives payment for the goods, the importer loses control over the exporter who would not be likely to supply the declaration unless there is significant continuing business with the importer, and (3) requesting the declaration from the exporter, but without any involvement on the part of the importer, will cause problems since Customs does not have the foreign language capability to communicate with small exporters and the assistance of the importer may be necessary as regards technical manufacturing processes. This commenter further recommended that, if the declaration requirement is retained, the regulations should be amended (1) to provide for centralization at Customs Headquarters of the decisions as to whether to request submission of the declaration, with the request then going to the importer who would pass it on to his supplier, and (2) to allow the district director some discretion by providing that failure to submit the declaration in a timely fashion "may" (rather than "will") result in a denial of duty-free treatment. Finally, as regards the provision relating to further verification of the submitted evidence of country of origin, one commenter argued that whereas the foreign government can make such further verification, the U.S. Government cannot do this (due to protocol and sovereignty problems) and the importer cannot control a denial of access on the part of the foreign government or exporter. This commenter recommended that the decision on whether further verification is necessary should be made in each case at Customs Headquarters, and the importer should be allowed an alternate means of satisfying Customs (*e.g.*, by verification performed by an in-country public accounting firm) if Customs is prevented from obtaining the necessary further verification.

As regards the comment directed solely to the CBI interim texts, Customs does not agree that the regulation should require certification of the CBI Form A by a designated beneficiary country government official as has been the case in the GSP. The reason for this proposal does not appear to be valid since a beneficiary country government official is not involved in the manufacturing operation and thus is not privy to the facts relating thereto. Since the certifying official must obtain the relevant facts from the manufacturer or exporter, such second-hand government certification of the Form A, which has no binding legal effect on Customs, represents merely another bureaucratic or administrative step in the export/import process. Customs remains of the opinion that the CBI program will operate more efficiently, from both a legal and operational standpoint, without government certification of the Form A.

For essentially the same reasons, Customs disagrees with the suggestion that the GSP regulations should not be aligned on the

CBI provisions. The initial CBI requirement for submission of the declaration/endorsement as documentary evidence of country of origin, as well as the new interim CBI requirement for submission of the declaration to support the Form A, were based on Customs experience under the GSP with has been found to have not always worked as well as this commenter appears to believe. The fact that the Congress did not indicate a need for any such changes in the GSP is largely irrelevant since this issue was never raised in connection with the amendments to the GSP effected by the Trade and Tariff Act of 1984. Customs is also of the opinion that the 5-year record retention period should be retained since it is consistent with the normal Customs recordkeeping requirements which must be followed by importers. The requirement should benefit importers who will be better assured that the backup records necessary to support the importer's claim will be available. Moreover, there is no merit to the argument that the record retention and supporting declaration requirement should be deleted for the reason that these requirements are burdensome and not in line with the original intent of the GSP program. The record retention and documentary requirements set forth in the interim GSP regulation are intended to assist Customs in administering the origin rules contained in the GSP statute and are consistent with the regulatory authority conferred on the Secretary of the Treasury by that statute. Acceptance of this commenter's argument would serve to minimize the importance which the Congress placed on the GSP rules of origin and would deny the fact that taking advantage of the GSP program implicitly imposes a certain burden of proof in this regard.

With regard to the comments directed toward both the CBI and the GSP interim provisions, Customs does not agree with the suggestion that a statement be included on the Form A to indicate whether the CBI or GSP origin criteria were used. The present regulations adequately cover this point. Submission of the entry summary with the "A" designation, coupled with submission of the "Generalized System of Preferences" Form A, will make it clear that a GSP transaction is involved. Submission of the entry summary with the "C" designation, coupled with the submission of a Form A containing instead the required words "Caribbean Basin Initiative", will indicate that a CBI transaction is involved. It would be inappropriate to conclude that a conscious decision to use one program rather than the other was made without any perception as to the differences in the origin rules under the two programs.

Customs does not agree that the prior recordkeeping requirements were sufficient to protect the revenue. As was clearly stated when the interim 5-year record retention and supporting declaration requirements were included in the CBI and GSP regulations, past experience under the GSP has shown that problems have arisen from the fact that in many cases exporters were not fully

aware either of the need for maintaining information to support the Form A or of the type of information needed. The CBI and GSP provisions do not set forth new substantive requirements as such but rather merely serve to clarify what has always been necessary in order to establish compliance with the origin criteria.

Customs also does not agree that the supporting declaration requirement should be deleted based on the alleged uncontrollable exposure faced by the importer due to his inability to control the actions of the exporter regarding the retention of records and the submission of the declaration. Since the importer of record is legally liable for the payment of duty on imported merchandise, the importer's ability to avail himself of duty-free treatment under the GSP or CBI will of necessity depend on his being supplied with merchandise which meets the GSP or CBI origin requirements. To the extent that the importer cannot control his foreign supplier as regards the record retention and declaration requirements, he would be equally unable to control his supplier as regards the actual production of the merchandise which is the basis upon which GSP or CBI duty-free status is determined. It would be inconsistent with commercial and legal reality to conclude that an importer neither assumes a risk nor bears any responsibility when he engages in a GSP or CBI transaction. It is incumbent on the importer to select a reliable foreign supplier so as to ensure the availability of the GSP or CBI benefits, and the mere fact that an importer is unable or unwilling to do so is not a sufficient basis for doing away with regulatory requirements which are specifically intended to ensure that Customs will be able to determine whether there is compliance with the statutory rules of origin.

It was with the above considerations in mind that Customs prepared the GSP and CBI regulations to provide that failure to submit the supporting declaration in a timely fashion "will" result in a denial of duty-free treatment. Since a request for the declaration will normally only be made based on a specific determination that there appears to be an insufficient basis for granting GSP or CBI duty-free treatment, any failure to submit the requested declaration so as to support the claim must result in a dutiable entry. Customs' statutory responsibility for ensuring that there is compliance with the GSP and CBI requirements, consistent with the Congressional intent behind the rules of origin, precludes the exercise of any discretion in this regard so as to give the importer the benefit of the doubt. Therefore, the regulations are not being amended to provide that the imported merchandise "may" be treated as dutiable in such a case.

In view of Customs decision to delete the original CBI declaration/endorsement approach because such an approach would cause the foreign manufacturer to disclose confidential business information to the importer, it would not be appropriate to require the involvement of the importer when a request for the declaration is

made. While there is nothing which would prevent a foreign manufacturer from requesting assistance from the importer, the decision to involve the importer should be left to the manufacturer,

Customs believes that it would be inappropriate to provide in the regulations for centralization at Customs Headquarters of all decisions to request the supporting declaration or to seek further verification of the submitted evidence of country of origin. Such a requirement would unnecessarily delay the entry/liquidation process. Further, the Customs field office is in the best position to decide what is necessary in an individual case. Finally, Customs does not believe that it would be appropriate to specify in the regulations the manner in which further verification should be obtained. Since protocol and sovereignty considerations and other factors may vary from country to country and from case to case, it is preferable to leave it to the discretion of the district director to use all reasonable means at his disposal to obtain such further verification. Although verification by the foreign government or by an in-country public accounting firm would not be precluded, the decision whether to accept such verification should also be left to the discretion of the district director.

Based on the above, Customs has determined that the interim CBI regulations regarding CBI documentary evidence of country of origin contained in § 10.198 and the interim GSP provisions concerning the supporting declaration contained in § 10.173(c) should be adopted as final rules. However, Customs agrees with the suggestion that the GSP regulations should be amended to allow a party other than the exporter to prepare the supporting declaration in a case where the exporter has insufficient knowledge of the manufacturer's operations, as, for example where the exporter is an independent selling or buying agent. Since the same considerations would apply in the case of the CBI, Customs believes that the final CBI regulations should contain a similar provision. Accordingly, appropriate modifications have been made to §§ 10.173 and 10.198.

Elimination of Foreign Government Certification of GSP Form A

A total of 15 comments were received on the proposal to do away with mandatory certification of the Form A by the designated beneficiary developing country (BDC) governmental authority. Seven commenters were in favor of the proposal, six were opposed, and two were neither in favor of nor against the proposal as such but rather proposed alternate approaches.

As concerns the arguments in favor of the proposal, commenters suggested that removal of the certification requirement would alleviate procedural difficulties encountered in obtaining a certified Form A from a foreign government under circumstances where the merchandise nevertheless meets the GSP origin requirements. Some commenters pointed out that these difficulties were encoun-

tered in particular where duplicate or retroactive Form A's were needed, as, for example, where the foreign manufacturer is controlled by the U.S. importer (who maintains the books and records) and the cost data to be reflected on the Form A can be determined only at the end of the company fiscal year. Even though the cost data can be made available to Customs from the domestic corporate headquarters, mandatory certification requires that the Form A be obtained from the foreign government. One commenter stated that the untimely issuance of the Form A by the foreign government adds to the importer's cost due to the need to post a bond for the missing document. Another commenter argued that the proposal would reduce the paperwork burden on brokers and Customs and would allow entries to move without being held up for missing documents since the exporter can usually supply the Form A at the time of exportation. One commenter suggested that mandatory certification is a shield which prevents Customs from verifying the information on the Form A and that the verification procedure is cumbersome since Customs must go through the Department of State in order to obtain such verification from the BDC government. As concerns the legal effect of BDC government certification, one commenter pointed out that Customs, and not the foreign government, inevitably must be satisfied as to the GSP eligibility of the imported merchandise. Another commenter pointed out that under the Customs laws the importer is still legally liable for supplying the proof as to GSP eligibility. One commenter argued that government certification of the Form A is procedural and thus can be dispensed with under the regulatory authority conferred on the Secretary of the Treasury, and that deletion of the certification requirement would not be inconsistent with any United Nations Conference on Trade and Development (UNCTAD) agreements since it has been recognized that the requirements and procedures under the GSP should be those which are imposed by the preference-giving country. One commenter suggested that the provision for submission of a detailed declaration to support the statements made on the Form A would overcome any drawback arising from deletion of the certification requirement. Finally, commenters argued that deletion of the certification requirement would align the GSP and CBI requirements and thus avoid confusion between the two programs.

Commenters in favor of deletion of the mandatory certification requirement also proposed an alternate approach in the event that the certification procedure is retained. Under this proposal, a provision would be made for not requiring government certification of the Form A if the importer has a controlling interest in the exporter. In favor of this alternate approach, it was argued that the importer would have automatic access to the necessary books and records and thus could readily make them available to Customs. One of these commenters suggested that the importer should be al-

lowed to file a written statement with the district director advising of the importer's control over the exporter and requesting a waiver of the certification requirement.

With regard to the arguments against the proposal to do away with mandatory government certification of the Form A, commenters argued that the foreign government officials are in a better position than foreign manufacturers or exporters to determine the relevant facts, and in many cases the exporter does not have access to the manufacturer's confidential business records. Commenters further argued that the GSP certification procedure has worked well and thus should not be changed, and in this regard it was alleged that (1) BDC governments have often refused to certify inaccurate Form A's, (2) the proposal will allow unscrupulous manufacturers and exporters to make false claims, particularly since the deterrent value of a penalty imposed by the BDC for a false claim will be lost, and (3) there will be delays in clearing shipments because Customs will have no authority to verify the facts in the source country. Commenters argued that adoption of the proposal would make it difficult or impossible for a BDC government to monitor GSP exports and exporters. Moreover, commenters stated that the proposal would shift the burden of verification from the BDC government to Customs, and that Customs may have difficulty in locating the exporter due to insufficient manpower.

Two commenters were of the opinion that the proposal would both increase the burden on exporters and adversely affect importers. With regard to the adverse effects on importers it was argued that (1) since the importer has little control over the diligence of the foreign manufacturer or exporter in adhering to Customs recordkeeping requirements, it would be burdensome and unfair to penalize an importer (by making the imported merchandise dutiable) because of a failure of a foreign firm to supply the requested documentation, and (2) whereas BDC government certification acts as a buffer for the importer and a letter of credit is normally contingent on the existence of a certified Form A, the proposed deletion of the certification requirement would put the importer at the mercy of his supplier and would thus increase the importer's exposure to fraud and to the assessment of duties and penalties. Two commenters were of the opinion that the proposal would further complicate an already complicated system. With regard to Customs' view that the GSP and CBI requirements should be the same, commenters argued that such conformity is not necessary since the GSP and the CBI are separate and distinct but that, if conformity is deemed necessary, the CBI should follow the GSP rather than vice versa.

It was also argued that the proposal would harm both BDC's and the GSP program as a whole in that (1) the present documentary requirements for verification of GSP claims will be even more important under the recently amended GSP statute since any evidence of malpractice or fraud will weigh heavily in any future

study made to determine whether the most competitive BDC's should continue to benefit under the program, (2) the proposal will disrupt the trade of those BDC's which are heavily dependent on exports and which produce goods identical to those made elsewhere, and (3) the absence of certification will give rise to greater opposition to the GSP on the part of U.S. producers. One commenter also suggested that in the event that certification of the Form A were made voluntary, but the BDC government nevertheless were to continue to require it, acceptance of an uncertified Form A by Customs would constitute acquiescence in a violation of the BDC law. Two commenters further argued that the proposal would be inconsistent with both the UNCTAD suggestions for documentary requirements and the requirements of GSP programs administered by other developed nations. As regards the proposed change to § 10.175(c)(4), Customs Regulations, which concerns merchandise shipped through a free trade zone in a BDC, one commenter was of the opinion that the regulation should not be amended. Finally, a BDC government opposed to the proposal suggested that if mandatory certification were not to be retained, the U.S. authorities should specifically designate that BDC government as being responsible for the Form A's covering merchandise imported from that BDC.

One commenter pointed out that as a result of the proposal an exporter who purchases goods from an independent BDC manufacturer in an arm's-length transaction would be placed in an impossible position since he would no longer be able to rely on the BDC government certification as regards the GSP eligibility of the goods. This commenter therefore suggested that the regulation provide that the manufacturer, rather than the exporter, be responsible for completing and signing the Form A if the exporter has inadequate knowledge of the operations of, and no financial ownership in, the manufacturer. Under this proposal Customs would still look to the exporter to supply the Form A. Another commenter merely suggested that the regulation refer to the Form A signed by the exporter of the merchandise "and by the representative of the Chamber of Commerce or the Chamber of Industries" in the country from which it is directly imported.

Based on the comments submitted, and its own experience with the value of the beneficiary-government certification as a guarantee of compliance with GSP legal requirements, Customs believes that the arguments in favor of the proposal to do away with mandatory government certification of the GSP Form A outweigh the arguments made in favor of its retention.

The arguments in favor of deletion of the mandatory certification requirement, which were submitted mainly by private domestic parties, clearly demonstrate that mandatory government certification has led to problems both as concerns the insurance of retroactive or duplicate Form A's and as concerns the need to post a bond

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if issuance of the Form A is untimely. Customs is of the opinion that in the absence of a significant law enforcement benefit attributable to beneficiary or government certification, those problems should not be allowed to continue, particularly to the extent that they are not attributable to a party directly involved in the commercial transaction. The GSP regulations should further the program, consistent with the need to ensure compliance with the legal requirements thereunder, rather than hinder it. Customs agrees that deletion of the mandatory certification requirement will reduce the paperwork burden on all concerned parties and will allow GSP entries to move more quickly and efficiently.

Customs is also of the opinion that deletion of the mandatory certification requirement would remove any confusion as to the legal effect of BDC government certification and would facilitate verification of the statements made on the Form A. As concerns the legal effect of government certification, Customs agrees that certification has no binding legal effect on the duty-free eligibility of imported merchandise since it is Customs, and not the BDC government, which is charged with the responsibility under U.S. law to determine the proper tariff status of imported merchandise. Moreover, notwithstanding what occurs in this regard in the exporting country, it is the importer who is legally responsible for establishing to Customs that there is compliance with the GSP requirements. With regard to verification of the statements made on the Form A, Customs also agrees that mandatory government certification has necessitated the use of a cumbersome and often ineffective procedure to obtain such verification. Use of an uncertified Form A will avoid a situation in which a request for further verification implicitly draws into question the veracity of a governmental certifying official and allow the verification procedure to be completed in a more timely and efficient manner.

Customs also agrees that deletion of the mandatory certification requirement is permissible under the regulatory authority conferred on the Secretary of the Treasury and is not inconsistent with any UNCTAD agreements. Whereas the GSP statute does not even require the use of a Form A in connection with GSP importations, that statute does confer upon the Secretary the authority to promulgate regulations to carry out its provisions. Since foreign government certification is not a proper legal basis for determining whether there is compliance with the statutory standards, deletion of the mandatory requirement would not be in conflict with the intended purpose of those regulations. With regard to the UNCTAD, Customs agrees that it was recognized that the applicable requirements and procedures in each case would be those imposed by the preference-giving country. Moverover, Customs is unaware of any binding international agreement which requires that the U.S. use the UNCTAD Form A incorporating government certification. Cus-

toms understands that general use of the Form A came about as a result of a non-binding UNCTAD recommendation.

For the reasons stated in connection with the discussion of the comments on the CBI interim regulations, Customs does not agree that foreign government officials are in a better position than foreign manufacturers or exporters to determine the relevant facts. Therefore, this argument is insufficient to support retention of mandatory government certification. Moreover, the discussion of the comments on the CBI and GSP interim provisions adequately disposes of those arguments in favor of the status quo which are based on the alleged adverse effect which deletion of mandatory certification would have on importers due to an importer's inability to control his foreign supplier so as to reduce his exposure to the assessment of duties and penalties. For essentially the same reasons, Customs does not agree that mandatory government certification should be retained because the deletion thereof would shift the burden of verification from the BDC government to Customs which allegedly has insufficient manpower for this purpose. As has already been pointed out, ultimate responsibility for verification has, as a legal matter, always rested with Customs, and the argument regarding alleged manpower limitations incorrectly suggests that Customs has the discretion to cede to others its statutory responsibility for the enforcement of the law.

Nor does Customs agree that mandatory certification should be retained based on the agreement that the GSP certification procedure has worked well. While a great many proper GSP claims have been made, and although Customs would not deny that BDC governments have in some instances refused to certify, or imposed penalties for, inaccurate Form A's, it is equally true that over the year's a significant number of GSP claims have been found by Customs not to be valid in spite of the government certification. The practical (as opposed to legal) value of the BDC government certification is directly dependent on the extent to which actual verification takes place in the BDC at the time of certification. Although Customs recognizes that government certification could be of value, Customs actual experience under the GSP has demonstrated that government certification does not necessarily ensure that an unscrupulous exporter will not make a false statement on the Form A.

With regard to the arguments that removal of mandatory government certification would have an adverse effect on BDC's, Customs does not necessarily agree that the proposal would make it difficult or impossible for a BDC government to monitor GSP exports and exporters. A BDC government in principle would still retain the authority under its own laws to impose necessary export controls, including mandatory government certification of the Form A. Moreover, even if a BDC government were to require certification, acceptance of an uncertified Form A for purposes of the

GSP program would not represent acquiescence in a violation of the BDC law since such "acquiescence" implies a responsibility on the part of the U.S. government (*i.e.*, to enforce the BDC law) which does not exist. Nor does Customs believe that the proposal would harm BDC's or the GSP program as a whole either on the ground that certification has become more important vis-a-vis the retention of GSP benefits by most competitive BDC's or on the ground that the absence of certification will give rise to greater opposition to the GSP on the part of U.S. producers. As regards the first point, the provisions in the GSP statute, as amended by the Trade and Tariff Act of 1984, regarding most competitive BDC's concern the withdrawal of GSP benefits based on economic performance and do not refer in any way to BDC government certification. As regards the second point, Customs is firmly of the view that opposition to the GSP both within domestic industry and within the Congress would be significantly greater if it were to appear that Customs was giving legal effect to BDC government certification so as to not look beyond the Form A to verify GSP compliance. Finally, given the fact that government certification has no legal effect on the question of GSP eligibility, there does not appear to be any basis for the argument that deletion of mandatory certification will disrupt the trade of those BDC's which are heavily dependent on exports and which produce goods identical to those made elsewhere.

Based on our analysis of the comments and further review of the matter, Customs has determined that the proposal to make BDC government certification permissive, rather than mandatory, should be adopted as a final rule. Accordingly, the proposed change to § 10.175(c)(4) concerning merchandise shipped through a BDC free trade zone should also be adopted since government certification would also not be required in such a case. However, Customs recognizes the possibility suggested by one commentor, that verfication procedures can be implemented by a beneficiary government in such a manner as to warrant a requirement for government certification. In such cases, Customs believes that it may be appropriate to enter into agreement on verification procedures providing for government certification. The proposal to also provide for signature on the Form A by the representative of the Chamber of Commerce or the Chamber of Industries should not be adopted since this would complicate the procedures and could lead to inconsistency in the requirements as regards BDC's not having such organizations. However, for the reasons stated in connection with the discussion of the GSP and CBI supporting declaration, Customs agrees with the suggestion that the GSP regulations should provide for preparation of the Form A by another party if the exporter has no knowledge of the relevant facts. A similar change should be included in the corresponding CBI provisions since the same consideration would apply.

Amendments to the GSP and CBI Regulations

In view of our determination, the GSP and CBI texts are amended by this document to provide for preparation of the Certificate of Origin Form A by the exporter or other appropriate party having knowledge of the relevant facts (see §§ 10.173(a)(1), 10.198(a)(1)). In addition, the GSP and CBI regulations have been amended to provide similar flexibility as regards the preparation of the supporting declaration, subject to the requirement that the parties preparing the Certificate of Origin and the declaration must be the same so that Customs will be able to contact the appropriate party to request the declaration based on the information appearing on the Certificate of Origin (see §§ 10.173(c) (1) and (2), 10.198(c) (1) and (2)). Since the exporter will not always be the party preparing the GSP and CBI declarations, the titles of the declarations have been amended to read "GSP Declaration" and "CBI Declaration" rather than "Declaration of Exporter" (see §§ 10.173(c)(1), 10.198(c)(1)).

Section 206 of Pub. L. 98–573, the Trade and Tariff Act of 1984, amended § 498(a)(1), Tariff Act of 1930, as amended (19 U.S.C. 1498(a)(1)), by increasing the informal entry limit from $250 to $1250. However, it exempted all articles valued in excess of $250 classified in Schedule 3, parts of Schedule 7, and Parts 2 and 3 of the Appendix of the Tariff Schedules of the United States Annotated or any other article for which formal entry is required without regard to value. Under 19 U.S.C. 1498(a)(1), the Secretary of the Treasury may specify the exact amount of the informal entry limit. The limit may vary for different classes or kinds of merchandise or different classes of transactions. After thorough consideration, it was determined that, with the exception of the specific statutory exclusions, the informal limit for all articles should be set initially at $1,000, with the option to increase it to $1250 in the future. Accordingly, on July 23, 1985, a document was published in the Federal Register as T.D. 85–123 (50 FR 29949) which amended various sections of the Customs Regulations, including § 10.173 of the GSP regulations, to establish the new informal entry monetary limit. While the GSP regulations have always included the dollar amount of the informal entry monetary limit, the CBI regulations simply refer to "formal" and "informal" entries. Upon reflection it is believed that the approach taken in the CBI regulations is the better approach since it will not be necessary to amend numerous sections of the regulations when the monetary limit is changed. Accordingly, § 10.173(a), (b) and (c)(1) of the GSP regulations have been amended to replace the dollar figures with references to "formal" and "informal" entries. These amendments will align the GSP and CBI regulations.

EXECUTIVE ORDER 12291

These amendments do not constitute a "major rule" as defined by § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this document because the rule will not have a significant economic impact on a substantial number of small entities.

PAPERWORK REDUCTION ACT

The regulation is subject to the Paperwork Reduction Act of 1980, Pub. L. 96-511. Accordingly, applicable sections have been cleared by the Office of Management and Budget and assigned control number 1515-0112. On March 26, 1985, Customs published in the Federal Register (50 FR 11849) a document as T.D. 85-38 which amended the Customs Regulations by setting forth in a new Part 178 (19 U.S.C. Part 178) a list of information collections contained in the regulations and the OMB assigned control numbers. An amendment to Part 178, relating to approval of information collection requirements has been made which includes the OMB control number granting approval for the information collection requirements of § 10.173 in the numerical listing of approval provisions.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 10 AND 178

Caribbean Basin Initiative, Customs duties and inspection, Generalized System of Preferences, Imports.

AMENDMENTS TO THE REGULATIONS

Parts 10 and 178, Customs Regulations (19 CFR Parts 10, 178), are amended as set forth below.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 13, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1623, 1624. Sections 10.171–10.178 also issued under 19 U.S.C. 2461 *et seq.* Sections 10.191–10.198 also issued under 19 U.S.C. 2701 *et seq.*

2. Section 10.173(a) as amended by T.D. 85–123 published in the Federal Register on July 23, 1985 (50 FR 29949) is amended by removing the words "$1,000 (except for articles valued in excess of $250 classified in Schedule 3; Parts 1, 4A, 7B, 12A, 12D, and 13B of Schedule 7; item 772.30 and 772.35; and Parts 2 and 3 of the Appendix of the Tariff Schedules of the United States Annotated)" in the first sentence of paragraph (a)(1) and inserting in their place the words "covered by a formal entry".

3. Section 10.173(a)(1) is further amended by revising the last sentence to read as follows:

§ 10.173 Evidence of the country of origin.

(a) *Shipments covered by a formal entry.* (1) *Certificate of Origin.* * * * The Form A shall be properly completed and signed by the exporter of the merchandise, or other appropriate party having knowledge of the relevant facts. The Form A need not be certified by the designated governmental authority in that country unless that country has a verification agreement with the U.S. Customs Service.

4. Section 10.173(a)(2) is amended by removing the words "appropriate governmental body" in the first sentence of the paragraph and inserting in their place the word "party".

5. Section 10.173(b) is amended by removing the words "valued at $250 or less" in the heading of paragraph (b) and the text of the paragraph and in each instance inserting in their place the words "covered by an informal entry".

6. Section 10.173(c) is revised to read as follows:

§ 10.173 Evidence of the country of origin.

* * * * * * *

(c) *Merchandise not wholly the growth, product, or manufacture of a beneficiary developing country.* (1) *Declaration.* In a case involving merchandise covered by a formal entry which is not wholly the growth, product, or manufacture of a single beneficiary developing country, the party which prepared and signed the Certificate of Origin shall be prepared to submit directly to the district director, upon request, a declaration setting forth all pertinent detailed information, concerning the production or manufacture of the mer-

chandise, which was relied upon in the preparation of the Certificate of Origin. When requested by the district director, the declaration shall be prepared in substantially the following form:

GSP DECLARATION

I, _____ (name), hereby declare that the articles described below were produced or manufactured in _____ (country) by means of processing operations performed in that country as set forth below and were also subjected to processing operations in the other country or countries which are members of the same association of countries as set forth below and incorporate materials produced in the country named above or in any other country or countries which are members of the same association of countries as set forth below:

Number and date of invoices	Description of articles and quantity	Processing operations performed on articles		Materials produced in a beneficiary developing country or members of the same association	
		Description of processing operations and country of processing	Direct costs of processing operations	Description of material, production process, and country of production	Cost or value of material
Date ..... Address ..... Signature ..... Title					

(2) *Retention of records and submission of declaration.* The information necessary for preparation of the declaration shall be retained in the files of the party which prepared and signed the Certificate of Origin for a period of 5 years. In the event that the district director requests submission of the declaration during the 5-year period, it shall be submitted directly to the district director within 60 days of the date of the request or such additional period as the district director may allow for good cause shown. Failure to submit the declaration in a timely fashion will result in a denial of duty-free treatment.

(3) *Verification of documentation.* The evidence of country of origin submitted under this section shall be subject to such verification as the district director deems necessary. In the event that the district director is prevented from obtaining the necessary verification, he may treat the entry as dutiable.

7. Section 10.175(c)(3) is amended by removing the words "issued by" in the first sentence and inserting, in their place, the words "prepared and signed in".

8. Section 10.175(c)(4) is revised to read as follows:

§ 10.175 Imported directly defined.

* * * * * * *

(c) * * *

(4) The person responsible for the articles in the free trade zone, or any other person having knowledge of the facts, shall prepare and sign an additional Certificate of Origin, Form A, declaring what operations, if any, were performed on the articles within the free trade zone. The additional Certificate of Origin shall be provided to the U.S. importer or consignee who shall present it to the district director along with the Certificate of Origin required by § 10.173(a)(1). The provisions of § 10.173 (a)(2), (a)(3), (a)(4) and (a)(5) are applicable to this paragraph.

9. Section 10.198(a)(1) is amended by adding the words ", or other appropriate party having knowledge of the relevant facts," after the word "merchandise" in the second sentence of the paragraph.

10. The heading of § 10.198(c)(1) is amended by removing the words "of the exporter".

11. Section 10.198(c)(1) is further amended by removing the word "exporter" in the first sentence and inserting in its place the words "party which prepared and signed the Certificate of Origin".

12. The title to the declaration in § 10.198(c)(1) is amended by removing the words "Declaration of Exporter" and inserting in their place the words **"CBI DECLARATION".**

13. Section 10.198(c)(2) is amended by removing the words "exporters files" in the first sentence of the paragraph and inserting, in their place, the words "files of the party which prepared and signed the Certificate of Origin".

14. Section 10.198(c)(2) is further amended by removing the word "exporter" in the second sentence of the paragraph and inserting, in its place, the words "appropriate party".

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by including § 10.173 in the proper numerical sequence of the listing of OMB approval control numbers as set forth below:

§ 178.2 Listing of OMB Control Numbers.

19 CFR Section	Description	OMB Control No.
* * * * * * *		
§ 10.173	Claim for duty-free entry of eligible articles under the Generalized System of Preferences.	1515–0112
* * * * * * *		

[Published in the Federal Register, June 9, 1986 (51 FR 20810]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 86-53)

AMERITRADE CORP., PLAINTIFF *v.* HARRY C. CARNES, DISTRICT DIRECTOR OF CUSTOMS, ET AL., DEFENDANTS

Court No. 86-02-00180

Before CARMAN, *Judge.*

[Defendants' motion for judgment upon the agency record granted in part, denied in part; remanded to Customs regarding revocation of cartman's license.]

MEMORANDUM OPINION

(Decided May 20, 1986)

Herrick & Larsen (Herbert P. Larsen on the motion) and *Reisman & Bryn (Mark S. Gallegos* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Florence M. Peterson* on the motion) for the defendants.

CARMAN, *Judge:* on February 18, 1986 the Court denied the motion of plaintiff Ameritrade Corporation for a preliminary injunction. Plaintiff had moved the Court to enjoin defendants from revoking plaintiffs' bonded warehouse and cartman's licenses. Defendants cross-moved for judgment upon the agency record (Rule 56.1) and that motion, opposed by plaintiff, remains before the Court. This memorandum opinion addresses the Court's previous order denying plaintiff's motion for a preliminary injunction as well as defendants' cross-motion for judgement on the agency record. The Court grants in part and denies in part defendants' cross-motion, sustaining the decision of the United States Customs Service (Customs) as to plaintiff's bonded warehouse license, and remanding to Customs as to plaintiff's cartman's license.

BACKGROUND

On August 28, 1985 Harry W. Carnes, District Director of Customs, notified plaintiff of his intent to revoke plaintiff's bonded warehouse status pursuant to 19 C.F.R. § 19.3(f) (1985). On November 21 and 22, 1985, Customs held a hearing at which plaintiff was

represented by counsel. At the hearing plaintiff's counsel agreed to treat the District Director's August 28 letter as proper notice of Customs' intent to also revoke plaintiff's cartman's license. On December 30, 1985 the hearing officer forwarded to the Regional Commissioner of Customs his recommendation that plaintiff's bonded warehouse and cartman's licenses be revoked. On February 4, 1986 the Regional Commissioner notified plaintiff of his decision to revoke its licenses.

Upon receiving notice of the Regional Commissioner's decision, plaintiff moved for a temporary restraining order, which the Court granted pending a hearing on plaintiff's motion for a preliminary injunction. On February 18, 1986 the Court held a hearing, ruling from the bench to dissolve the temporary restraining order and denying plaintiff's motion for a preliminary injunction. The parties agreed to an expedited briefing schedule on the motion for judgment on the agency record. On February 28 plaintiff filed a motion for certification for appeal, which the Court denied. On March 7 plaintiff filed a motion requesting a ninety day extension for filing its brief in response to defendants' cross-motion for judgment on the agency record. The Court denied that motion as well. On March 25 defendants filed a motion for a protective order providing that discovery not be had.

OPINION

I. *The Preliminary Injunction*

To obtain a preliminary injunction a party must show (1) that it is threatened with irreparable harm, (2) that the public interest would best be served by an injunction, (3) that the party is likely to succeed on the merits, and (4) that the balance of hardships favors the moving party. *See S.J. Stile Associates* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981). In *DiJub* v. *United States,* 1 CIT 42, 52-53, 505 F. Supp. 113 (1980), this court held that the loss of a cartman's license, without more, did not constitute irreparable harm. Similarly, the Court in the instant case reasoned that loss of the bonded warehouse and cartman's licenses did not cause irreparable harm. *Manufacture de Machines du Haut-Rhin* v. *Von Raab,* 6 CIT 60, Slip Op. 83-77 (July 25, 1983) (lost profits, lost good will and tarnished reputation found not to constitute irreparable harm as condition precedent to jurisdiction under 28 U.S.C. § 1581(h). Because plaintiff failed to show that it would be irreparably harmed by loss of its licenses pending a decision on the merits, the Court denied its motion for a preliminary injunction.

II. *Judgment Upon the Agency Record*

The District Director notified plaintiff of his intent to revoke its bonded warehouse status because plaintiff had violated Customs regulations 19 C.F.R. §§ 19.6(e)(2) and 19.6(b)(1). 19 C.F.R § 19(e)(2) states:

> The district director may revoke or suspend for cause the right of a proprietor to continue the bonded status of the warehouse * * * if the warehouse proprietor refuses or neglects to obey any proper order of a Customs officer or any Customs order, rule, or regulation relative to the operation or administration of a bonded warehouse.

The other regulation, 19 C.F.R. § 19.6(b)(1), provides for the removal of bonded merchandise from a bonded warehouse without the physical supervision of a Customs officer. Under that provision, the warehouse proprietor is "relieved for responsibility only if it receives the signed receipt on the withdrawal or removal document of the carrier named in the document."

Customs alleged that plaintiff violated these regulations by selling approximately 2,900 cases of bonded liquor to an unbonded warehouse, from which they were then sold into United States commerce without payment of duties. Customs also alleged that plaintiff's employees falsified the withdrawal documents on the liquor. At the hearing Customs presented unrefuted evidence that plaintiff's employees had prepared withdrawal documents (CF 7512s) showing that the liquor was to be delivered by plaintiff's bonded cartman to another bonded cartman and subsequently to an exporting carrier; that plaintiff's cartman instead sold the liquor to America First, an unbonded warehouse; and that America First sold the liquor in the United States without paying duties. Plaintiff's main defense was that its employees completed the CF 7512s according to instructions from America First and that plaintiff's president was unaware of the falsification of the documents or the diversion of the liquor by America First. The hearing officer found that plaintiff's contentions were unsupported by the evidence and recommended that plaintiff's license be revoked.

The Regional Commissioner reviewed the recommendation and the record of the hearing and issued a decision, supported by an eighteen page opinion, to revoke plaintiff's warehouse and cartman's licenses. The Regional Commissioner stated that there was no doubt in his mind that bonded liquor from plaintiff's warehouse was diverted without payment of duties, and that plaintiff filed false CF 7512s "knowing these documents to be false, or with reckless disregard for their truth and accuracy." Decision of Regional Commissioner Kwas 7. The Regional Commissioner concluded that plaintiff violated Customs rules and regulations regarding the in-bond movement and documentation of bonded liquor, and that the District Director's decision to revoke plaintiff's bonded warehouse status was not an abuse of discretion or a violation of Customs rules, regulations or proceedings. *Id.* at 15.

Plaintiff challenges the Regional Commissioner's decision as arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence on the record. Plaintiff also challenges the Regional Commissioner's action revoking its cartman's license as

ultra vires, claiming the Regional Commissioner lacked power to revoke its cartman's license.

A. *The Bonded Warehouse Status*

Plaintiff first contends that the Regional Commissioner's decision is unsupported by substantial evidence in the record. According to plaintiff, evidence at the hearing showed that plaintiff misdelivered the bonded liquor through mistake of fact and excusable neglect. The clear evidence presented at the hearing was that plaintiff's president signed 329 false withdrawal documents and that almost 2,900 cases of bonded liquor were sold by plaintiff to an unbonded warehouse and from there sold into United States Commerce without payment of duties. This is clearly sufficient evidence to support the Regional Commissioner's conclusion that even if plaintiff's president had unknowingly signed false documents, his neglect in failing to discover the falsification or the diversion of the liquor was not excusable. Plaintiff has essentially asked the Court to weight the evidence and arrive at an independent conclusion. The Court, however, is bound to uphold the agency so long as there is such evidence in the record as a reasonable mind would accept to support the conclusion reached. *See Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197 (1938). Such evidence exists in this record.

Plaintiff further contends that the Regional Commissioner's decision was improper because the prosecutor for Customs at the hearing drafted some portion of the supporting opinion. Plaintiff offers no proof of this, nor any proof that the Regional Commissioner did not personally review the record and consider the evidence. Even if the prosecutor did participate in drafting the opinion, that would not be sufficient to show that the Regional Commissioner did not properly and impartially consider the record. *See Baltimore Security Warehouse Co.* v. *United States,* 9 CIT ——, Slip Op. 85–131 (December 13, 1985).

Plaintiff challenges Customs' actions on a host of other grounds, suggesting first that the Customs regulations cited by the District Director in his notice of intent to revoke the bonded warehouse status are not capable of violation and therefore cannot provide a basis for revocation. The regulations cited by the District Director were 19 C.F.R. § 19.3(e)(2), which provides grounds for revocation of bonded warehouse status, and § 19.6(b)(1), which provides that the warehouse proprietor is responsible for bonded merchandise until it is signed for by the bonded cartman shown on the withdrawal documents. Regardless of whether the regulations were capable of violation, the District Director's letter provided plaintiff sufficient notice of the charges against it prior to the hearing. Customs introduced evidence at the hearing to prove these charges. In reviewing that evidence, the Regional Commissioner found that plaintiff had violated a variety of Customs regulations providing for the withdrawal and movement of in-bond liquor. Based on these violations,

the Regional Commissioner was within his authority in revoking plaintiff's license under 19 C.F.R. § 19.3(e)(2).

In a similar vein plaintiff complains that its due process rights were violated because Customs regulations 19 C.F.R. § 19.3 is unreasonable in that it allows revocation on certain enumerated grounds and then includes a catchall provision allowing revocation for violation of *any* Customs rule, regulation or order. Plaintiff's argument is unsupported by any authority or reasoned argument. Congress delegated to Customs the authority to establish regulations for granting bonded warehouse status. 19 U.S.C. § 1556 (1982). It is reasonable for Customs to condition conferral of that privilege upon compliance with all Customs regulations.

Plaintiff also argues that Customs violated its own policies and practices because it did not grant plaintiff an opportunity to correct its practice of delivering liquor to an unbonded consolidator. Plaintiff points to no evidence showing that Customs had a policy of allowing bonded warehouses to correct fraudulent practices once it discovered them. Of similar tenor are plaintiff's arguments that Customs generally tolerated the practice of delivering to an unbonded consolidator and unfairly singled out plaintiff for punishment, and that Customs' punishment was unnecessarily harsh. Customs has discretion to decide which violators it will pursue and what punishment it will mete out. *See Tempo Trucking & Transfer Corp.* v. *Dickson*, 405 F. Supp. 506, 514 (E.D.N.Y. 1975).

Plaintiff's final argument is that it suffered procedural unfairness because Customs did not provide it with a copy of the hearing officer's recommendation. Plaintiff points to no statute or regulation requiring Customs to provide it with such a copy, nor does plaintiff claim it was in any way prejudiced. Moreover, the recommendation was a part of the official record which plaintiff could have received upon request. *See Baltimore Security Warehouse Co.* v. *United States*, 9 CIT ——, Slip Op. 85-31, 8 (December 13, 1985).

B. *The Cartman's License*

Both plaintiff's bonded warehouse status and bonded cartman's license were purportedly revoked by the Regional Commissioner's decision of February 4, 1986. Plaintiff argues that although Customs regulations give the Regional Commissioner authority to revoke bonded warehouse status, *see* 19 C.R.F. § 19.3, the authority to revoke a cartman's license after an appeal and hearing is vested by regulation in the Commissioner of Customs. *See* 19 C.F.R. § 112.30(3)(e). Defendant relies upon the stipulation of plaintiff's counsel at the hearing that the hearing would resolve the issue of both licenses. Plaintiff cannot now be heard to complain, defendant argues, because it agreed to the single proceeding and decision.

Although plaintiff could agree at the hearing that notice of intent to revoke the cartman's license was adequate, and that the hearing transcript and hearing officer's recommendation could

serve as the basis for decision regarding revocation of both licenses, plaintiff's stipulation is ineffective to grant a power of revocation to the Regional Commissioner that the regulations do not give. *Cf. United States* v. *Nixon,* 418 U.S. 683, 694-96 (1974) (Attorney General may not exercise a power he has delegated by regulation to Special Prosecutor).

Accordingly, that portion of the Regional Commissioner's decision revoking plaintiff's cartman's lilcense is reversed and the case is remanded to Customs with the instruction that the hearing transcript and hearing officer's recommendation may serve as the basis for decision, but any decision on the status of plaintiff's cartman's license must be rendered by the Commissioner of Customs, as provided in the regulations.

(Slip Op. 86-54)

ATLANTIC STEEL CO., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANTS

Consolidated Court No. 83-12-01752

Before CARMAN, *Judge.*

[Plaintiffs' motion for judgment on the agency record denied; judgment for defendant.]

MEMORANDUM OPINION

(Decided May 20, 1986)

Wiley & Rein (Charles Owen Verrill, Jr., Robert E. Nielsen, and *Robert C. Weissler* on the motion) and *Fried, Frank, Harris, Shriver & Jacobson (David E. Birenbaum* and *Alan Kashdan* on the motion) for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director (*Platte B. Moring, III* on the motion) for the defendant.

CARMAN, *Judge:* Plaintiffs in this case move pursuant to Rule 56.1 for judgment upon the agency record, challenging the final determination of the United States Department of Commerce, International Trade Administration (ITA) in its antidumping investigation, *Carbon Steel Wire Rod from Trinidad and Tobago,* 48 Fed Reg. 43,206 (Sept. 22, 1983). Defendant United States opposes plaintiffs' motion. Plaintiffs, domestic steel producers, challenge the ITA's determination as unsupported by substantial evidence and not in accordance with law because the ITA allowed adjustments to foreign market price based upon credit and warehousing costs experienced by the foreign manufacturer in its domestic market. The Court denies plaintiffs' motion for judgment on the agency record and affirms the ITA's determination.

Background

The ITA initiated an investigation of carbon steel wire rod from Trinidad and Tobago pursuant to a petition filed by domestic producers in Trinidad and Tobago that exported to the United States during the period of investigation (April 1 to September 30, 1982) was the Iron and Steel Company of Trinidad and Tobago, Ltd. (ISCOTT). On September 16, 1983, the ITA determined that carbon steel wire rod from Trinidad and Tobago was being sold at less than fair value in the United States. 48 Fed. Reg. 43,206. In calculating dumping margins, the ITA allowed adjustments to foreign market value of differences in circumstances of sale based upon credit and warehousing costs ISCOTT claimed were greater in the home market than the United States market.

The adjustments claimed by ISCOTT arise from its practice of filling confirmed domestic orders in advance of the shipment date and storing the wire rod for those orders in its warehouse. ISCOTT prepares weekly Production Inventory Control (PIC) reports in which it identifies the wire rod in its warehouses to particular confirmed orders. The PIC report divides the warehoused wire rod into three categories: "committed," "reserved," and "available." Committed tonnage is specifically allocated to the particular customer in the PIC report; reserved tonnage is designated to particular home market customers based upon anticipated orders, but is available to fill other orders in certain situations; and available tonnage is general inventory, freely available to fill any orders.

ISCOTT held committed inventory to fill home market orders an average of approximately 9 weeks longer than it held committed inventory to fill United States orders. In calculating the home market price to obtain foreign market value, the ITA allowed adjustments for credit and warehouse costs associated with this additional standing time. Plaintiffs object that these adjustments are unsupported by substantial evidence in the record and not in accordance with law.

Discussion

The antidumping statue provides for adjustments to foreign market value when there are differences in the circumstances of sale between the foreign market and the United States market. 19 U.S.C. § 1677b(a)(4)(B)(1982). United States Department of Commerce (Commerce) regulations establish the criteria under which the ITA can adjust foreign market price due to differences in circumstances of sale:

> [R]easonable allowances will be made for bona fide differences in circumstances of the sales compared to the extent that * * * the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those

> circumstances which bear a direct relationship to the sales which are under consideration.

19 C.F.R. § 353.15(a) (1985).

Plaintiffs claim that the ITA should not have adjusted the foreign market value for credit and warehousing costs associated with sales in ISCOTT's home market because: (1) The costs do not result in a price difference in the home market, (2) the costs are not directly related to sales, (3) the ITA's method of calculating these costs is unsupported by substantial evidence and, (4) the ITA should not have allowed the adjustments because ISCOTT's warehousing practices are "unreasonable."

(1) Plaintiffs first suggest that adjustments for the credit and warehousing costs are improper because the record contains no evidence that these added costs affected pricing in the home market. Plaintiffs apparently read the Commerce regulation to require that a particular cost to the manufacturer results in an increased price to the home market consumer before an adjustment can be made. They rely for this interpretation on the language of the regulation allowing an adjustment so long as "the amount of any *Price differential* is wholly or partly due to such circumstances." 19 C.F.R. § 353.15(a) (emphasis added). It is clear, however, from the rest of the Commerce regulation and ITA practice that the regulation imposes no such limitation.

The Commerce regulation itself provides that, in making adjustments for differences in circumstances of sale,

> the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

19 C.F.R. § 353.15(d). The regulation itself thus contemplates that the ITA will usually base adjustments upon the cost to the manufacturer, Moreover, the ITA has consistently applied the regulation allowing circumstances of sale adjustment based upon cost to the manufacturer as well as effect on price. *See, e.g., Television Receiving Sets, Monochrome and Color, From Japan,* 50 Fed. Reg. 24,278, 24,282 (June 10, 1985); *Carbon Steel Plate From the Republic of Korea,* 49 Fed. Reg. 26,774, 26,775 (June 29, 1984); *Certain Tapered Journal Roller Bearings and Parts Thereof From Italy,* 49 Fed. Reg. 2278, 2279-80 (January 19, 1984).[1]

Plaintiffs rely on this court's opinion in *Rhone Poulenc, S.A.* v. *United States,* 8 CIT 47, 592 F. Supp. 1318 (1984), in which the

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[1] In *Tapered Journal Roller Bearings and Parts Thereof From Italy,* 49 Fed. Reg. 2278 (1984), the ITA explicitly rejected the argument that it should not allow an adjustment for different credit costs without a showing that these costs affected price.

> The fact that RIV has chosen not to increase its prices to account for the inability on the part of its customers to make payments on a timely basis does not dispose of the fact that RIV has had differing credit experiences in the two markets. To the contrary, it indicates that RIV is absorbing its costs in the American market relative to the Canadian market, an occurrence which the Act was intended to address. Since use of the cost criterion provides a means by which to redress this situation, we have used the differences in credit costs in the two markets to calculate a circumstances of sale adjustment.

court upheld the ITA's refusal to grant a circumstances of sale adjustment for technical services. Plaintiffs' reliance is misplaced. The *Rhone Poulenc* court refused to reverse the ITA because it agreed that the technical services were not directly related to the sales under consideration, but were general costs relating to "independent purposes such as basic research or promoting good will." 592 F. Supp. at 1335. The court based its decision on the finding that the technical services costs were not directly related to home market sales, not an inquiry into whether the claimed costs were passed on in the home market price. *See also, F.W. Myers & Co.* v. *United States,* 72 Cust. Ct. 219, 233, 376 F. Supp. 860, 872 (1974) ("it must be shown that each claimed expense had a reasonably direct effect upon the *sales* in the market under consideration") (emphasis added); *compare* 19 U.S.C. § 1677a(d)(1)(C)(1982) (specifically requiring a finding that taxes have been passed on in the home market price before an adjustment is allowed to United States Price).

(2) Plaintiffs next argue that there is not a sufficiently direct relationship between the credit and warehousing costs and the sales under investigation because the committed wire rod is merely "general inventory." *See Steel Wire Rope From the Republic of Korea,* 48 Fed. Reg. 41,615, 41,617 (Sept. 16, 1983) (no adjustment allowed for costs associated with carrying general inventory). Plaintiffs suggest that the committed wire rod is general inventory because ISCOTT did not physically identify or segregate the committed tonnage of different customers. It would be burdensom and unnecessary to require ISCOTT to physically identify or segregate each customer's committed order. The ITA conducted on-site verification and concluded that the PIC report effectively identified tonnage as committed to a particular customer or available to fill new orders. It was reasonable for the ITA to find that costs associated with the wire rod identified in the PIC report as committed were directly related to the sales under investigation.

Plaintiffs also imply that, prior to actual shipment or payment, even committed tonnage must be considered general inventory. With respect to an adjustment for credit costs, plaintiffs maintain that it is "the ITA's *uniform* practice * * * to deny *any* adjustment based on credit costs incurred before inventory was shipped." Plaintiffs' Brief 16. In the determinations plaintiffs cite,[2] the ITA did indeed deny adjustments for pre-shipment credit costs. The adjustments were denied, however, because the ITA found no direct relationship between the costs and the sales under investigation, not because of a policy against allowing adjustments for pre-shipment credit costs.

[2] Plaintiffs cite *Color Television Receivers From Korea,* 49 Fed. Reg. 7620, 7626 (March 1, 1984); *Lightweight Polyester Filament Fabrics From the Republic of Korea,* 48 Fed. Reg. 49,679, 49,683 (Oct. 27, 1983); *Certain Stainless Steel Sheet and Strip Products From France,* 48 Fed. Reg. 19,441, 19,443 (April 29, 1983), *amended,* 48 Fed. Reg. 25,244 (June 6, 1983).

With respect to warehousing costs plaintiffs again rely upon the rule against allowing an adjustment unless expenses are identified with a particular sales transaction. Plaintiffs' Brief 31. Plaintiffs cite the ITA's determination in *Butadiene Acrylonitrile Rubber From Japan,* 41 Fed. Reg. 782 (Jan. 5, 1976), in which the ITA stated that adjustments for warehousing costs "could be made to the extent to which [they] are documented as being related to specific sales." *Id.* at 783. In the instant investigation, the ITA concluded that the cost to ISCOTT of warehousing committed inventory could be directly related to sales of the committed inventory. The ITA's conclusion was reasonable and is supported by substantial evidence in the record.

Nor does the Court find support in plaintiffs' argument that, because an order and commitment do not constitute a "sale" under the Uniform Commercial Code (UCC), committed tonnage should be considered general inventory and not identified with a particular sales transaction. The UCC does not control the ITA's choice of methodology in a dumping investigation. In the questionnaire used by the ITA in this and other investigations, the ITA states that sales date from the time when basic contract terms, including price, are set. *See* Record, Appendix II, p. ii of Doc. No. 18. The ITA found that a sale occurred when an order was placed, and found further that "after-sale warehousing was a condition of sale" to home market purchasers. 48 Fed. Reg. at 43,209.

The credit and warehousing adjustments allowed by the ITA relate to *post-sale* expenses. The ITA found that ISCOTT sufficiently identified committed tonnage to particular sales. Thus the time at which costs began accruing to specific sales transactions was the time of sale—when an order was placed—and not, as plaintiffs would have it, the time of shipment.

(3) The ITA allowed an adjustment for warehouse and credit costs incurred by ISCOTT from the time a home market purchaser placed an order. The ITA must therefore have assumed that finished stock sufficient to fill the order existed on the date of order. Plaintiffs contend that this assumption is not based on substantial evidence in the record and that therefore the ITA's methodology, conclusions, and ultimate determination are unsupported by substantial evidence. The Court's review of the record for substantial evidence is a limited one. So long as the record contains some evidence from which a reasonable mind could draw the conclusions the agency drew, the Court must uphold the agency. *See Carlisle Tire and Rubber Co.* v. *United States,* 9 CIT ——, 622 F. Supp. 1071 (1985). Confidential documents in the record show that during the period under investigation ISCOTT had sufficient available inventory to cover domestic orders as they were placed. *See* Record, Doc. Nos. 107, 127. Other confidential documents show that on the first and last days of the investigation, ISCOTT had in stock sufficient wire rod to cover outstanding orders. *See id.* Doc. No. 106. It was

reasonable for the ITA to assume from this evidence that ISCOTT had inventory on hand to meet domestic orders as they were placed, and its methodology is therefore supported by substantial evidence in the record.

(4) Plaintiffs' final objection is that Commerce regulations require the ITA to allow adjustments only for costs that are reasonable. It is commercially unreasonable, plaintiffs claim, for ISCOTT to produce such large quantities of wire rod that they have enough on hand to fill orders for a period of months. The regulation provides that "reasonable allowances * * * be made for bona fide differences in the circumstances of the sales compared." 19 C.F.R. § 353.15(a). The regulation requires only that the allowance be reasonable, not that the ITA make a determination as to whether the costs the foreign manufacturer incurs in different markets are reasonable.

CONCLUSION

The ITA determined that ISCOTT incurred post-sale credit and warehousing costs in the home market and that those costs were directly related to the sales under investigation. Accordingly, the ITA allowed adjustments to the foreign market price. The Court finds that the ITA's allowance of these adjustments and its method of calculating their amount are in accordance with law and supported by substantial evidence in the record. The ITA's determination is affirmed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/82	Newman, S.J. May 21, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-12-01714	Item 682.25 11.8% or 11%	Item 682.30 5.8% or 5.6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/83	Newman, S.J. May 21, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-12-01719	Item 682.25 11.8% or 11%	Item 682.30 5.8% or 5.6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/84	Newman, S.J. May 21, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-12-01723	Item 682.25 11%	Item 682.30 5.6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/85	Newman, S.J. May 21, 1986	C.J. Tower & Sons of Buffalo, Inc.	82-3-00273	Item 682.25 12.5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/86	Newman, S.J. May 21, 1986	C.J. Tower & Sons of Buffalo, Inc.	84-1-00024	Item 682.25 12.5%	Item 682.25 12.5%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/87	Newman, S.J. May 21, 1986	Novatronics of Canada, Ltd.	81-12-01709	Item 682.25 11% or 12.5%	Item 682.25 11% or 12.5%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/88	Aquilino, J. May 22, 1986	Applied Motion Products	83-9-01313	Item 682.25 10.3% or 9.6%	Item 682.30 5.3% or 5.1%	Agreed statement of facts	San Francisco Electric Motors

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/163	Re, C.J. May 20, 1986	Mitsubishi International Corp.	73-10-02885	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S., C.D. 4739	New York, Los Angeles Not stated
V86/164	Watson, J. May 21, 1986	Baar & Beards	R59/6570, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk scarves
V86/165	Watson, J. May 21, 1986	Gimbel Bros. Inc.	R58/23671	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Gloves
V86/166	Watson, J. May 21, 1986	Nichimen Co.	R63/8214, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; an entirety
V86/167	Watson, J. May 22, 1986	Nichimen Co.	R61/6635, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York, Los Angeles Sewing machines
V86/168	Watson, J. May 22, 1986	Nomura (America) Corp.	R64/5843, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Seattle Transistor radios together with their accessories and parts; an entirety

Appeal to the U.S. Court of Appeals for the Federal Circuit

Badger Powhatan v. United States, 10 CIT ——, Slip Op. 86-38 (April 2, 1986), *appeal docketed* No. 86-1251 (Fed. Cir. May 13, 1986).

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
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U.S. Customs Service

Treasury Decisions

(T.D. 86-108)

Approval of Coastal Gulf & International, Inc., To Gauge Imported Petroleum and Petroleum Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Coastal Gulf & International, Inc., P.O. Box 1156, Donaldsonville, Lousiana 70346, has applied to Customs for approval to gauge imported petroleum and petroleum products. It has been determined that Coastal Gulf & International meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of Coastal Gulf & International, Inc., to gauge imported petroleum and petroleum products in all Customs Districts is approved.

EFFECTIVE DATE: June 4, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: June 5, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

[Published in the Federal Register, June 12, 1986 (51 FR 21434)]

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19 CFR Parts 4, 6, 24, 111, 123, and 145

(T.D. 86-109)

Amendments to the Customs Regulations Regarding Users Fees for Customs Services

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations.

SUMMARY: This document amends the Customs Regulations on an interim basis to provide for the payment of specific fees to Customs for the processing of persons, aircraft, vehicles, and merchandise arriving in the U.S., as well as for the payment of an annual fee by customs brokers. These fees were authorized as part of the recently enacted Consolidated Omnibus Budget Reconciliation Act of 1985 and must be paid in exchange for a variety of services performed by Customs officers relating to the arrival of commercial vessels of 100 net tons or more; the arrival of commercial trucks; the arrival of railway cars; the arrival of many private vessels and aircraft; the arrival of passengers (with certain exceptions) aboard commercial vessels or aircraft; the preparation of documentation in connection with dutiable mail entries; and an annual fee from customs brokers. The amendments are being made on an interim basis due to the limited period of time available to initiate these changes before the law becomes effective. However, any written comments received will be considered before a final rule is issued.

DATES: Interim regulations effective on July 7, 1986. Written comments must be received on or before August 11, 1986.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Charles Davies, Office of Inspection and Control (202-566-9425).

Legal Aspects: Arthur I. Rettinger, Office of the Chief Counsel, (202-566-2482). On carrier fees, John A. Mathis, Office of Regulations and Rulings, (202-566-5706), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Accounting Aspects: Robert Hamilton, National Finance Center, (317-298-1308), c/o Revenue Accounting, P.O. Box 68901, Indianapolis, Indiana 46278.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (the Act, Pub. L. 99-272), establishes a schedule of fees chargeable to users of various services provided by the Customs Service in connection with the processing of persons, aircraft, vehicles, vessels, and merchandise arriving in the U.S., as well as for the payment of an annual fee by customs brokers. In addition to

established specific fees, the Act sets forth certain limitations or conditions concerning the collection of fees, and authorizes the promulgation of such rules and regulations as may be necessary to carry out the provisions of the new law.

Prior to enactment of this legislation, Customs had no general legal authority to collect fees for the processing of persons, aircraft, vehicles, vessels, and merchandise arriving in or departing from the U.S. Customs does, however, have specific authority to charge fees under certain limited circumstances, such as when providing pre-clearance of passengers and private aircraft, when such services are of special benefit to particular persons. Customs also has authority to assess fees on operators of bonded warehouses and foreign trade zones and on the entry of vessels into ports. Further, Customs has authority to collect the navigation fees specified in § 4.98, Customs Regulations (19 CFR 4.98). Finally, Customs is authorized to receive reimbursement from carriers for overtime services provided during non-business hours, and reimbursement from local authorities for services provided to certain small airports.

By the terms of the Act, the Congress has given Customs the authority to collect fees for services provided in connection with:

(1) The arrival of commercial vessels of 100 net tons or more.

(2) The arrival of a commercial truck.

(3) The arrival of railroad cars, whether passenger or freight.

(4) The arrival of private vessels or aircraft.

(5) The processing of dutiable mail for which Customs prepares documentation.

(6) An annual fee for each customs broker permit held by individuals, partnerships, associations, or corporate brokers.

(7) The processing of each passenger aboard a commercial vessel or aircraft arriving from outside the U.S.

Fees for several of the above categories of services are subject to certain limitations which are detailed later in this document. However, one example of a limitation merits special mention. Pursuant to 46 U.S.C. 104 (see § 4.94, Customs Regulations (19 CFR 4.94)), pleasure vessels from certain nations are granted cruising licenses which exempt them, after they report their first arrival to Customs, from formal entry, from filing manifests, from obtaining permits to proceed between ports of the U.S., and from clearance for a period of one year. Although there is no specific exemption for such vessels in the Act, neither is there an indication that the Congress intended to revise 46 U.S.C. 104, which specifically exempts such vessels from "charges for entering or clearing, dues, duty per ton, or tonnage taxes." Thus, and administrative exception is being made. Owing to the mid-year implementation date for these new requirements, it has been decided that for the calendar year 1986 only, the annual one-time fee for private vessels and aircraft will be $12.50.

The main body of the amendments will appear as new §§ 24.22 and 111.96, Customs Regulations (19 CFR 24.22 and 111.96), with appropriate cross references added to the following parts of the Customs Regulations.

(1) For commercial vessels and passengers—Part 4, Customs Regulations (19 CFR Part 4).

(2) For private aircraft and commercial aircraft passengers—Part 6, Customs Regulations (19 CFR Part 6).

(3) For railroad cars and commercial trucks—Part 123, Customs Regulations (19 CFR Part 123).

(4) For mail entries—Part 145, Customs Regulations (19 CFR Part 145).

COMMENTS

Before adopting the interim regulations as a final rule, Customs will give consideration to any written comments (preferably in triplicate) timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue NW., Washington, D.C. 20229.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

The statutory effective date for collection of user fees is July 7, 1986. In light of the limited deadline imposed upon Customs to implement these changes, it has been determined that, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure is impracticable. For the same reason, pursuant to 5 U.S.C. 553(d)(3), we are dispensing with a delayed effective date. However, before adopting final regulations, consideration will be given to all written comments timely submitted.

E.O. 12291 AND REGULATORY FLEXIBILITY ACT

Because the amendments do not meet the criteria for a "major rule" within the meaning of § 1(b) of E.O. 12291, Customs has not prepared a regulatory impact analysis.

Because no notice or proposed rulemaking is required for these interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

PAPERWORK REDUCTION ACT

The collections of information contained in the interim regulations have been submitted to the Office of Management and Budget

pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). Notice of OMB action will be published in the Federal Register.

List of Subjects

19 CFR Part 4—Cargo vessels, Passenger vessels, Vessels, Yachts.
19 CFR Part 6—Air Carriers, Aircraft.
19 CFR Part 24—Accounting, Taxes.
19 CFR Part 111—Administrative practice and procedure, Brokers.
19 CFR Part 123—Canada, Mexico, Motor carriers, Railroads, Vessels.
19 CFR Part 145—Postal service.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Amendments to the Regulations

Parts 4, 6, 24, 111, 123, and 145, Customs Regulations (19 CFR Parts 4, 6, 24, 111, 123, and 145), are amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority for Part 24, Customs Regulations, continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1624; 31 U.S.C. 9701; Pub. L. 99-272.

2. Part 24 is amended by adding a new § 24.22 to read as follows:

§ 24.22 Fees for Certain Services.

(a) *Definitions.* For purposes of this section:

(1) The word "vessel" includes every description of watercraft or other contrivance used or capable of being used as a means of transportation on water, but does not include aircraft or any ferry.

(2) The word "arrival" means arrival at a port of entry in the customs territory of the U.S., or any place serviced by a port of entry.

(3) The words "calendar year" mean the period from January 1 to December 31 of any particular year.

(b) *Fee for arrival of a commercial vessel of 100 net tons or more.* (1) The master, licensed deck officer, or purser of any commercial vessel of 100 net tons or more which is required to enter under § 4.3 of this Chapter, and any U.S.-flag vessel proceeding coastwise under § 4.85 of this Chapter shall, upon arrival, proceed to Customs

and tender a processing fee in the amount of $397 for the services provided. The fee shall be collected at each port of arrival.

(2) *Exceptions.* Foreign passenger vessels making at least three trips a week from a port in the U.S. to the high seas and returning to the same U.S. port, not having touched any foreign port or place, shall be exempt from the payment of an arrival fee, even though formal entry is still required.

(c) *Fee for arrival of a commercial truck.*

(1) *Commercial truck defined.* For the purposes of this paragraph, a commercial truck is defined as a self-propelled vehicle designed and used for the transportation of commercial merchandise, or the transportation of non-commercial merchandise on a for-hire basis. Empty trucks and truck cabs without trailers fitting this description are also included.

(2) *Fee.* The driver or other person in charge of a commercial truck or truck cab entering the customs territory of the U.S. shall, upon arrival at a port of entry in the customs territory of the U.S., proceed to Customs and tender the sum of $5 for the services provided.

(3) *Prepayment.* The owner or operator of a commercial truck may apply for a prepaid permit for a calendar year upon payment of $100. The following information, together with the payment, shall be provided:

(i) Vehicle make, model, and model year.

(ii) Vehicle Identification Number (VIN).

(iii) License numbers issued by state, province, or county.

(iv) Owner's name and address.

(4) Payment may be made to the Customs officer at the port of entry, or in accordance with the provision of paragraph (i) of this section. The prepaid permit will be in the form of a decal to be placed in the lower left hand corner of the truck windshield, prior to first clearance through Customs for any calendar year. No credit toward the annual fee shall be given for payments made at individual crossings.

(d) *Fee for arrival of each railroad car.*

(1) *Fee.* A fee of $5 shall be charged for each railroad car, whether passenger or freight, loaded or empty, upon each arrival at a port of entry in the customs territory of the U.S. The railroad company receiving a rail car in interchange at a port of entry or, barring interchange, the company moving a car in line haul service into the customs territory of the U.S., shall be responsible for payment of the fee. No fee shall be required for locomotives and cabooses, but the $5 fee shall be assessed for empty railroad cars which are dropped from an in-transit train in the U.S. and are placed in the railroad interchange system.

(2) *Prepayment.* Railroad companies may, at their option, prepay a $100 calendar year fee for each railroad car. This payment shall be remitted in accordance with the provision of paragraph (i) of

this section. No credit will be given for payments made toward the annual fee at individual crossings.

(3) *Payment and monthly statement procedures.* (i) The Association of American Railroads (AAR), and the National Railroad Passenger Corporation (AMTRAK), shall file monthly statements with the Director, National Finance Center, within 60 days after the end of each calendar month. Each statement shall indicate:

(A) The number of railroad cars entering the customs territory of the U.S. during the relevant period;

(B) The number of those railroad cars pulled by each carrier; and

(C) The total monthly processing fee due from each carrier.

(ii) The individual carriers shall remit the fees calculated by AAR, and AMTRAK shall remit the fees it has calculated, within 60 days after the end of each calendar month in which railroad cars entered the customs territory of the U.S. The submission of monthly statements and the remission of fees shall be in accord with the procedures specified in paragraph (i) of this section.

(4) *Maintenance of records.* The Association of American Railroads (AAR), and the National Railroad Passenger Corporation (AMTRAK) shall maintain all such documentation necessary for Customs to verify the accuracy of fee computations and to otherwise determine compliance under the law. Such documentation shall be maintained for a period of 3 years from the date of fee calculation. The AAR, AMTRAK, and each railroad company responsible for making fee payments shall advise the Director, National Finance Center, of the name, address, and telephone number of a responsible officer who shall be able to verify any statements or records required to be filed or maintained under this paragraph. The Director, National Finance Center, shall be promptly notified of any changes in the identifying information submitted. The information required to be submitted under this subparagraph shall be in accord with the procedures set forth in paragraph (i) of this section.

(5) *Exemptions.* No fee shall be collected under this paragraph for Customs services provided in connection with the arrival of any railroad car that is part of a train whose journey originates and terminates in the same country, if

(i) The car is part of the train when the train departs the U.S.; and

(ii) No passengers board or disembark from the car, and no cargo is loaded or unloaded from the car, while the train is within any country other than the country in which the train originates and terminates.

(e) *Fee for arrival of a private vessel or private aircraft.* Except as otherwise provided in this paragraph, the master or other person in charge of a private vessel or aircraft shall, upon first arrival at a port in the customs territory of the U.S. in any calendar year, proceed to Customs and tender the sum of $25 for the services pro-

vided. Only one $25 fee shall be collected in connection with arrivals of each private vessel or private aircraft in a calendar year. The $25 fee may be prepaid to Customs. A receipt for the payment of the fee shall be provided by Customs to the master or other person in charge of the private vessel or private aircraft and shall be retained as proof of payment. The proof of payment shall be presented to Customs upon each arrival of the vessel or aircraft. The requirements of this paragraph shall not apply to private pleasure vessels of less than 30 feet in length, so long as they are not carrying any goods required to be declared to Customs, nor to private pleasure vessels granted a cruising license under § 4.94 of this Chapter, during the pendency of that license. The fee specified in this paragraph shall be in addition to any overtime charges.

(f) *Fee for dutiable mail.* The addressee of each item of dutiable mail for which a Customs officer prepares documentation shall be assessed a processing fee in the amount of $5. When the merchandise is delivered by the Postal Service, the fee shall be shown as a separate item on the entry and collected at the time of delivery of the shipment along with any duty and taxes due. When Customs collects the fee directly from the importer or his agent, the fee will be included as a separate item on the informal entry or entry summary document.

(g) *Fee for arrival of passengers aboard commercial vessels and commercial aircraft.*

(1) *Fee.* Except as set forth in this paragraph, each passenger requiring Customs processing who is aboard a commercial vessel or commercial aircraft which arrives in the customs territory of the U.S. from a place outside thereof, shall be assessed a fee in the amount of $5 for the processing.

(2) *Exceptions.* The fee set forth in subparagraph (1) shall not be assessed for the following categories of arriving passengers:

(i) Persons whose journey originates in Canada, Mexico, a territory or possession of the U.S., or any adjacent island. The U.S. territories and possessions include American Samoa, Guam, the Nothern Mariana Islands, Puerto Rico and the U.S. Virgin Islands. The adjacent islands include all of the islands in the Caribbean Sea, the Bahamas, Bermuda, St. Pierre, Miquelon, and the Turks and Caicos Islands.

(ii) Crew members and persons directly connected with the operation, navigation, ownership, or business of the vessel or aircraft;

(iii) Diplomats, except for U.S. diplomats, who can show that their names appear on the accreditation listing maintained by the U.S. Department of State. In lieu of such listing an individual diplomat may present appropriate proof of diplomatic status to include possession of a diplomatic passport or visa, or diplomatic identification card issued by a foreign government;

(iv) Persons departing and returning to the U.S. without having touched a foreign port or place;

(v) Persons arriving as passengers on any aircraft used exclusively in the governmental service of the U.S. or a foreign government, including any agency or political subdivision thereof, so long as the aircraft is not carrying persons or merchandise for commercial purposes. Passengers on commercial aircraft under contract to the U.S. Department of Defense are exempted if they have been precleared abroad under the joint DOD/Customs Military Inspection Program; and

(vi) Persons arriving on an aircraft due to an emergency or forced landing when the original destination of the aircraft was a foreign airport.

(vii) Persons transiting the U.S. and not processed by Customs.

(3) The fees specified in this paragraph shall be collected under the following circumstances:

(i) When through tickets or travel documents are issued indicating travel to the U.S. which originates in a location other than as specified in subparagraph (2) of this paragraph;

(ii) When through tickets or travel documents are issued in an exempt location indicating an arrival in the U.S. following a stopover (layover) in a location other than as specified in subparagraph (2)(i) of this paragraph; and

(iii) When passengers arrive in the U.S. in transit from a nonexempt location and are processed by Customs.

(4) *Collection of fees.* Carriers issuing tickets or travel documents on or after July 7, 1986, are responsible for the collection of the passenger processing fee from all passengers transported into the U.S. for whom the fee applies. The ticket or travel document shall be marked to indicate that the required fee has been collected from the passenger. If the ticket is not so marked and was issued in a foreign country, the fee shall be collected and remitted by the departing carrier upon departure of the passenger from the U.S. If collected at time of departure from the U.S., the carrier making the collection shall issue a receipt to the passenger. U.S.-based tour wholesalers who contract for passenger space and issue non-carrier tickets will collect and remit the processing fee to Customs in the same manner as the carrier.

(5) *Payment and quarterly statement procedures.* Payment must be made no later than 31 days after the close of the calendar quarter in which the fees are collected. If the issuing carrier has not collected the required fee from passengers, the person who first collects that fee shall remit it to Customs.

(i) Fee payments shall be accompanied by a statement which includes the following information:

(A) Name and address of the party remitting payment;

(B) Taxpayer Identification number of the party remitting payment; and

(C) Calendar quarter covered by the payment.

(ii) Fee payments shall be at the location and in accordance with the procedures specified in paragraph (i) of this section.

(6) Carriers contracting with a U.S.-based tour wholesaler are responsible for notifying Customs of all flights or voyages contracted, the number of spaces contracted for, and the name, address and taxpayer identification number of the tour wholesaler all within 31 days after the close of the calendar quarter in which such a flight or voyage occurred.

(7) *Maintenance of records.* Each airline and vessel company affected by this paragraph shall maintain all such documentation necessary for Customs to verify the accuracy of fee computations and to otherwise determine compliance under the law. Such documentation shall be maintained for a period of 2 years from the date of fee calculation. The affected companies shall advise the Director, National Finance Center, of the name, address, and telephone number of a responsible officer who shall be able to verify any records required to be maintained under this paragraph. The Director, National Finance Center, shall be promptly notified of any changes in the identifying information submitted. Required information shall be submitted as set forth in paragraph (i) of this section.

(8) *Limitation on charges.* Other than the $5 processing fee for arriving passengers specified in this paragraph, arriving scheduled airline flights as defined in § 6.1(f) of this Chapter and operating within the requirements of § 6.2 of this Chapter, shall be provided inspectional services for their passengers at no additional cost.

(h) *Annual customs broker fee.* Customs brokers are subject to an annual fee for each permit held by an individual, partnership, association, or corporate broker as specified in § 111.96 of this Chapter.

(i) *Fee remittance and information submission procedures.*

(1) *Fee remittance.* All fees required to be remitted pursuant to this section shall be payable by check or money order to the U.S. Customs Service, in the amounts prescribed in these regulations. Unless otherwise provided for in this section, all fee remittances required by this section shall be mailed to: U.S. Customs Service, P.O. Box 198151, Atlanta, Georgia 30384. Each payment shall be accompanied by information sufficient to identify the person or organization remitting the fee, a brief description of the type of fee being remitted (whether railroad, commercial airline passenger, or other), and the time period to which the payment applies.

(2) *Information submission.* Unless otherwise specified, all information, summaries, reports, or other data required to be submitted to Customs pursuant to this section shall be mailed to the Director, National Finance Center, Attn: Revenue Accounting, P.O. Box 68901, Indianapolis, Indiana 46278.

PART 111—CUSTOMS BROKERS

1. The authority citation for Part 111, Customs Regulations (19 CFR Part 111), is amended to read as set forth below. The statutory citations appearing elsewhere in Part 111 are removed.

AUTHORITY: 19 U.S.C. 66, 1202, (Gen. Hdnte. 11), 1624, 1641.

2. Part 111 is amended by creating a new subpart E and adding a new § 111.96, to read as follows:

SUBPART E—FEES

§ 111.96 Fees.

(a) [Reserved].

(b) [Reserved].

(c) *User Fee.* An annual user fee for $125 will be assessed for each permit held by an individual, parthership, association or corporate broker.

(1) The fee is payable for each calendar year in each district where a broker has a permit to do business. If a broker receives a permit at a time other than the beginning of a calendar year, the full $125 must be paid immediately. If a broker fails to pay the fee by January 1 of each year or immediately at the time he receives his permit, the district director will notify the broker in writing of his failure to pay and that the permit is revoked. The notice will constitute revocation of the permit.

(2) For calendar year 1986, brokers must remit payment of $125 by August 5, 1986, in each district where they have a permit to do business. If payment is not made by August 5, 1986, notice will be given and revocation will be effective August 5, 1986.

(d) [Reserved].

(e) *Payment of Fee.* All fees shall be paid by check or money order payable to the U.S. Customs Service.

CONFORMING AMENDMENTS

PARTS 4, 6, 123, AND 145, CUSTOMS REGULATIONS

To conform the Customs Regulations to the changes made by the amendments to Part 24, Customs Regulations (19 CFR Part 24), Parts 4, 6, 123, and 145, Customs Regulations (19 CFR Parts 4, 6, 123, and 145), are amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103.

2. Part 4 is revised by adding a new paragraph (i) to § 4.98 to read as follows:

§ 4.98 Navigation fees.

* * * * * * *

(i) Vessels, whether private or commercial, and passengers arriving in the customs territory of the U.S. aboard commercial vessels, may be subject to the payment of fees for services provided them as set forth in § 24.22 of this Chapter.

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624; 49 U.S.C. 1474, 1509.

2. Part 6 is revised by adding a new § 6.1a to read as follows:

§ 6.1a Customs private aircraft and commercial passenger fees.

Private aircraft and passengers aboard commercial aircraft arriving in the customs territory of the U.S., may be subject to the payment of fees for services provided them as set forth in § 24.22 of this Chapter.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for Part 123 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

§ 123.1 also issued under 19 U.S.C. 1459;
§ 123.2 also issued under 19 U.S.C. 1460;
§ 123.3 also issued under 19 U.S.C. 1459;
§ 123.4 also issued under 19 U.S.C. 1484, 1498;
§ 123.7 also issued under 19 U.S.C. 1498;
§ 123.8 also issued under 19 U.S.C. 1448, 1450–1454, 1459;
§ 123.9 also issued under 19 U.S.C. 1460, 1584, 1618;
§ 123.11 also issued under 19 U.S.C. 1465;
§§ 123.12–123.18 also issued under 19 U.S.C. 1322;
§§ 123.21–123.23, 123.25–123.29, 123.41, 123.51 also issued under 19 U.S.C. 1554;
§ 123.24 also issued under 19 U.S.C. 1551;
§§ 123.31–123.34, 123.42, 123.52, 123.64 also issued under 19 U.S.C. 1553;
§ 123.63 also issued under 19 U.S.C. 1461, 1462;
§ 123.71 also issued under 19 U.S.C. 1595.

2. All other statutory authority cited at the end of the index and various sections in Part 123 is removed.

3. Part 123 is revised by adding a new § 123.1a to read as follows:

§ 123.1a Customs railroad car and commercial truck fees.

Each commercial truck, truck cab, and railroad car (except locomotives and cabooses), whether passenger or freight, whether empty or otherwise, which enters the customs territory of the U.S., is subject to the payment of fees for services provided them as set forth in § 24.22 of this Chapter.

PART 145—MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

2. Part 145 is revised by adding a new § 145.1a to read as follows:

§ 145.1a Customs fees for certain dutiable mail entries.

Each item of dutiable mail for which Customs prepares documentation will be subject to the payment of a fee for services provided, as set forth in § 24.22 of this Chapter.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 4, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 11, 1986 (51 FR 21152)]

(T.D. 86-110)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
May 5, 1986	$0.007278
May 6, 1986	.007168
May 7, 1986	.007235
May 8, 1986	007294
May 9, 1986	.007289
Israel shekel:	
May 5-9, 1986	N/A

South Korea won:	
May 5–8, 1986	.001125
May 9, 1986	.001126
Taiwan N.T. dollar:	
May 5–6, 1986	.025934
May 7, 1986	.025940
May 8, 1986	.025947
May 9, 1986	.025961

(LIQ-03-01 S:COM CIE)

Dated: May 9, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-111)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
May 12, 1986	$0.007342
May 13, 1986	.007233
May 14, 1986	.007267
May 15, 1986	.007273
May 16, 1986	.007207
Israel shekel:	
May 12–16, 1986	N/A
South Korea won:	
May 12, 1986	.001126
May 13, 1986	.001127
May 14–16, 1986	.001126
Taiwan N.T. dollar:	
May 12, 1986	.025981
May 13, 1986	.025994

May 14, 1986	.026001
May 15, 1986	.025867
May 16, 1986	.026028

(LIQ-03-01 S:COM CIE)

Dated: May 16, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-112)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
May 19, 1986	$0.007207
May 20, 1986	.007123
May 21, 1986	.007082
May 22, 1986	.007027
May 23, 1986	.006988
Israel shekel:	
May 19-23, 1986	N/A
South Korea won:	
May 19, 1986	.001125
May 20-23, 1986	.001124
Taiwan N.T. dollar:	
May 19, 1986	.026035
May 20, 1986	N/A
May 21, 1986	.026055
May 22, 1986	.026062
May 23, 1986	.026069

(LIQ-03-01 S:COM CIE)

Dated: May 23, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

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(T.D. 86-113)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

May 26, 1986, holiday.

Greece drachma:	
May 27, 1986	$0.006995
May 28, 1986	.007042
May 29, 1986	.006983
May 30, 1986	.006897
Israel shekel:	
May 27-30, 1986	N/A
South Korea won:	
May 27-30, 1986	.001122
Taiwan N.T. dollar:	
May 27, 1986	.026089
May 28, 1986	.026110
May 29, 1986	.026123
May 30, 1986	.026151

(LIQ-03-01 S:COM CIE)

Dated: May 30, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
May 5, 1986	.065232
May 6, 1986	.064267
May 7, 1986	.064412
May 8–9, 1986	.065232
Belgium franc:	
May 5, 1986	.022416
May 6, 1986	.022183
May 7, 1986	.022297
May 8, 1986	.022351
May 9, 1986	.022472
Denmark krone:	
May 5, 1986	.123824
May 6, 1986	.122279
May 7, 1986	.122888
May 8, 1986	.123946
May 9, 1986	.123793
Finland markka:	
May 5, 1986	.202347
May 7, 1986	.200904
May 8, 1986	.202634
May 9, 1986	.202163
Germany deutsche mark:	
May 5, 1986	.457143
May 6, 1986	.452940
May 7, 1986	.455270
May 8, 1986	.458716
May 9, 1986	.459137
Ireland pound:	
May 5, 1986	1.3950
May 6, 1986	1.3807
May 7, 1986	1.3835
May 8, 1986	1.3980
May 9, 1986	1.3958
Italy lira:	
May 5, 1986	.000667
May 6, 1986	.000660
May 7, 1986	.000663
May 8–9, 1986	.000668
Japan yen:	
May 5, 1986	.006038
May 6, 1986	.006015
May 7, 1986	.006057
May 8, 1986	.006112
May 9, 1986	.006160
Netherlands guilder:	
May 5, 1986	.405515
May 6, 1986	.401768

May 7, 1986	.404122
May 8, 1986	.407415
May 9, 1986	.407997
New Zealand dollar:	
May 5, 1986	.57950
May 6, 1986	.58130
May 7, 1986	.58330
May 8, 1986	.58450
May 9, 1986	.58920
Norway krone:	
May 5, 1986	.144238
Spain peseta:	
May 5, 1986	.007194
May 8, 1986	.007218
May 9, 1986	.007207
Sweden krona:	
May 8, 1986	.142552
Switzerland franc:	
May 5, 1986	.545852
May 6, 1986	.541712
May 7, 1986	.545703
May 8, 1986	.550964
May 9, 1986	.552486

(LIQ-03-01 S:COM CIE)
Dated: May 9, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-115)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
May 12, 1986	$0.065370

May 13, 1986	.064641
May 14, 1986	.065030
May 15, 1986	.064704
May 16, 1986	.064309
Belgium franc:	
May 12, 1986	.022487
May 13, 1986	.022272
May 14, 1986	.022371
May 15, 1986	.022282
May 16, 1986	.022148
Denmark krone:	
May 12, 1986	.124224
May 13, 1986	.122850
May 14, 1986	.123510
May 15, 1986	.122963
May 16, 1986	.122041
Finland markka:	
May 12, 1986	.201613
Germany deutsche mark:	
May 12, 1986	.459982
May 13, 1986	.454959
May 14, 1986	.457771
May 15, 1986	.455166
May 16, 1986	.452284
Ireland pound:	
May 12, 1986	1.3985
May 13, 1986	1.3825
May 14, 1986	1.3910
May 15, 1986	1.3825
May 16, 1986	1.3745
Italy lira:	
May 12, 1986	.000670
May 13, 1986	.000663
May 14, 1986	.000665
May 15, 1986	.000663
May 16, 1986	.000659
Japan yen:	
May 12, 1986	.006205
May 13, 1986	.006135
May 14, 1986	.006124
May 15, 1986	.006112
May 16, 1986	.006046
Netherland guilder:	
May 12, 1986	.403330
May 13, 1986	.403796
May 14, 1986	.406091
May 15, 1986	.404089
May 16, 1986	.401606

New Zealand dollar:	
May 12, 1986	.58900
Spain peseta:	
May 12, 1986	.007228
Switzerland franc:	
May 12, 1986	.554170
May 13, 1986	.547645
May 14, 1986	.550206
May 15, 1986	.546747
May 16, 1986	.543036
United Kingdom pound:	
May 12, 1986	1.5460

(LIQ-03-01 S:COM CIE)
Dated: May 16, 1986.

ANGELA DEGAETANO,
Chief,
Custom Information Exchange.

(T.D. 86-116)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
May 19, 1986	$0.063888
Belgium franc:	
May 19, 1986	.022022
Germany deutsche mark:	
May 19, 1986	.449640
Ireland pound:	
May 19, 1986	1.3660
Japan yen:	
May 19, 1986	.005947
May 20, 1986	.005931
May 21, 1986	.005925
May 22, 1986	.005907

May 23, 1986	.005896
Nethereland guilder:	
May 19, 1986	.399074
Norway krone:	
May 22, 1986	.130073
May 23, 1986	.129702
Republic of South Africa rand:	
May 20, 1986	.44050
May 21, 1986	.44000
May 22, 1986	.43800
May 23, 1986	.44000

(LIQ-03-01 S:COM CIE)

Dated: May 23, 1986.

ANGELA DEGAETANO,
Chief,
Custom Information Exchange.

(T.D. 86-117)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

May 26, 1986, holiday.	
Japan yen:	
May 27, 1986	$0.005910
May 28, 1986	.005917
Norway krone:	
May 27-28, 1986	.129955
May 29, 1986	.128883
May 30, 1986	.127551

Republic of South Africa rand:

May 27, 1986	.42950
May 28, 1986	.43000
May 29, 1986	.42950
May 30, 1986	.42350

(LIQ-03-01 S:COM CIE)

Dated: May 30, 1986.

ANGELA DEGAETANO,
Chief,
Custom Information Exchange.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-555)

PERMAGRAIN PRODUCTS, INC., APPELLANT *v.* UNITED STATES, APPELLEE

Craig E. Ziegler, Montgomery, McCracken, Walker & Rhoads, of Philadelphia, Pennsylvania, argued for appellant.

Joseph I. Liebman, Attorney in Charge International Trade Field Office, Department of Justice, of New York, New York argued for appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Judith M. Barzilay*.

Appealed from: U.S. Court of International Trade.

Chief Judge RE.

(Appeal No. 86-555)

PERMAGRAIN PRODUCTS, INC., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided June 4, 1986)

Before DAVIS and NIES, *Circuit Judges*, and SWYGERT,* *Senior Circuit Judge*.

NIES, *Circuit Judge*.

Permagrain Products, Inc. appeals from the final judgment of the United States Court of International Trade in Case No. 81-12-01644, entered September 4, 1985, which upheld the United States Customs Service's classification of the subject merchandise under item 202.60 of the Tariff Schedules of the United States (TSUS). We affirm.

OPINION

The imported merchandise was classified by Customs as "other hardwood flooring" under item 202.60 of the TSUS. Permagrain challenged that classification, contending that the merchandise was properly classifiable as "hardwood lumber, rough, dressed or

*Honorable Luther Merritt Swygert, U.S. Senior Circuit Judge for the Seventh Circuit, sitting by designation.

worked" under item 202.42 of the TSUS. The Court of International Trade, in a thorough opinion authored by Chief Judge Re, considered the extensive testimony and other evidence presented and held that Customs' classification of the merchandise under item 202.60 of the TSUS was correct. Having considered Permagrain's arguments presented in the appeal, we are unpersuaded that the Court of International Trade committed any errors of law, or that any of its findings are clearly erroneous. *See Daw Industries, Inc.* v. *United States*. 714 F.2d 1140, 1142 (Fed. Cir. 1983). We affirm on the basis of Chief Judge Re's opinion.

AFFIRMED

(Appeal No. 86-603)

UNITED STATES STEEL CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES OF AMERICA AND THE U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, DEFENDANTS-APPELLEES AND SSAB SVENSKT STAIL AB, INTERVENOR-APPELLEE

J. Michael Jarboe, of Pittsburgh, Pennsylvania, argued for appellant. With him on the brief was *John J. Mangan*.

Platte B. Moring, III, Department of Justice, of Washington, D.C., argued for appellees. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrencis, Lynn G. Kamarck* and *Elizabeth K. Dorminey*, Import Administration, U.S. Department of Commerce, of counsel.

Louis H. Kurrelmeyer, Winthrop, Stimson, Putnam & Roberts, of Washington, D.C., argued for intervenor SSAB Svenskt Staal AB. With him on the brief was *Robert Reed Gray*.

Appealed from: U.S. Court of International Trade.

Judge RESTANI.

(Appeal No. 86-603)

UNITED STATES STEEL CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES OF AMERICA AND THE UNITED STATES DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, DEFENDANTS-APPELLEES, and SSAB SVENSKT STAAL AB, INTERVENOR-APPELLEE

Before MARKEY, *Chief Judge*, RICH and ARCHER, *Circuit Judges*.

ARCHER, *Circuit Judge*.

ORDER

At oral argument, Appellee, United States, suggested mootness because all of the entries of merchandise here involved have been liquidated. Appellant, United States Steel Corporation (U.S. Steel),

agreed this was true but argued that we should nevertheless decide this appeal. It contended that the short time frame would make judicial review of the action of the International Trade Administration (ITA) unavailable in this and similar circumstances where ITA has terminated a suspension order prior to the completion of a countervailing duty investigation.

U.S. Steel's assertion is not correct. Here, U.S. Steel did not appeal the denial of the preliminary injunction by the Court of International Trade, which it could have done pursuant to 28 U.S.C. § 1292(c)(1), nor did it seek a stay of the agency action pending appeal after the decision of that court. With these alternatives available, we must dismiss this appeal which would not redress the alleged injury of U.S. Steel because it could not reach the entries in question.

Accordingly, IT IS ORDERED that the appeal be dismissed.

Dated: May 23, 1986.

For the Court.

GLENN L. ARCHER, JR.,
Circuit Judge.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-55)

NATIONAL CORN GROWERS ASSOCIATION, NEW ENERGY CO. OF INDIANA, ARCHER DANIELS MIDLAND CO., OHIO FARM BUREAU FEDERATION AND A.E. STALEY MANUFACTURING CO., PLAINTIFFS *v.* JAMES A. BAKER III, SECRETARY, UNITED STATES DEPARTMENT OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY, U.S. DEPARTMENT OF THE TREASURY, WILLIAM VON RAAB, COMMISSIONER, U.S. CUSTOMS SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS AND RAJ CHEMICALS, INC., CERTIFIED OIL CO. AND CITICORP INTERNATIONAL TRADING CO., INC., INTERVENOR-DEFENDANTS

Court No. 85-08-01151

OPINION

[Declaratory judgment and permanent injunction for plaintiffs Archer Daniels Midland Company and A.E. Staley Manufacturing Company; intervenor importers to remit unpaid duties.]

(Decided May 22, 1986)

Williams & Connolly (*Aubrey M. Daniel III, Stephen L. Urbanczyk, Manley W. Roberts, Robert W. Hamilton* and *William R. Murray, Jr.*) for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Kenneth N. Wolf*) for the defendants.

McDermott, Will & Emery (*Charles R. Work, R. Sarah Compton, Kurt J. Olson, Jacqueline E. Zins, Daniel C. Beckhard* and *Carolyn K. Weeder*) for intervenor-defendant RAJ Chemicals, Inc.

Rogers & Wells (*Robert V. McIntyre* and *Roger A. Clark*) for intervenor-defendant Certified Oil Company.

Wilmer, Cutler & Pickering (*A. Douglas Melamed, Robert C. Cassidy, Jr.* and *Deborah M. Levy*) for intervenor-defendant Citicorp International Trading Company, Inc.

David L. Armstrong, Attorney General (*Frank F. Chuppe*, Assistant Deputy Attorney General) for The Commonwealth of Kentucky, as *amicus curiae*.

Mayer, Brown & Platt (*Charles S. Levy*) for American Farm Bureau Federation, as *amicus curiae*, and *Hamel & Park* (*Jerome P. Weiss*) for Illinois Agricultural Association, as *amicus curiae*.

D'Amico, Luedtke, Demarest & Golden (*William F. Demarest, Jr.* and *Lizbeth R. Levinson*) for Citgo Petroleum Corporation, as *amicus curiae*.

AQUILINO, *Judge:* The background of this case has been set forth in Judge Carman's opinion, 9 CIT ——, Slip Op. 85-98 (Sept. 20, 1985), as well as in opinions of this court [1] deciding various motions, and will be discussed hereinafter only as it relates to necessary findings of fact or conclusions of law.

The plaintiffs and the defendants specify the issues of law essentially as (1) whether the U.S. Customs Service had authority to permit importation of fuel ethanol from Brazil after August 2, 1985 without payment of the full duties prescribed in the Tariff Schedules of the United States and (2) whether Customs Service rulings permitting such importation were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1)(A).

I

The parties also agree that the actions of the defendants complained of are to be measured by the contents of the administrative record. However, the parties do not concur as to what that record entails. Their disagreement stems from defendants' failure to comply with the mandate of 28 U.S.C. § 2635(d)(1), which is:

> In any other civil action in the Court of International Trade in which judicial review is to proceed upon the basis of the record made before an agency, the agency shall, within forty days or within such other period of time as the court may specify, after the date of service of the summons and complaint upon the agency, transmit to the clerk of the court, as prescribed by its rules--
>
> (A) a copy of the contested determination and the findings or report upon which such determination was based;
>
> (B) a copy of any reported hearings or conferences conducted by the agency; and
>
> (C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action.

The summons and complaint were served on August 29, 1985. In the absence of the record (or any application to extend the time for the filing thereof), this court in Slip Op. 85-105 granted plaintiffs' motion for certain discovery of the defendant officials on the authority of *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), *Texas Steel Company* v. *Donovan*, 93 F.R.D. 619 (N.D.Tex. 1982), *Exxon Corporation* v. *Department of Energy*, 91 F.R.D. 26, 32-46 (N.D.Tex. 1981), *Quincy Oil, Inc.* v. *Federal Energy Administration*, 468 F.Supp. 383 (D.Mass. 1979), and *Gulf Oil Corporation* v. Schlesinger, 465 F.Supp. 913, 916 (E.D.Pa. 1979). That discovery included production of documents, responses to interrogatories and presentment for depositions of Deputy Director John T.

[1] *See* 9 CIT ——, Slip Op. 85-105 (Oct. 9, 1985), and 9 CIT ——, 623 F.Supp. 1262 (Nov. 26, 1985), the latter cited hereinafter as "Slip Op. 85-119".

Roth and Director Harvey Brent Fox of the Classification and Value Division of the Customs Service.

The court scheduled trial of any outstanding issues of fact. Thereafter, counsel for the defendants filed with the Clerk documents claimed to comprise the administrative record. They also interposed on the eve of trial a motion for judgment on that record pursuant to CIT Rule 56.1 and moved for a stay until resolution of their dispositive motion.

The court denied a stay. The plaintiffs moved to supplement the record with documents, mostly obtained during the discovery, and with Roth and Fox deposition testimony; intervenor-defendant RAJ Chemicals, Inc. [hereinafter referred to as "RAJ"] submitted an *in limine* motion to limit the scope of review to the administrative record.[2]

That record was submitted by counsel for the defendants under cover of an affidavit of Mr. Roth wherein he is characterized as having been "involved directly in the decisions"[3] at issue in this case. The affidavit incorporates by reference and attaches a list of documents contained in defendants' response to plaintiffs' request to produce. The list has been marked to indicate which papers produced during discovery are not considered by the defendants to be part of their record and therefore were not filed.

Of those papers, plaintiffs' motion to supplement sought admission into evidence of Nos. 12, 59, 60, 71, 79, 105, 107, 116, 117, 120, 122, 123, 124, 125 and 127, as well as three documents[4] not on the government list. The motion stated that the Roth affidavit

> excludes a number of * * * documents that were before the agency at the time of the agency decisions, some of which documents were filed with the agency by the public or interested parties and some of which were prepared by the agency and help explain the decisionmaking process * * *. Since these documents come within the terms of Rule 72(a) and 28 U.S.C. § 2635, they should be included in the Administrative Record.[5]

In addition to 28 U.S.C. § 2635 quoted above, CIT Rule 72(a) provides that

> within 40 days after the service of the summons and complaint upon the agency, the agency shall file with the clerk of the court the items specified in paragraphs (1), (2) and (3) of this subdivision (a), if they exist, and the certified list specified in paragraph (4) of this subdivision (a), as part of the official record of the civil action

[2] Plaintiffs' motion was denied from the bench as to the documents; the depositions were received. To the extent RAJ's motion implied opposition to any supplementation of the record as filed by the defendants, it was denied. *See* Tr. at 117-18.

[3] Affidavit of John T. Roth, paras. 3, 4, 5 and 6 (Dec. 2, 1985) [hereinafter cited as "Roth Affidavit"]. The plaintiffs marked this affidavit as their trial Exhibit 1.

[4] Marked for identification as plaintiffs' trial Exhibits 17, 18 and 19.

[5] Memorandum in Support of Plaintiffs' Motion to Supplement the Administrative Record and to Admit Deposition Testimony and Documents Explaining the Agency's Decision, p. 2.

> (1) A copy of the contested determination and the findings or report upon which such determination was based.
> (2) A copy of any reported hearings or conferences conducted by the agency.
> (3) Any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action. The agency shall identify and file under seal any document, comment, or other information obtained on a confidential basis, including a nonconfidential description of the nature of such confidential document, comment or information.
> (4) A certified list of all items specified in paragraphs (1), (2) and (3) of this subdivision (a).

For his part, Mr. Roth makes the point several times in his affidavit that he "expanded" [6] paragraph (1) of this rule to supply certain documents as part of the record and that he also included other documents which do "not come within the scope of Rule 72(a) (1), (2) or (3)." [7]

In view of this attitude, and of the dictates of the above-quoted rules of law, it is difficult to discern why a number of documents discovered by the plaintiffs and proffered to supplement the record were not included in the first place. For example, document 71 is a request dated June 27, 1985 for a ruling by the Customs Service as to the duty on fuel ethanol proposed to be imported from Brazil by Citicorp International Trading Company, Inc.[8] and document 79 is a reply thereto on July 15, 1985. Documents 122, 123, 124 and 125 are requests in May and June 1985 for Customs Service rulings on proposed importations of fuel ethanol by RAJ, Valley Green International Trading Corporation and Certified Oil Company.[9] Exhibit 19 is a letter dated July 18, 1985 from RAJ's counsel to Mr. Fox contending that the Service's rulings underlying this case "represent a clear and cogent interpretation of the relevant TSUS items and should not be revoked or modified". On the other hand, plaintiffs' position is much less tenable on other documents, *e.g.*, No. 12 (complaining *ex post facto* about the ruling revocations through *ex parte* procedures), No. 105 (Customs Service news bulletins after the fact) and Nos. 107 and 116 (attempts by Customs to explain its actions to Senator Robert Dole and then Secretary of Agriculture John R. Block, respectively).

Notwithstanding the varying degrees of apparent relevance of the foregoing documents, they are not part of the administrative record according to the Roth affidavit, *i.e.*, they were not before the decisionmaker at the time of decision. In the face of such a certifi-

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[6] Roth Affidavit, para. 11, p. 4; para. 12; para. 13, p. 7; and para. 14, p. 8.
[7] *Id.*, para. 11, p. 5 and para. 13, p. 8.
[8] On November 26, 1985, the court granted the motion of this company [referred to hereinafter as "Citicorp"] to intervene in this action as a party defendant.
[9] On October 10, 1985, Certified Oil Company's motion to intervene as a party defendant was granted. On December 9th, its counsel served and filed a "Notice of Withdrawal" and since then has been absent from the case.A

cation, the court is not at liberty to hold otherwise simply on the grounds of production during discovery and relevance, which is all the plaintiffs show. *See generally San Luis Obispo Mothers for Peace* v. *NRC*, 751 F.2d 1287, 1323–29 (D.C. Cir. 1984), *vacated in part on another ground on reh'g en banc*, 760 F.2d 1320 (D.C. Cir. 1985); *Star-Kist Foods, Inc.* v. *United States*, 8 CIT 305, Slip Op. 84–130 (Dec. 6, 1984). The court therefore denied plaintiffs' motion as to the documents,[10] and, with the limited exception of Exhibit 2, none are relied on hereinafter.

The Administrative Procedure Act and 28 U.S.C. § 2640(d) contemplate the availability of a complete record. However, no record was filed in a timely manner, thereby necessitating the independent discovery, which itself gave rise to the format, if not the contents, of the decisionmaker's certification. His affidavit admits that there are no reported hearings or conferences conducted by the agency[11] within the meaning of 28 U.S.C. § 2635(d)(1)(B) and CIT Rule 72(a)(2). Furthermore, Mr. Roth's attempts to "expand" the record notwithstanding, the court is unable to conclude after careful review that it contains either findings or a report of the kind contemplated by subparagraphs (A) and (1) of the foregoing rules as a basis for the administrative actions contested herein.

It has been held that hearings and formal findings are not always necessary to make an administrative record whole. *E.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 140–41 (1973) (interpreting the National Bank Act, 12 U.S.C. § 26); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. at 409 (interpreting the Department of Transportation Act, 49 U.S.C. § 1653(f), and the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138). The Supreme Court recently stated in *Florida Power & Light Co.* v. *Lorion:*

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.[12]

Of course, at the time of plaintiffs' motion to supplement, the court was not in a position to determine the adequacy of the administrative record in view of its last-minute filing along with defendants' motion for judgment thereon. Moreover, contrary to an earlier suggestion by the court that liquidation be suspended pending expedited resolution of the issues raised,[13] the defendants (according to letters from their counsel dated November 27 and December 23, 1985) had liquidated two of the contested ethanol en-

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[10] Marked for identification at trial as plaintiffs' Exhibits 2 through 19.
[11] *See* Roth Affidavit, paras. 11(2), 12(2), 13(3) and 14(2).
[12] 106 S.Ct. 1598, 1607 (1985). *See* 5 K. Davis, Administrative Law Treatise 29:22 at 439 (2d ed. 1984).
[13] *See* Slip Op. 85–119, 623 F.Supp. at 1271.

tries on November 15 and December 20, 1985, respectively.[14] These maneuvers effectively have made remand upon any determination of record inadequacy inappropriate.

As indicated above, in the absence of the record, the court had granted leave to take deposition(s) of the decisionmaker(s)[15] on the authority of *Citizens to Preserve Overton Park, Inc.*, v. *Volpe*, 401 U.S. at 420 (Where there are no formal findings, "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves"). *See Public Power Council* v. *Johnson*, 74 F.2d 791, 793-94 (9th Cir. 1982); *Environmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981); *Hurst* v. *United States Postal Service*, 586 F.2d 1197, 1200 n.6 (8th Cir. 1978). As the Supreme Court stated in *Camp* v. *Pitts*, 411 U.S. at 142-43:

> If * * * there was such a failure to explain administrative action as to frustrate effective judicial review, the remedy was * * * to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

Having granted this remedy under the rare circumstances indicated, it would indeed be anomalous and not in the interests of effective judicial review for the court now not to receive and consider the deposition testimony of the decisionmakers along with the documents which they thereafter claim constitute their record.

II

From the outset, the defendants challenged the standing of the plaintiffs to prosecute this case. That challenge was overruled by Judge Carman during hearing and determination of plaintiffs' original application for a preliminary injunction. *See* Slip Op. 85-98 at 4. Then, on further consideration of defendants' motion to dismiss the complaint, joined in by RAJ, this court, taking the allegations of the complaint as true for purposes of deciding the motion, denied dismissal on the ground of lack of standing. *See* Slip Op. 85-119, 623 F.Supp. at 1264-66. Finally, the trial itself focused on this issue.

The intervenor-defendants argue vigorously in their post-trial briefs that the plaintiffs failed to carry their burden of proof on the question. This position is not well-taken, however, as to two of the plaintiffs.

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[14] A third letter dated January 14, 1986 states that another entry was liquidated on January 10th.

Finally, defendants' counsel sent a letter to the court dated April 10, 1986 and stating that Customs had notified its field offices on March 24 and 27, 1986 that suspension of liquidation of the four remaining, contested entries herein had been lifted as a result of final negative determinations by the International Trade Commission as to dumping of, and countervailing duties on, Brazilian fuel ethanol. *Compare* note 37 *infra with* 51 Fed. Reg. 9538 (March 19, 1986).

[15] Presumably, the examinations were based upon the documents produced during discovery, both those claimed now to comprise the record and those sought by the plaintiffs to be added thereto.

A. *Standing of Plaintiff Archer Daniels Midland Company ("ADM")*

ADM, which is the largest domestic producer [16] of anhydrous ethyl alcohol or ethanol,[17] operates plants in Peoria and Decatur, Illinois and Cedar Rapids and Clinton, Iowa. *See* Tr. at 55. Almost all of this product is derived from corn,[18] with ADM attempting to sell the resultant fuel ethanol to petroleum marketers across the United States—from Minnesota to Florida to California.[19]

A document in the administrative record herein describes the status of fuel ethanol in this country as follows:

> United States fuel ethanol sales find their modern origins in the oil supply disruptions and price escalations associated with the Arab oil crisis of the 1970's and the tax subsidies (both Federal and State) that began in 1978. Fuel ethanol and certain other gasoline extenders were promoted to lessen the likelihood that United States consumers would be held hostage in the future. Although OPEC's threat has subsided and the rate of growth of gasoline demand has lessened, fuel ethanol demand has been sustained in the 1980's, and likely in the future, by domestic rather than foreign policy. The adoption of the catalytic converter in the Clean Air Act of 1970 effectively required that new automobiles sold in the United States burn unleaded gasoline. This resulted in both increased demand for such gasoline and for sources of non-lead octane enhancers.
>
> Fuel ethanol, in addition to being a gasoline extender, is a significant source of octane. Fuel ethanol supplies were encouraged by tax credits granted under the Windfall Profits Tax legislation of 1980. Thus, through public policy affecting both the demand side and the supply side, U.S. fuel ethanol sales (U.S. apparent consumption) have grown from under 10 million gallons in 1978 to over 531 million gallons per year in 1984 (of which 430 million were produced domestically). Continued growth in U.S. sales has been further assured by recent EPA rulings that require the lowering of the lead content of leaded gasoline production from 1.1 grams per gallon (gpg) to 0.5 gpg by July 1, 1985 and to 0.1 gpg by January, 1986. Based on the most recent estimates, that nevertheless predates [*sic*] the

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[16] *See, e.g.*, transcript of deposition on December 10, 1985 of Edward A. Harjehausen [hereinafter cited as "Harjehausen Deposition"], pp. 112-14, 134-35.

[17] The intended use of this product is both as an "extender" and an octane "enhancer" of gasoline [*see, e.g., id.* at 148-49], ergo the vernacular "fuel ethanol" and "gasohol". This use, however, is not new:

> Ethyl alcohol has been used for many years as a motor fuel when blended with gasoline, particularly in Europe. From 5 to 20 percent anhydrous alcohol is used in commercial blends. Alcohol has an octane number of 99 and a higher heat of vaporization than gasoline, both of which are technologically desirable. Despite alcohol having only two-thirds the calorific value of gasoline, blends of up to about 15 percent alcohol provide slightly more power and lower fuel consumption than straight gasoline. This anomaly is explained on the basis of a higher fuel/air ratio for the alcohol blend. In countries that imposed compulsory mixing, gasoline/alcohol blends were not readily acceptable by the public. However, gasoline/alcohol/benzene blends were acceptable, as indicated by experience in France with a blend consisting of 75 percent gasoline, 15 percent alcohol, and 10 percent benzene.

Marks' Standard Handbook for Mechanical Engineers at 7-20 (8th ed. 1978). One witness estimated that in 1985 "5 to 7 percent of the gasoline in this country contain[ed] ethanol." Harjehausen Deposition, p. 130.

[18] The Peoria plant has also processed some rye, milo and corn screenings. *See* Harjehausen Deposition, p. 115.

[19] *See, e.g.*, Tr. at 58 and Harjehausen Deposition, pp. 70, 75, 163 and 165.

> EPA's lead reduction edict, fuel ethanol sales are expected to raise by 15 percent for the year 1986 to 678 million gallons.[20]

For years, there has been analysis of motorfuel use in the United States on a regional or PADD ("Petroleum Administration for Defense District") basis. Florida, for example, is in PADD–I, which experienced a 93 percent increase in fuel ethanol sales from January 1984 to January 1985.[21] California, which experienced "sharp declines" in ethanol sales for the same period,[22] is part of PADD–V.

For its part, ADM's sales in Florida for the first half of 1985 "averaged around 3 million gallons a month."[23] Sales for the second half of last year declined markedly.[24] More specifically, Citgo Petroleum Corporation[25] was an inportant customer of ADM during the first half of 1985 in Florida[26] and in other states. Indeed, ADM maintains a terminal for distribution of ethanol to Florida (and elsewhere) at Avondale, Louisiana. ADM's subsidiary American River Transportation Company chartered a large, ocean-going barge with a capacity of approximately 55,000 barrels at a rate of $4,200.00 per day "to improve [ADM's] service to [its] Florida customers,"[27] including Citgo, starting in April 1985.

Nevertheless, soon thereafter the barge was subchartered because ASM "couldn't get consistent business" for it in Florida.

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[20] Record Document ("RD") 44 (Glassman-Oliver Economic Consultants, Inc., *The Effect of Additional Supplies of Fuel Ethanol on U.S. Producers and Consumers* at 3–4 (footnotes omitted)).

The final rule of the Environmental Protection Agency as to gasoline lead content is set forth at 50 Fed.Reg. 9386 *et seq.* (March 7, 1985). *See also* 50 Fed. Reg. 13,116 *et seq.* (April 2, 1985) banking of lead rights).

[21] *See* RD 44 (Alcohol Update, *Ethanol Blend Market Share Jumps in January* at 4).

[22] *Id.*

[23] Harjehausen Deposition, p. 194. *See* Tr. at 229, 250. Most of the evidence in this case was adduced under a protective order agreed to by the parties. The court respects the desirability of confidentiality and therefore refers herein only to specific data produced in confidence as is minimally necessary to make this opinion intelligible.

[24] *See* Harjehausen Deposition at 195; Tr. at 250.

[25] Referred to hereinafter as "Citgo". After the court had set this case down for trail, Citgo filed a motion for leave to intervene as a party defendant, stating, among other things:

> Citgo is a large independent refiner and major producer of gasohol and gasoline fuels. In conjunction with its parent company, the Southland Corporation, Citgo markets gasohol in twenty (20) states through Citgo and 7-Eleven branded outlets. Together, Southland and Citgo are one of the largest domestic marketers of gasohol in the nation with 1985 sales of gasohol estimated to exceed 800 million gallons * * *.
>
> During June and July 1985 respectively, Citgo entered into two contracts for the purchase of Brazilian ethanol from importer Southern Missouri Oil Company * * *. Southern Missouri was a recipient of a Custom Service letter ruling to the effect that the 60 cent per gallon duty imposed by item 901.50 of the * * * (TSUS) did not apply to certain alcohol mixtures. Subsequently, Southern Missouri received a letter from the Customs Service revoking the prior rulings. This revocation letter also contained at "grandfather" provision challenged by plaintiffs in this action. This grandfather provision permitted certain limited previously contracted quantities of alcohol mixtures classifiable under TSUS item 432.10 to enter the United States prior to 5:00 p.m. November 1, 1985 exempt from the 60 cent per gallon duty imposed on ethyl alcohol under item 901.50, TSUS.
>
> Pursuant to this provision, Southern Missouri entered two shipments of ethanol mixtures during the weekend of October 26–27, 1985 without liability for the 60 cent per gallon duty imposed by TSUS item 901.50. Once entered, the imported mixtures were immediately sold to Citgo. Citgo has agreed to indemnify Southern Missouri for certain increased duties for which Southern Missouri might become legally liable as a result of this lawsuit.

[26] *See* Tr. at 243. *Cf. id.* at 56–57.

[27] *Id.* at 242.

Memorandum in Support of Motion of Citgo Petroleum Corporation for Leave to Intervene, pp. 1–3.

At trial, the court denied this motion to intervene, whereupon Citgo moved for reconsideration, stating in its motion, among other things, that "Citgo is not a holder of a revoked letter ruling nor a holder of one of the grandfather rulings which are the subject of this litigation" and that "Citgo is not an importer of record". This later motion was denied in an order dated January 6, 1986, which also granted Citgo's motion to exclude from the case the transcript of plaintiffs' deposition on December 12, 1985 of the company's general manager of industrial products and special products.

Thereafter, the court granted Citgo's motion for leave to file a brief as *amicus curiae*.

ADM's vice-president of marketing, Edward A. Harjehausen, testified as follows as to the company's loss of business from Citgo:

> Q. Did you sell product to Citgo after the month of May?
> A. No, we didn't.
> Q. Did you make effort to sell them product after the month of May?
> A. Yes, we did.
> Q. In what months did you make efforts to sell the product for use in Florida?
> A. We offered to sell them product in June, July and in August.
> Q. And did you sell them product?
> A. No, we didn't sell them anything.
> Q. Did you have an understanding as to why not?
> A. Well, I am not sure why not. There was an indication that our pricing wasn't attractive. There was an indication that he didn't really need any. I cannot honestly say we pinned down a specific reason why.
> Q. Did you quote a price?
> A. Yes.
> Q. Was the price different in any material respect from the price that you had been quoting in the previous months?
> A. No.
> Q. There was a change in the tax incentive in July in Florida, isn't that correct?
> A. Yes there was.
> Q. Did you change your price as a result of that change in the tax incentive.
> A. No. We felt that the ethanol sold in Florida market prior to the tax change was undervalued, and that when the tax change came into play, we didn't feel that the overall economics warranted a price change, so we made no price change.
> Q. Did the change in the Florida tax incentive change your desire to sell product in the State of Florida?
> A. No.
> Q. Did it change the volume that you wanted to sell or try to sell or desire to sell in Florida?
> A. No.
> Q. Did it change your price?
> A. No.[28]

This testimony was adduced in rebuttal to that of Citicorp's expert witness,[29] who sought to analyze the economics of ADM's loss in Florida of some 1.5 million gallons[30] of ethanol sales per month during the last half of 1985. ADM has made a "conscious decision to sell less product in the Florida market" because it "did not want to run into head-to-head competition with ethanol-toluene

[28] *Id.* at 246–47.
[29] *See generally id.* at 143–92.
[30] *See, e.g., Id.* at 250; Harjehausen Deposition, pp. 194–95.

blends."[31] In essence, this witness, John G. Reilly, concluded that ADM's decision was "economically justifiable"[32] and "rational."[33] He sought to support this conclusion by projecting the profitability of a diversion of 1.5 million gallons of ethanol per month from Florida to Minnesota, Illinois and Kansas.[34]

However, Mr. Reilly did not know the average "net-back" to ADM from ethanol sales in Florida or in the other three states. *See* Tr. at 158. He admitted that whatever price differentials may have existed between the two areas had not "triggered any action"[35] on ADM's part to remove product from Florida at least up until June 1985. Mr. Reilly agreed that a basic economic principle or truism operating herein is that more supply in a given market will result in downward pressure on pricing,[36] and he also was aware that Citgo had purchased approximately 18.5 million gallons of fuel ethanol from Southern Missouri Oil Company[37] at a price substantially below that of ADM.[38] Finally, Mr. Reilly, who testified that for several months he had been conducting a study in connection with the ITC injury investigation of fuel ethanol from Brazil, conceded an awareness of continuing ADM sales in Florida, albeit not to its erstwhile most important customer, Citgo. *See id.* at 188.

In the face of such evidence of loss of business in the largest market for gasohol,[39] the intervenor-defendants cling to their position that ADM

> has failed to demonstrate that it has standing in this case because it has failed to demonstrate that it has been "injured in fact" by the Service's decision to grandfather a limited amount of mixtures.[40]

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[31] Harjehausen Deposition, p. 91. *See also* Tr., p. 60. Mr. Harjehausen testified at trial that his company determined in September-October 1985 to reduce the amount of ethanol for sale in Florida. *See id.* at 64. Citicorp called Citgo's counsel to the stand who offered hearsay testimony to the effect that that decision had been reached in April. *See id.* at 193. This testimony was not corroborated by Citgo's manager of special fuels, Jack Woersching, under examination by counsel for Citicorp and for the plaintiffs. *See generally id.* at 328–34.

What the evidence shows, and the court finds, is that a meeting between Messrs. Harjehausen, Woersching and others took place on April 9, 1985 at which time a commitment was sought for the purchase from ADM of Citgo's "entire requirement in Florida" [*id.* at 339] for a period of six to twelve months. No such agreement was reached, and Citgo purchases of fuel ethanol from its "traditional supplier—ADM—[*id.* at 333] ceased soon thereafter.

[32] *Tr.* at 168.

[33] *Id.* at 172, 183.

[34] *Compare* Citicorp trial Exhibit 2 *with* Tr. at 149–54.

[35] Tr. at 163.

[36] *See id.* at 156, 170, 185.

[37] Hereinafter referred to as "Southern Missouri". This alcohol was landed in Louisiana in October 1985 from two ships, as shown in Slip Op. 85–119, 623 F.Supp. at 1270. As also shown in that opinion, 623 F.Supp. at 1269–70, liquidation of these entries was suspended per force of an ITA preliminary determination of likely sale in the United States at less than fair value. *See also* plaintiffs' trial Exhibit 20 (USITC Pub. No. 1678 (preliminary ITC determination that "there is reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Brazil of certain ethyl alcohol") (April 1985)).

[38] *See* Tr. at 168 and *compare id. and id.* at 169–70, 171 185 *with id.*, at 261. Citgo's manager special fuels estimated that this supply of ethanol would fulfill the company's needs in Florida until the end of March 1986. *See id.* at 319.

[39] *See* Tr. at 305–06.

[40] Intervenor-Defendant RAJ Chemicals, Inc.'s Post-Trial Brief and Memorandum in Support of Motion for Judgment on the Record [hereinafter cited as "RAJ Post-Trial Brief"], p. 24. *See also* Trial Brief of Citicorp, pp. 64–67.

In *Allen* v. *Wright*, 104 S.Ct. 3315, 3325 (1984), the Supreme Court stated that

> the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, "'distinct and palpable,'" *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth* v. *Seldin, supra*, at 501), and not "abstract" or "conjectural" or "hypothetical," *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101–02 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S., at 38, 41. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

Years earlier, a government claim of lack of standing on the part of Students Challenging Regulatory Agency Procedure, suing under the APA, 5 U.S.C. §702, to enjoin ICC orders permitting railroad rate increases had been rejected by the Court as follows:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker* v. *Carr*, 369 U.S. 186; a $5 fine and costs, see *McGowan* v. *Maryland*, 366 U.S. 420; and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663. While these cases were not dealing specifically with §10 of the APA, we see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§22.09–5, 22.09–6 (Supp. 1970)[41]

RAJ's emphasis on ADM's size and market share is misplaced,[42] just as is Citicorp's theory that ADM profited by determining to sell elsewhere the product it could not market in Florida.[43] Indeed, as shown in the analysis of the ethanol market in California *infra*, ADM's size and concomitant ability to deliver its product anywhere

[41] *United States* v. *SCRAP*, 412 U.S. 669, 689 n. 14 (1973).
[42] *See* RAJ Post-Trial Brief, pp. 24–25.
[43] *See* Trial Brief of Citicorp, p. 66.

in the United States support, rather than undermine, its standing. As for the ADM sales in Minnesota and elsewhere in PADD–II, plaintiffs' expert witness testified:

> My opinion is that the facts presented today by Mr. Reilly have no bearing on whether or not there was harm to ADM as a result of an influx of Brazilian Ethanol into Florida. Tr. at 215.

Further:

> There is no question in economic theory or in what evidence I have seen admitted that there was harmful effect because of the influx of Brazilian ethanol into the Florida market on ADM and other marketers in that area. *Id.* at 216.
>
> * * * * * * *
>
> Whatever the conditions are in Florida, if you bring in additional supply, whatever they were before, if an additional supply comes in, standard economic analysis tells you the price of ethanol will fall * * *. Anybody in Florida holding ethanol at the time of the increased availability and the subsequent reduction of price will suffer harm. *Id.* at 217.

The court agrees with this analysis. The record herein amply shows, and the court so finds, that ADM suffered injury in the Florida market sufficient to prosecute this case to judgment. The test, as the Supreme Court indicated in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), is the existence of "an *injury* of *any* kind, economic or otherwise". 454 U.S. at 486 (emphasis in original).

If economics is "an inexact science in which emotions play a big role,"[44] then a loss of good will in Florida might alone be enough to satisfy the injury-of-any-kind test. But much more has been proven here. In addition to the loss of the 1.5 million gallons of business a month discussed above, the evidence also shows, and the court finds, that ADM ended 1985 with higher inventories of ethanol and fewer customers.[45]

The intervenor-defendants emphasize the deposition testimony, read into the record at trial, of the president of the Ethanol Corporation,[46] James Bruce Smith, that the fuel ethanol market "had al-

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[44] P. Samuelson, Economics, An Introductory Analysis, p. 9 (3d ed. 1955). Indeed, Mr. Harjehausen testified that ADM is able to sell in the ethanol market place at prices higher than those of its competition. *See* Tr. at 251.

[45] *See* Harjehausen Deposition, pp. 155, 159.

[46] This company has been a customer of both ADM and plaintiff A.E. Staley Manufacturing Company [hereinafter referred to as "A.E. Staley" or "Staley"] in the Florida market and elsewhere in PADD–I.

At the close of his presentation on January 6, 1986, Citicorp's counsel moved, to the extent necessary, the admission into evidence of testimony on plaintiffs' application for a preliminary injunction on September 13, 1985, which included that of an expert, Donald L. Martin, who had been called by RAJ.

In calling Mr. Smith as a rebuttal witness at trial, plaintiffs' counsel announced that Mr. Smith would rebut the testimony of Mr. Martin [Tr. at 262], primarily in regard to the fuel ethanol market in North Carolina. Counsel for RAJ and Citicorp both objected that this proffer was not proper rebuttal, and the court sustained the objection in view of CIT Rule 65(a)(2) and the trial record before it. The court reserved judgment on the objections of both intervenor-defendants to plaintiffs' offer of Exhibit 23 into evidence. *See* Tr. at 280–84.

Continued

ready been slaughtered in Florida before ET got there."[47] He attributed this to three factors—increased competition, bad publicity, and the reduced state tax exemption, with the competition characterized as the biggest factor. *See* Tr. at 296–98. Indeed, on August 5, 1983, the Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2701 *et seq.*, became law. Section 2701 empowers the President to "proclaim duty-free treatment for all eligible articles from any beneficiary country" in that geographic region. *Cf.* 19 U.S.C. § 2702(b). Apparently pursuant to this authority, Customs has twice ruled that fuel ethanol from the area can enter this country, including Florida, duty free.[48] In any event, Mr. Smith testified that a principal competitor was marketing ethanol which had entered entirely duty free, as well as at the five percent *ad valorem* rate at issue herein. *Cf.* Tr. at 298–99. In other words, the biggest cause of the "slaughter" of the Florida market was fuel ethanol not subjected to the surcharge (now 60 cents) prescribed by item 901.50, TSUS.

The defendants and RAJ argued in support of their original motions to dismiss that this case was moot, and intervenor-defendants' position now is also based on timing. That is, even if the determinations of the Customs Service to permit entry of Caribbean and Brazilian fuel ethanol without payment of the surcharge killed the market for the domestic product in Florida, that destruction has occurred prior to the Service's August actions complained of herein.

This position has some merit, but not enough to justify the relief requested by the defense because the court finds that the harm to ADM in Florida, which before Agust 1985, has continued well beyond that time. For example, Citgo's manager of special fuels estimated at trial that he had enough of the Brazilian product to satisfy his company's entire need for fuel ethanol in Florida for a number of months. *See* Tr. at 319. In fact, the residue of the two

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That document, which is a letter from Mr. Smith to Mr. Harjehausen dated August 16, 1985 and discussing the ethanol market in North Carolina, apparently had been an attachment to an affidavit of Mr. Smith dated September 11, 1985 [plaintiffs' Exhibit Z] which he had brought to New York in anticipation of testifying in open court on September 13th. Mr. Smith did not testify, nor were the affidavit and letter received in evidence by the court. *See* transcript of proceedings on Sept. 13, 1985 [hereinafter cited as "Sept. 13 Tr."], p. 164. Furthermore, while Mr. Martin, during his testimony, made mention of North Carolina several times, that state's situation was hardly central to his thesis of absence of irreparable harm based on a continental United States market. *See generally id.* at 132–55.

Post-trial briefs for both sides continue the argument on admissibility of this document. The court points out in response to this argument that, while its rulings from the bench as to the scope of Mr. Smith's rebuttal testimony must stand and intervenor-defendants' objections to admission of Exhibit 23 therefore must be sustained, that letter is part of the administrative record herein. *See* RD 88.

Also at the close of his case on January 6th, Citicorp's counsel offered into evidence excerpts of the transcripts of the depositions of one Alfred C. Kellogg on December 12 and Gary Towne on December 13, 1985. The plaintiffs objected at that time, and they object now, to these proffers. The objection as to Mr. Towne, who is not an officer, director or managing agent of A.E. Staley within the meaning of CIT Rule 30(b)(4) (or Rule 32(a)(4)) and who appeared for deposition pursuant to a notice thereof specifically naming him, was sustained by the court from the bench. *See* Tr. at 198. That ruling stands.

As for Mr. Kellogg, who is counsel to Citicorp's Global Trade Division in New York City, there was and is no showing that he meets any of the conditions of CIT Rule 32(a)(3), hence plaintiffs' objection is hereby sustained, and no part of either his deposition transcript of Mr. Towne's transcript is otherwise referred to or relied on by the court in this opinion.

[47] Tr. at 291. The reference "ET" is to ethanol toluene, the primary fuel ethanol mixture at issue in this case.

[48] *See* 50 Fed. Reg. 14250–51 (April 11, 1985). *Cf.* Presidential Proclamation 5452 of March 31, 1986 to "Withdraw Preferential Treatment Under the Generalized System of Preferences for Certain Ethanol Mixtures", 51 Fed. Reg. 11539 *et seq.*, (April 4, 1986).

Southern Missouri shipments has been stored in Louisiana, with Citgo using the same oceangoing barge earlier chartered and then released by ADM for the transport of this Brazilian alcohol to Florida.[49] Furthermore, the April 10, 1986 letter from defendants' councel indicated that the duties on those two entries, as well as on the once-suspended Citicorp entries, have yet to be liquidated.

In denying the motions to dismiss on the ground of mootness in Slip Op. 85–119, the court, without the benefit of a timely-filed administrative record or the evidence thereafter adduced at trial, relied on the "capable-of-repetition, yet-evading-review" doctrine as set forth in *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975), and other cases. The first requisite element had already been met by the date of that opinion, to wit, the challenged action of the Customs Service was too short in its duration (90 days) to be fully litigated prior to its expiration. With regard to the second requirement (existence of "a reasonable expectation that the same complaining party would be subjected to the same action again"), the court was unable to conclude then that such an expectation was out of the question.

Having now reviewed the agency record, as well as the evidence on plaintiffs' standing, the court concluded not only that such a reasonable expectation continues to exist but also that there has been no abatement in the controversies between the plaintiffs and defendants over the Customs Service's authority not to liquidate any unliquidated fuel ethanol entries herein at the rate prescribed by item 901.50, TSUS and between the plaintiffs and intervenor-defendants as to the importers' obligations to remit the unpaid duties.

As shown in Slip Op. 85–119, 623 F.Supp. at 1270, RAJ imported some 7.03 million gallons of fuel ethanol into the California market in September 1985. Its counsel characterizes ADM's claim of injury in that market as a result of this shipment as "pure nonsense" on the ground that "ADM abandoned the California market in May 1985".[50] This characterization misses the mark, however.

The evidence shows, and the court finds, that ADM sold sizeable quantities of fuel ethanol in California in April and May 1985. *See* Tr. at 62. ADM sold additional product in California in December 1985. *See id.* ADM's vice-president of marketing testified to continuing "talk * * * to customers around the country,"[51] one of which had been RAJ's September California customer, Beacon Oil Company[52], and he testified at trial that ADM's sales efforts were not limited to any particular geographic area of the United States. *See* Tr. at 55. In short, the court finds that ADM did not "abandon"

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[49] *Compare* Tr. at 239 with *id.* at 318. By comparision, ADM has continued to make available (and sell) ethanol to Citgo in other markets. *See* Harjehausen Deposition, p. 194.

[50] RAJ Reply Brief, p.7.

[51] Harjehausen Deposition, p. 163.

[52] *Compare Tr.* at 132 (RAJ "had not sold any product to Beacon in the past") *with* Harjehausen Deposition, p. 168.

the California market in 1985, notwithstanding the "sharp declines" in overall ethanol sales at the start of the year noted in the RAJ record document quoted above, page 14, nor does the record support a finding that ADM was incapable of delivering product to Beacon in September 1985. What the record does show is that RAJ's sale price to Beacon then was significantly lower than ADM's sale prices before and after September to its other California customer[53], which itself was the recipient of a RAJ commission on the sale to Beacon. *See id.* at 132. To imply that this price differential, based in part on the contested 5% *ad valorem* duty[54], could not and did not harm ADM in such a way as to confer standing to prosecute this case is to turn both economics and the law askance.

B. *Standing of Plaintiff A.E. Staley*

The defense claims of lack of standing on the part of plaintiff A.E. Staley are also unpersuasive. This company produces annually millions of gallons of fuel ethanol and attempts to market its product, as well as that acquired from others, in PADD-I, including Florida and North Carolina.

Staley's vice-president and general manager of its ethanol business unit, W. Robert Schwandt, testified, and this court finds, that entry of fuel ethanol into PADD-I in 1985 without payment of the duty prescribed by item 901.50, TSUS resulted in an absolute loss of business on the part of the company. *See* Sept. 13 Tr., p. 85. *See also id.* at 87. Indeed, in North Carolina, Staley's sales droppped by more than 90 percent from June to July, and they have remained at a low level since then[55] due to an inability to compete with "non-duty paid alcohol."[56] The company's offer price in that state during the late autumn, 1985 was some 30 cents per gallon higher than that offered by others.[57]

Staley considers Florida to be "very important". Schwandt Deposition, p. 77. In June–July 1985, its sales of fuel ethanol there exceeded a million gallons. *See id.* at 75, 77. By the time of the trial, monthly sales in that state had also suffered "severe deterioration" due to "much lower price elsewhere." Tr. at 45.

As with ADM *supra,* the intervenor-defendants argue that Staley's lost business is not sufficient to confer standing. Both RAJ and Citicorp contend again that whatever harm Staley suffered in 1985 occurred prior to the "grandfathered imports in September and October". Reply Brief of Citicorp, p. 26. While the court agrees that the harm to Staley began before those particular entries, the court also finds that those Citicorp entries into PADD-I added to that harm thereafter. Not only had Staley's sales in North Caroli-

[53] *Compare* Tr. at 133 *with id.* at 62, 63.
[54] *Cf.* Tr. at 133.
[55] *Compare Tr. at 44 with id.* at 45, 49. At the time of trial, the company's sales in North Carolina in December were none. *See id.* at 49.
[56] Sept. 13 Tr., p. 92. *Cf.* transcript of deposition on December 13, 1985 of W. Robert Schwandt [hereinafter cited as "Schwandt Deposition"], p. 62.
[57] *Compare* Tr. at 45 *and* Schwandt Deposition, p. 80 *with* Tr. at 287.

na fallen towards zero by the time trial began in December,[58] but Mr. Schwandt earlier had described one aspect of this harm as follows:

> Q. * * * Does the importation of ethanol toluene blends into PAD [*sic*] I constitute a viable threat of serious harm to A.E. Staley that could not be undone?
>
> A. Yes
>
> Judge Carman: How?
>
> [A] It has already specifically caused us to lose business and the margin attached to that business. We can't recover that. Furthermore, it has raised a question of credibility in the minds of our customers to what is the real cost and value of this product. So, when we go back, if we get an opportunity to go back, our job will be more difficult.
>
> Judge Carman: So, its [*sic*] a potential of loss of goodwill with customers and the loss of revenue that gives you the irreparable harm?
>
> [A] Yes.[59]

As indicated in Section A above, such a negative turning of customers might alone be enough to satisfy the standing standard enunciated in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. at 486

The intervenor-defendants also point to the fact that Staley's manufacture of fuel ethanol has not been diminished. *See, e.g.*, Tr. at 46. Indeed, the evidence indicates injury to the "merchandise side" of the business. *Id.* That is, the company's lost sales have been of product produced by others (and sought to be marketed by Staley) rather than by its own Tennessee plant. RAJ's argument, for example, is that

> the interest asserted by Staley in this litigation—that of a merchandiser of ethanol from foreign and domestic sources—is not within the zone of interest protected or regulated by the relevant statuts * * *. For that reason alone, Staley does not have standing to pursue this action and its claims for relief should be denied.[60]

The relevant statute implied is item 901.50, TSUS. The brief of Citgo, as *amicus curiae*, argues at page 9 that this tariff was not designed to protect the domestic ethanol industry, that is,"[i]t is a revenue measure pure and simple." *Id.*, p. 8. RAJ's Post-Trial Brief, on the other hand, states (at pages 32–33):

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[58] *See* Tr. at 49. The intervenor-defendants attempt to attribute this dearth of sales to North Carolina's elimination of its state tax incentive. There can be little doubt that this changed circumstance had a negative impact on fuel ethanol sales in the state [*cf. id.* at 44 and Plaintiffs' Post-Trial Briefs, p. 20], but the EPA rule on gasoline lead content referred to above, page 13 and n. 20, assures ethanol of a role as a substitute octane enhancer in North Carolina, as elsewhere, and it is this market, at a minimum, which Staley is still attempting to compete in [*see* Schwandt Deposition, pp. 80–81]—without much success due to customer expectations of cheaper imports.

[59] Sept. 13 Tr., pp. 87–88.

[60] RAJ Reply Brief, p.13.

> The additional duty in item 901.50 TSUS offsets certain tax benefits that accure from the use of ethanol in motor fuel. (*See* 26 U.S.C. §§ 40; 4081) and in effect eliminates these benefits in the case of imported fuel ethanol. *See* 126 Conf. Rec. S.31709 (December 3, 1980) (statement of Senator Bellman); 126 Cong. Rec. H.11691 (December 3, 1980) (Statement of Representative Ullman). In turn, the tax benefits arising from the use of ethanol in motor fuel are designed to encourage the domestic production of this alternative to petroleum-based fuels. *See* Senate Rep. No. 905–529, 95th Cong., 2d Sess. 45, *reprinted in* 1978 U.S. CODE CONG & AD. NEWS 7981. Thus, item 901.50, TSUS, coupled with the tax subsidies provided in 26 U.S.C. §§ 40, 4081, affords a competitive price advantage to domestically produced ethanol and as such protects domestic producers of fuel grade ethanol by assuring that only domestically produced product benefits fully from the federal tax incentives. *See also* 126 Cong. Rec. S.153147 (December 3, 1980) (statement of Senator Dole).

The RAJ analysis is sounder on the intent and effect of the tariff,[61] but it is not enough to support the proposed conclusion that Staley's injury is outside the zone of interest to be protected. While the evidence indicates that Staley itself has sought to sell imported Brazilian ethanol,[62] that evidence also shows, and the court finds, that this plaintiff purchased millions of gallons of domestically-produced fuel ethanol for resale in North Carolina, Florida and elsewhere in 1985, including during the time of the entries disputed herein. *See generally* Schwandt Deposition, pp. 32–34.

From the outset of this case, RAJ has sided with the defendants in their position that the plaintiffs were required to protest pursuant to 19 U.S.C. § 1516. This position was overruled in Slip. Op. 85–119, but it is useful to note that that section of the Tariff Act itself confers standing on merchandisers such as Staley. Furthermore, the plaintiffs were not required to pursue such a protest because of the nature of the controversy herein and the relief requested, including a declaratory judgment. When this relief is requested, the Supreme Court has stated:

> * * * Basically, the question in each case is whether the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.[63]

The facts adduced in this case show, and the court concludes, the plaintiff A.E. Staley Manufacturing Company meets the standing requirements.

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[61] The courlt notes in passing that, while the revenues raised by the tariff are no doubt sizeable (at least when the Customs Service deigns to enforce it), import duties have long ceased constituting a primary source of revenue for the treasury of the United States.

[62] *See* Schwandt Deposition, p. 32.

[63] *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), cited with continued approval in *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983).

C. *Lack of Standing of Other Plaintiffs.*

Plaintiffs' complaint on its face was sufficient to withstand a motion to dismiss. However, as the Court noted in *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 115 n. 31 (1979):

> Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial.

Plaintiffs; proof is inadequate to support standing now on the part of the National Corn Growers Association, New Energy Company of Indiana and the Ohio Farm Bureau Federation, Inc. Indeed, at trial counsel entered a stipulation to the effect that the New Energy Company does not now sell, nor has it ever sold, fuel ethanol in either PADD-I or California and that it is

> unable to identify in any way in which it has been injured by the importation of 44 million gallons of ethanol toluene blends during the 90 day grandfather period at issue in this case. Tr. at 102.

As for the Ohio Farm Bureau Federation, Inc., the evidence shows that it is a trade representative of some 90,000 people and that it owns Ohio Farm Bureau Synfuels, Inc., which has a 20 percent interest in South Point Ethanol, a producer of fuel ethanol from corn.

South Point considers the State of Maryland an "attractive" potential market in veiw of its proximity to the company's plant. *See* Tr. at 85. It sold some ethanol in that state in 1985,[64] and it determined to attempt to market larger quantities there. To this end, a sizeable storage tank and some rail cars were leased for a year. But these steps were taken without any contractual commitment to purchase South Point's ethanol. *See id.* at 84. And there was testimony to the effect that it is "almost impossible" [65] to blend gasohol in Maryland due to "volatility standards". *See id.* at 126. In other words, South Point, which was selling elsewhere all the ethanol it produced anyway,[66] was looking to engender "new demand" in that state. *See* Tr. at 84. The hoped-for customer had been working with RAJ in an attempt to develop an appropriate gasohol blend for Maryland. But RAJ had not sold fuel ethanol to that company,[67] thereby leaving plaintiffs' counsel to contend now that the RAJ entry in California without payment of the item 901.50 duty enables RAJ to "compete more agressively" in Maryland. Plaintiffs' Post-Trial Brief, p. 31, n. 30. If the best proof of such aggressiveness is price, injury to the Ohio Farm Bureau Federation, Inc.

[64] *See* Tr. at 80.
[65] *Id.* at 127.
[66] *See id.* at 84.
[67] *See id.* at 126, 128.

has not been established since South Point's proposed ethanol price was but a penny more a gallon than that of RAJ,[68] which differential evaporates with the South Point testimony that the hoped-for customer prefers domestically-produced ethanol. *See* Tr. at 75.

In sum, the evidence fails to substantiate standing on the part of plaintiff Ohio Farm Bureau Federation, Inc., and the same is true for plaintiff National Corn Growers Association.

This latter organization was characterized at trial as a "non-profit, non-partisan association designed to benefit and represent the corn growers of this country on issues of importance to them". *Id.* at 88. It has some 17,000 members and 19 supporting members, including ADM and A.E Staley.[69] The testimony of its witness, however, failed to prove injury either to itself or to its corn-growing members caused by the actions of the defendants complained of herein. Rather, the evidence simply reflects a generalized concern for the continued expansion of domestic production of ethanol derived from home-grown corn. *See id.* at 88–95.

The Supreme Court has held that a trade association like that of the corn growers does have standing to bring suit on behalf of its members when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germaine to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Earlier, in *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975), the Court had pointed out that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." However, proof of harm to one or more of those individual members is required to justify any relief. *See* 422 U.S. at 515.

That proof of harm to individual growers of corn has not been adduced here,[70] that is, there is no showing that *Hunt* condition (a), *supra*, is met. Rather, plaintiffs' counsel argue now that the Association has standing based on the injury to non-voting, "supporting members" ADM and A.E. Staley. But neither of these corporations is a corn grower, nor are their interests necessarily coincident with those of American corn farmers. For example, ethanol can be, and is, derived from other grains. And those raw materials are also subject to importation. In short, the court is unable to conclude that the proven harm to ADM and A.F. Staley is sufficient to sus-

[68] *Compare id.* at 75 *with* transcript of deposition on December 13, 1985 of RAJ president Maulik Radia [hereinafter cited as "Radia Deposition"], p. 35.

[69] Such supporting members, however, do not have a vote, nor are they eligible to be directors of the association. Rather, they pay dues and provide financial and other assistance to the organization. *See* Tr. at 99–100.

[70] The administrative record contains a letter to Mr. Fox from the Association dated August 16, 1985 [RD 10] which attempts to quantify the harm to U.S. corn farmers to be caused by two of the contested Brazilian shipments, albeit in a general way and based upon a number of unsubstantiated assumptions.

tain the continued presence in this case of plaintiff National Corn Growers Association simply on the ground of payment of dues. *cf. Health Research Group* v. *Kennedy,* 82 F.R.D. 21, 27-28 (D.D.C. 1979).

III

The defendants argue in their post-trial brief that the plaintiffs have not shown that whatever injury in fact they suffered was caused by the activities of the Customs Service. This argument is not well-taken; the court finds that injury to plaintiffs ADM and A.E. Staley described above fairly can be traced to defendants' determinations to permit more than 40 million gallons of fuel ethanol from Brazil to enter the United States during September and October 1985 for distribution and sale in PADD-I and California without payment of the duties prescribed by item 901.50, TSUS.[71]

Of course, in their motion for judgment on the agency record, submitted on the eve of trial, the defendants contend that their actions "were lawfully done", to quote from page 4 of their memorandum of law. However, just as the facts do not support the thesis of defendants' post-trial brief, neither does the law support their pretrial position. Indeed, the best indicator of this is their own determination reached by August 1985 that they had been wrong to "impl[y to RAJ, Citicorp and other importers] that the duty of 60 cents per gallon provided for in item 901.50, TSUS, would not apply." [72] That is, to quote further from this revocation letter to RAJ:

> Upon review of this matter we conclude that the 60 cents per gallon duty should be applied to the ethyl alcohol component of this mixture when the mixture is imported for fuel use, *inasmuch as the language of item 901.50 encompasses all ethyl alcohol, provided for in item 427.88, which is imported for fuel use, whether it is imported by itself or in a mixture.* RD 16 (emphasis added).

The administrative record contains a lengthy document [RD 114] prepared by The Brazilian Ethanol Producers' Special Committee on the export potential of fuel ethanol and which computes an "additional availability of 250 million gallons yearly for export [to the United States], beginning in 1985." The United States ambassador to Brazil sent the following letter dated July 5, 1984 [RD 94] to the defendant Commissioner of Customs.

> Recently my Senior Commercial Officer, Mr. Emilio Iodice, and I met with Shegeaki Ueki, the president of the Brazilian state petroleum company Petrobras. Among the subjects we

[71] In Slip Op. 85-98, p. 4, Judge Carman determined the difference between this duty and 5% *ad valorem* to be approximately 58 cents per gallon.

[72] RD 16 (letter from Harvey B. Fox to Maulik H. Radia stamped August 2, 1985). *See* RD 3, RD 7, RD 23, RD 40 and RD 91.

discussed was the tariff treatment of Brazilian anhydrous alcohol exported to the U.S.

Because of the lack of foreign exchange due to growing debt service requirements, Brazil has become a world leader in the substitution of fuel alcohol for gasoline in automobiles. Unfortunately (from Brazil's perspective), the very high U.S. tariffs on alcohol have greatly limited exports of Brazilian alcohol to the U.S.

As you can see from Mr. Ueki's note, Petrobras is interested in obtaining a favorable tariff ruling on the importation of anhydrous alcohol that is pre-blended with additives such as MTBE, BTX and others. According to Mr. Ueki, the product would be used as an additive to gasoline. What the Brazilians are interested in is finding some formula to export a product of alcohol, but which is different enough to qualify for a lower tariff rate.

In view of the bad news they are about to get on alcohol in the Congress and from the States of California and Florida, a positive response on this subject would elicit a most positive reaction on the part of the Brazilians. It would serve somewhat to mitigate what has been considered here a growing protectionism stance on our part.

I realize that you do not normally involve yourself in details like this, but I would appreciate your help in seeing that Mr. Ueki's letter gets to the right office in Customs. After the ruling is made, I would be happy to transmit it to Mr. Ueki * * *.

Customs responded favorably to this plea on September 12, 1984, concluding that item 901.50 TSUS would not be applied.[73] Predictably, this resolution to disregard the plain meaning of this law engendered protests from domestic interests such as those now plaintiffs in this case[74] and inquiries from members of Congress. For example, Senators Robert Dole and Richard G. Lugar sent a letter to Secretary Baker on July 17, 1985, stating, among other things:

> We are concerned about certain recent Customs Service letter rulings pertaining to the importation of certain so-called mixtures of ethanol with various other petroleum based additives. These rulings effectively contravene Congressional intent. Unless they are immediately revoked, there will be a substantial loss of revenue to the U.S. Treasury and a threat to the economic viability of a major new U.S. industry.
>
> The clear intent of Congress was to impose a special duty on imported fuel ethanol in order to offset corresponding U.S. tax exemptions for the sale of ethanol/gasoline blends. The current amount of this duty is 60¢ per gallon plus a 3% ad valorem tax. These letter rulings permit a defacto [*sic*] repeal of this duty if the imported ethanol is simply mixed with as little as 7% toluene or other similar additive. RD 98.

[73] *See* RD 94 (letter from Arthur P. Schifflin to Hon. Diego C. Asencio).
[74] *See, e.g.*, RD 78 (letter from Stephen L. Urbanczyk, Esq. to Harvey B. Fox (July 3, 1985)).

Recipients of the "letter rulings" referred to included RAJ, Citicorp, Certified Oil Company and Southern Missouri. With the exception of Southern Missouri, those letters were sent in June 1985. *See* RD's 20, 84. In fact, Citicorp's brief states that

> Citicorp had been exploring the possibility of importing mixtures containing ethanol since late 1984 and entered into an agreement with Petrobras in May 1985 to import a small quantity of an ethanol/toluene mixture. It imported 2.2 million gallons of this ethanol/toluene mixture, which was entered in July 1985. This was a "trial lot" (called "CitiChem I") which Citicorp sold to its customer, Chemical Fuels Corporation. The mixture imported in July consisted of 92.5 percent Brazilian ethanol and 7.5 percent toluene. Although *the Customs Service had not issued a ruling letter to Citicorp specifically for this shipment* Citicorp believed, and Customs agreed, that the ethanol/toluene mixture was not dutiable under TSUS 901.50 because the Customs Service has so ruled such in other cases: * * * Citicorp was entitled to rely on those rulings * * * .[75]

Trial run or not, Customs issued revocation letters to Citicorp and the other proposed importers on or about August 2, 1985,[76] conditioned as follows:

> This revocation is made pursuant to section 177.9(d)(1), Customs Regulations, and is effective with respect to all entries made after 5:00 pm local time, August 2, 1985. Entries made prior to that time will be governed by the ruling previously issued to you. With respect to any entries made after the effective date of the instant ruling, Customs will consider all facts and evidence submitted by you in connection with claims of reliance on the ruling previously issued you.

The issue[77] raised by this decision, as phrased by defendants at page 3 of their memorandum, is whether the Customs Service had authority to permit the importation of ethanol blends beyond August 2, 1985, without the payment of duties at the rate provided for under item 901.50, TSUS, following issuance of the foregoing revocation rulings. The court concludes that the answer to this question is that Customs did not have such authority.

As Justice Holmes once stated on behalf of a unanimous Supreme Court, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward,* 279 U.S. 337, 339 (1929). Another unanimous[78] Court, in

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[75] Trial Brief of Citicorp, p. 6, n. 12 (citations omitted; emphasis added). Apparently, RAJ brought a shipment of fuel ethanol into Houston. The testimony thereon is unclear as to whether it arrived pursuant to a prior Customs letter, but, in any event, it was subjected to a duty of 5% *ad valorem* prior to the Customs revocation letter of August 2, 1985 at issue herein. *See* Radia Deposition, p. 13.

[76] *See supra* n. 72. The letter to Southern Missouri [RD 40] is stamped August 7, 1985, and its effective date is stated to be that date as opposed to August 2nd.

[77] Defendants' Memorandum of Law lists as its first issue whether a cause of action lies against them. Slip Op. 85–119 determined that causes do lie, the remedies for which are discussed hereinafter in Point V.

[78] Justices Marshall, Rehnquist and O'Connor took no part in the decision. *See* 467 U.S. at 866.

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), noted that:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent * * *. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. 467 U.S. at 843 n. 9 (citations omitted).

Here, once the defendants had come to admit their erroneous disregard of the law, they opted for a course called reliance between the Scylla and Charybdis of their own creation. This choice compounded their error. Indeed, the ruminations at pages 8–9 of their memorandum of law are revealing, to wit:

> Within its judgment and discretion, the Customs Service could have implemented the substance of its August 2 (and 7), 1985 revocation decision(s) in several ways. It could have advised the recipients that it intended to revoke the earlier favorable rulings 90 days hence (*i.e.* on November 1, 1985), thereby providing 90 days notice (and perhaps permitting a flood of imports). Alternatively, the Customs Service could have done nothing and on November 1, 1985, revoked the rulings without notice (thereby potentially injuring importers and domestic purchasers). Additionally, the Customs Service might have implemented the revocations of August 2 and 7, 1985, in modified form by providing for a longer (or shorter) "grace period." Alternatively, the Customs Service could have declined to act on plaintiffs' request (RD Nos. 78 and 134) for administrative reconsideration of its original rulings (*i.e.*, the ones revoked by the August 2 and 7 rulings) and compelled plaintiffs to initiate formal proceedings pursuant to the provisions of 19 U.S.C. § 1516. Finally, the Customs Service could have determined that a uniform and established practice existed (if investigation had permitted such a finding), thereby permitting importation of ethanol blends without the duties provided for under item 901.50, TSUS, until 30 (or 90) days following publication of the notice in the Federal Register * * *. [footnote omitted]

Expediency, however, having once failed the defendants, is not the correct guidepost—notwithstanding the validity of much that surrounds this presentation in their memorandum. For example, no one disputes 19 U.S.C. § 3's grant to the Secretary of the Treasury of the "superintendence of the collection of the duties on imports as he shall judge best" or the power to promulgate rules and regulations encompassed in 19 U.S.C. § 1624 or the authority to prescribe forms of entries found in 19 U.S.C. § 66. But whatever the breadth of such statutory parameters, they do not accommodate defendants' actions in this case.

Sections 1624 and 66 of Title 19 are claimed to be *pari materia*,[79] which makes the general powers set forth therein subject to the restraint "not inconsistent with law." The law here (item 901.50, TSUS) provides:

> Ethyl alcohol (provided for in item 427.88, part 2D, schedule 4) when imported to be used in producing a mixture of gasoline and alcohol or a mixture of a special fuel and alcohol for use as a fuel, or when imported to be used otherwise as fuel * * * *. 60¢ per gal.[80]

There is nothing in the record before the court to indicate that between the time of this item's enactment in 1980 and 1984 the defendants had difficulty with either its plain meaning or its enforcement. Moreover, whatever uncertainty may have developed thereafter was laid to rest at the start of August 1985, as quoted above, page 39. In fact, the defendants have left the intervenor-defendants to contend now that "TSUS 901.50 was not intended to apply to mixtures,"[81] which, in the view of these importers, are properly classified under item 432.10, TSUS.[82] But this position glosses over the intended *use* of the Brazilian ethanol, namely, mixed with gasoline[83] to fuel motor vehicles, which brings it within the ambit of item 901.50. If the intent were otherwise, each gallon could be subjected to the distilled spirits tax prescribed by 26 U.S.C. § 5001(a)(1), depending on the degree of denaturement by substances like the aromatic hydrocarbon toluene. That is, toluene is added to ethyl alcohol to avoid this tax, and not that of item 901.50. *Cf.* 26 U.S.C. § 5214(a)(1)(c).

The defendants attempt to rely on 19 U.S.C. § 1315(d), which provides, in pertinent part:

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; * * *

But defendants' own revocation letters in this case [RD 3, 7, 16, 23, 40, and 91] deny the existence of any "established and uniform practice", and no publication of their decision(s) to revoke therefore

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[79] *See* Defendants' Memorandum of Law, p. 10, n. 11.

[80] Unless the context indicates otherwise, the court's references in this opinion to this item 901.50, TSUS encompass, necessarily, item 427.88.

[81] Trial Brief of Citicorp, p. 39.

[82] *See generally id.* at 40–43; RAJ Post-Trial Brief, pp. 51–55. The court notes in passing that the prescribed rate of duty for this item is "5% ad val., but not less than the highest rate applicable to any component compound." The mixture referred to in the Customs correspondence with Citicorp dated June 12, 1985 contemplated 92.5% ethanol; the mixture specified in the letter to RAJ dated June 3, 1985 was 89–92.5% ethanol, the rest benzene, toluene or xylene. Hence, that prescription, on its face, brings item 427.88, and thus item 901.50, into account.

[83] Under Formula No. 20 of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, 27 C.F.R. 21.24, denaturing ethyl alcohol with unleaded gasoline restricts it to fuel use.

occurred. In short, Section 1315(d), with its 30-day grace period, is inapposite.

The defendants opted for a period of 90 days from the date of their revocation(s), and their counsel refer the court to the Customs Service's general-ruling-procedure regulations, specifically, 19 C.F.R. § 177.10(e). However, that regulation, covering effective dates of published decisions, provides for immediate application of rulings, except that

> a change of practice resulting in the assessment of a higher rate of duty or increased duties shall be effective only as to merchandise entered for consumption or withdrawn from warehouse for consumption on or after the 90th day after publication of the change in the Federal Register.

The defendants admit, however, that their "revocation does not constitute a change in practice warranting publication," [84] and they therefore cannot rely on the time period of this regulation.

Finally, the defendants seek support in 19 U.S.C. § 1514(c)(2), but the 90-day period in that section of the Tariff Act of 1930 is the amount of time permitted for the filing of a protest of decisions within the purview of subsection (a) thereof. Nothing in that statutory section contemplates the kind of time lapse at issue here.

The Supreme Court has stated in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 415, and other cases, that decisions of a cabinet Secretary are entitled to a presumption of regularity, but the Court also has pointed out the "presumption is not to shield his action from a thorough, probing in-depth review."

Such a review in this case shows a clear-out attempt by the defendants not to apply the correct rate of duty prospectively, albeit limited to a period of 90 days. While their own regulation on the effect of a revocation of the kind at issue here, 19 C.F.R. § 177.9(d)(2), proscribes retroactive application,[85] it does not provide for a prospective non-enforcement of the proper duty. Of course, if it did not provide the regulation could run afoul of the long-standing rule that the Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. *See, e.g., Morrill* v. *Jones*, 106 U.S. 466, 467 (1883); *Czarnikow-Rionda Company* v. *United States*, 60 CCPA 6, 9, C.A.D. 1071, 468 F.2d 211, 214 (1972). In any event, there is no such regulation, nor is there any statute protecting defendants' conduct in this case. As the Supreme Court stated as long ago as 1836:

> The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion he may adopt necessary

[84] Defendants' Memorandum of Law, p. 15, n. 15. The other sections of Part 177 of the Service's regulations cited in this memorandum, to wit, 19 C.F.R. 1770.0, 177.1, 177.9(a), 177.9(c), 177.9(d)(1) and 177.9(d)(2), do not support defendants' position, nor do they support the position of the intervenor-defendants.

[85] Presumably, this is why the revocation letters [*see* supra p. 42] state that "[e]ntries made prior to that time [5 p.m. on Aug. 2, 1985] will be governed by the ruling previously issued to you" and also why those entries are not now challenged by the plaintiffs.

> forms and modes of giving effect to the law, yet, neither he nor those who act under him, can dispense with, or alter any of its provisions.[86]

This principle remains just as true today. *E.g., Chemung County* v. *Dole,* 781 F.2d 963, 968 (2d Cir. 1986) ("Government agencies are not at liberty to violate statutory commands").

IV

The foregoing conclusion of the court that the defendants acted in excess of their statutory authority obviates a need to review the importer claims of reliance presented to the Customs Service. However, review of those claims, pressed now by the intervenor importers before the court, further reveals the unlawfulness of defendant's actions.

In *Bowman Transportation, Inc.* v. *Arkansas—Best Freight System, Inc.,* 419 U.S. 281, 285-86 (1974), the Supreme Court summarized the appropriate scope of judicial review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A),[87] as follows:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute it judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra,* at 416. The agency must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962). While we may not supply a reasoned basis for the agency's action that the agency itself has not given, *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 595 (1945).

In this case, the agency's governing regulation, 19 C.F.R. § 177.9(d), which Customs relied on in issuing its revocation letters on August 2 (and 7), 1985, states:

> *Modification or revocation of ruling letters*—(1) *Generally.* Any ruling letter found to be in the error or not in accordance with the current views of the Customs Service may be modified or revoked. Modification or revocation of a ruling letter shall be effected by Customs Headquarters by giving notice to the person to whom the ruling letter was addressed and, where cir-

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[86] *Tracy* v. *Swartwout,* 35 U.S. 80, 95 (1836).

[87] The Customs Courts Act of 1980, 28 U.S.C. 2640(d), requires this court to review a case such as this under Section 706.

cumstances warrant, by the publication of a notice or other statement in the Customs Bulletin.

(2) *Effect of modification or revocation of ruling letters.* The modification or revocation of a ruling letter will not be applied retroactively with respect to the person to whom the ruling was issued, or to any person directly involved in the transaction to which that ruling related, *Provided:*

(i) The request for a ruling contained no misstatement or omission of material facts,

(ii) The facts subsequently developed are not materially different from the facts in which the ruling was based,

(iii) There has been no change in the applicable law,

(iv) The ruling was originally issued with respect to a prospective transaction, and

(v) All of the parties involved in the transaction acted in good faith in reliance upon the ruling and retroactive modification or revocation would be to their detriment.

Nothing in this paragraph will prohibit the retroactive modification or revocation of a ruling with respect to a transaction which was prospective at the time the ruling was issued, inasmuch as such a transaction was not entered into in reliance on a ruling from the Headquarters Office or the Regional Commissioner, New York Region.

The areas of contention herein are those within the purview of subsections (iv) and (v), primarily the latter. On this point, the testimony of the Customs decisionmaker, Mr. Roth is:

> We found no evidence that would be inconsistent, in our opinion, with a finding of good faith, however. *With respect to detriment we made no finding that a particular agreement was binding or with respect to the relief, if any, which would have been available under force majeure or similar provisions contained in a particular agreement.*[88]

In view of this admission that there was no finding as to detriment, a key question is whether the administrative record[89] supports RAJ and Citicorp claims of such reliance.[90]

A. *The Record on RAJ*

To begin with, the administrative record certified by decisionmaker Roth does not contain the request for a ruling apparently made by RAJ on May 6, 1985. Be that as it may, RAJ, seemingly on the advice of counsel,[91] assumed that a ruling letter would be

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[88] Attachment to page 126 of transcript of deposition of John T. Roth on October 15, 1985 [hereinafter cited as "Roth Deposition"] (emphasis added).

[89] As indicated in Point I above, the parties agree that the actions of the defendants are to be measured by the contents of this record. The defendants, as well as RAJ and Citicorp, objected at the start of the trial to any supplementation of that record, and this court has concluded that it is not at liberty to disregard the certification of the decisionmaker as to the contents of the record before him.

[90] The importers assert essentially two types of reliance claims, one involving business activities they engaged in in connection with the June 1985 ruling letters. The second involves importation of fuel ethanol after Customs had agreed in August 1985 to grandfather such shipments.

[91] *See* RD 21 (letter from R. Sarah Compton, Esq. to Harvey B. Fox (Aug. 9, 1985) [hereinafter cited as "Compton August 9 Letter"], stating at page 5 that "[i]n May 1985, RAJ Chemical contacted Washington counsel and

Continued

issued automatically.[92] It did not wait for such a letter, but rather entered as of May 9, 1985 into what it now claims was a binding contract to supply the Beacon Oil Company in California with approximately four million gallons of ethanol monthly for one year.

The documents submitted by RAJ to the Customs Service, however, do not confirm the existence of such a contract with Beacon. The document in the record purported to be the contract [RD 21, Ex. 5] is not signed, nor does it reflect the name of the other party.[93] RAJ submitted to Customs a copy of a telex to an undisclosed party, dated May 15, 1985, that made reference to its offer to sell ethanol/toluene as of May 9th. *See* RD 21, Exhibit 4. In this telex, Mr. Radia listed the conditions for a letter of credit and stated that RAJ has yet to receive a telex from the putative buyer "accepting our agreement as out lined [*sic*] in our telex of May 9, 1985."[94]

The May 15 telex projected a "loading date around May 25, 1985." RD 21, Exhibit 4. At that time, RAJ apparently was attempting to negotiate the purchase of ethanol from Brazil. On May 9th, Mr. Radia had reduced to a writing to S.A. Costa Pinto Exportacao e Importacao ("CP") what he apparently believed was a CP offer for the sale of four million gallons of ethanol/toluene and RAJ's counter offer to purchase eight million gallons.[95] Mr. Radia had telexed CP on May 12th and agreed to "reluctantly accept" an offer for four million gallons at a price of two cents more per gallon than the price RAJ had contemplated paying for the same quantity in the May 9 telex. *See* RD 21, Exhibit 7.

RAJ claims that these documents show that a contract "was negotiated and executed on the 'spot market.'"[96] On May 22nd, a letter of credit was posted for RAJ's benefit. *See* RD 42. Under its terms, the bank would pay if RAJ provided documents showing delivery of ethyl alcohol into the buyer's tank at Redwood City, California.[97] While the quantity was not specified, the price per gallon

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was informed that the Asencio letter was accurate, valid and in effect") and (Affidavit of Maulik H. Radia, para. 11 (Aug. 7, 1985)).

[92] Counsel and Mr. Radia contend that RAJ received oral assurances from the Customs Service's Import Specialist in New York that the item 901.50 duty would not be levied and that a ruling letter would be issued upon request. *See* Compton August 9 Letter, p. 5 and Radia Affidavit, pp. 3–4.

RAJ could not have relied on the oral assurances of the Import Specialist. While oral inquiries regarding rulings may be made, the regulations clearly state that the "Customs Service will not issue rulings in response to oral requests. Oral opinions or advice of Customs Service personnel are not binding on the Customs Service." 19 C.F.R. 177.1(b).

[93] If the absence of any signature or name was the result of redaction for fear of disclosure of confidential information, that fear was unwarranted in view of safeguards such as 19 C.F.R. 103.15, which provides that

> the disclosure of information relative to the business of one importer or exporter that is acquired by a Customs officer or employee in an official capacity to any person not authorized by law or regulations to receive this information is a ground for dismissal from the United States Customs Service, suspension, or other disciplinary action, and if done for a valuable consideration subjects that person to criminal prosecution.

[94] RD 21, Exhibit 4, p. 2. The administrative record does not include a copy of a telex dated May 9th to the putative buyer.

[95] *See* RD 21, Exhibit 6. The record does not contain a response from CP.

[96] Compton August 9 Letter, p. 6. While the documents show that RAJ had agreed to the price fixed by CP on May 12th, there is evidence in the record that CP was still considering the terms of the proposal on May 15th, and its response was due by the end of May 16th. In his telegram to the California buyer, Mr. Radia mentioned that "the attorneys of the Brazillian [*sic*] Company is [*sic*] studying the terms and conditions [*sic*] of the sale and should respond by end of May 16, 1985." RD 21, Exhibit 4, p. 2.

[97] The buyer's name was apparently redacted by RAJ from the copy it sent to the Customs Service.

and the amount of the letter of credit were. Simple arithmetic discloses that the letter was for the purchase of six million gallons.

The letter of credit posted for the benefits of RAJ did not bind it to sell any ethanol. RAJ could draw on that letter if it provided the bank with proper documentation of receipt of the alcohol. RAJ would not be penalized on account of the letter of credit if it failed to make delivery. In its reply brief, page 48, RAJ attempts to shift the burden to the plaintiffs to explain why a letter of credit would be posed if RAJ had no obligations to perform. But, at the administrative level, the burden was on RAJ to supply sufficient evidence as to its reliance claims.

Customs issued its ruling letter to RAJ on June 3, 1985. *See* RD 17. However, if RAJ had binding agreements, the contents of the administrative record suggest their existence prior to this date and therefore that no rational basis existed for the Service's acceptance of a RAJ claim of actual reliance on the letter.

The court also fails to discern a rational basis for any Customs accceptance of RAJ's claim that it entered into its supply contract on June 24, 1985.[98] A June 24 agreement[99] established that CP would be the exclusive supplier and that RAJ would be the exclusive buyer of "the product" for four markets in the United States, including California. Under its terms, RAJ would lose the status of exclusive buyer if it failed to purchase for each market minimum monthly orders. It would also lose its status if it failed to place minimum first orders by specific dates set forth in the agreement.[100] But, contrary to RAJ's claim, this agreement did not obligate it to purchase anything from CP. Rather, RAJ was given an option to buy ethanol at a price that "will be negotiated under good faith on a case by case basis."[101] In any event, there simply is nothing in the record that shows that the ethanol/toluene for the September 4 shipment at issue herein was purchased by RAJ pursuant to the June 24 agreement.

The plaintiffs have attempted to show that the order for this shipment was placed on August 1, 1985 and accepted on August 2nd.[102] But plaintiffs' cross-examination of Mr. Radia proves that this shipment was not sent in respone to such an order. In effect, Mr. Radia testified that he paid almost six cents less for the fuel ethanol than the price stated in his August 1 offer.[103] The admin-

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[98] *See* RD 22, p. 2 (letter dated August 16, 1985 from R. Sarah Compton, Esq. to Harvey B. Fox).

[99] RAJ provided Customs with two copies. In one, the product is defined as "anhydrous alcohol blended with more than 5% denaturing agents from Brazil." In the other, the product is defined as "anhydrous alcohol mixed with toluene, xylene or benzene from Brazil." *See* RD 21, Exhibit 12.

[100] The first order for California had to be placed by August 15, 1985., The first order for each of the other three markets had to be placed by July 10, 1985. The record does not reflect that RAJ placed timely orders for those other markets.

[101] RD 21, Exhibit 12. Of course, Section 2-305(1) of the Uniform Commerical Code provides that "parties if they so intend can conclude a contract for sale even though the price is not settled."

[102] *See* Plaintiffs' Post-Trial Brief, pp. 83-84. Plaintiffs' purpose is to show that RAJ entered into a contract at a time when it was known in the industry that Customs was revoking its ruling letters.

[103] *Compare* Tr. at 132 *and* Radia Deposition, p. 15 *with* RD 21, Exhibit 12, p. 5.

istrative record does not contain any explanation for such a sudden price reduction.

RAJ has attempted to venture outside this record, but the attempt only weakens its argument. At trial, RAJ offered an exhibit (4) that shows that the letter of credit was transferred for the benefit of CP. The document, dated May 25, 1985, states the price per gallon to be the same as the amount indicated in the Radia testimony. The total value of the transfer equaled six million times the listed gallon price.

The conclusion to be drawn from the record (and the offered exhibit) is that the September 4 shipment was made pursuant to a May agreement.[104] The price in the letter of credit and the quantity correspond to the price which RAJ paid and to the quantity which it received,[105] and the delivery was made to the port indicated in the letter of credit.[106] In sum, examination of RAJ's record before Customs constrains this court to conclude that it was arbitrary, capricious and an abuse of discretion for the Service to have acquiesced in RAJ's claims of reliance.

B. *Citicorp's Record*

Citicorp made three importations of fuel ethanol from Brazil [107] without payment of the duty prescribed by item 901.50, TSUS. The first, aggregating 2.2 million gallons of 92.5 percent ethanol and 7.5 percent toluene, was landed in July 1985. Citicorp admits that this shipment was made pursuant to May 1985 agreement with the Brazilian supplier and without any prior Customs approval. *See supra* p. 41.

The company's first request for a ruling letter was apparently made in June. On June 19, 1985, Customs issued the requested ruling. *See* RD 8. The administrative record indicates that in July Citicorp engaged in negotiations by telex with a Brazilian supplier for the immediate purchase of eight million gallons of ethyl alcohol/unleaded gasoline. On July 18th, Citicorp made and offer to the supplier. *See* RD 51 at 4. On July 19th, the supplier responded with a counter offer of the same quantity at ten cents more per gallon. *See id.* at 5. Citicorp had until July 22nd to accept; it responded on that date, agreeing on price, provided that loading occurred that week and that freight did not exceed a specified price per gallon.

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[104] Although the record is unclear as to why a clause—6—in the June 24 agreement attempting to void any previous contract did not have that effect on the May order, the record is clear that RAJ and CP did not treat that order as void.

[105] The price which RAJ agreed to pay for four million gallons on May 13, 1985 was one quarter of a cent less per gallon than what was paid.

[106] The May 25 transfer of the letter of credit listed the shipment terms C.I.F San Francisco. This term was clarified in a telex of May 31 requiring deliver "C.I.F. into the buyers tank at Pilot Terminal, Redwood City, California." RAJ trial Exhibit 4 at 3. This same telex requires the shipment C.I.F. San Francisco. *Id.*, p. 5. Such usage of these two cities within one document is understandable in light of their proximity and Customs Service inclusion or Redwood City within the port of San Francisco. *See e.g.*, T.D. 44731, 59 Treas. Dec. 680 (1931). *See also* T.D. 56020, 98 Treas. Dec. 582 (1963); T.D. 79-74, 13 Cust. Bull. 169; T.D. 82-9, 16 Cust. Bull. 22; and 19 C.F.R. 101.3(b).

[107] Citicorp apparently has only recently entered into this business. A person with over 40 years of experience in the industry testified that Citicorp "is not generally known as being active in the production or sale of ethanol". Schwandt Deposition, p. 55.

See id. at 6. The supplier rejected these conditions on July 23rd, apparently because Citicorp had failed to understand that, under the offer, it would be responsible to supply the transportation.[108] Citicorp was afforded an opportunity to request a price for a C.I.F. or C & F transaction.[109] Citicorp responded on the same day, requesting an offer on a C & F basis.[110] The record does not reflect the supplier's making of an offer in accordance with this request. However, the supplier made an offer, dated July 25th,[111] for the sale F.O.B. Santos at the price agreed to in the earlier telexes. *See* RD 51 at 21. The offer specified that it was "valid for acceptance until July 26, 1985, close business New York time." *Id.* at 20. Citicorp responded that day by nominating a vessel and demanding that the ethyl alcohol/unleaded gasoline meet quality standards specified in the telex. It requested that the supplier telex confirmation of acceptance of the conditions and stated that "[u]pon receipt of this information we will confirm acceptance of your offer." *Id.* at 19. The supplier responded that same day, agreeing to Citicorp's selection of the vessel but disagreeing as to the quality specifications. The supplier offered final product specifications "as it is" in the tanks in Santos, Brazil. *See id.* at 18. The supplier stated in that telex that Citicorp should confirm on July 29th.[112]

No such confirmation is contained in the record, nor can it be persuasively argued that the parties had agreed on the basic terms and were just missing a formality. There was no agreement on the fundamental issue of product quality, and this court therefore cannot conclude that it was not arbitrary, capricious and an abuse of discretion for Customs to accept the claim of reliance made by Citicorp. A July 29 telex from the company, confirming an agreement, was not submitted to Customs and therefore could not have been considered when the Service made its decision. However, even if that document, produced at trial as Citicorp Exhibit 11, were part of the record before the decisionmaker, it would not have demonstrated sufficient detriment—for the confirmation, as well as the offer dated July 25, contain broadly-worded *force majeure* clauses

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[108] *See* RD 51 at 7. The various telexes all state F.O.B. Brazil or Santos as a shipment term. U.C.C. Section 2-319 reads:

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. place of destination, the seller must at his own expenses and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503); * * *

The term used in the documents here falls under subsection (a). That is, F.O.B.-the-place-of-shipment requires the buyers to pay the cost of transportation from the point of embarkment.

Citicorp expressed concern about the potential freight charges in its telex of July 22. The July 23 telex shows that the Brazilian supplier became concerned that Citicorn did not understand what an F.O.B.-the-place-of-shipment term means.

[109] *See* RD 51 at 7. U.C.C. Section 2-320(1) states that the "term C.I.F. means that the price included in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination."

[110] *See* RD 51 at 8. This request is further indication of misunderstanding.

[111] The offer appears to have been signed on July 16, 1985. *See* RD 51 at 20.

[112] *See* RD 51 at 18. This extended the period for acceptance beyond July 26th.

which gave Citicorp an option of not accepting the fuel ethanol after Customs revoked its ruling letter.

Citicorp urges the court to consider its entering into a downstream contract because of reliance on its ruling letter. *See* Trial Brief of Citicorp, p. 8. The administrative record, however, only contains a July 26 offer to purchase eight million gallons by one of Citicorp's customers.[113] The offeror specifically requested confirmation of the proposed purchase agreement. *See* RD 51 at 10. No such confirmation is in the record, and therefore the Customs Service could not have made its finding of reliance on the basis of a binding downstream contract.

Citicorp offered at trial a copy of this agreement,[114] but the court notes that it too has a broadly-worded *force majeure* clause. Citicorp's assertion that this clause will not be invoked even if it is required to pay the contested duty [115] has no bearing on its claim of reliance.[116] The critical question here is not whether Citicorp will pay that duty but whether the Customs Service's revocation of its ruling letter obligated Citicorp, as a matter of law, to bear the burden of any payment.

Citicorp also attempts to show that it chartered a ship to transport the fuel ethanol on the basis of its ruling letter. *See* Reply Brief of Citicorp, p. 50 and Trial Exhibit 9. A confidential memorandum to the Commissioner of Customs from the Director of the Classification and Value Division with a handwritten date of 8/8/85 states that Citicorp would have lost more than $450,000 if that vessel had left Brazil without the alcohol. *See* RD 70, pp. 1-2. Reliance was deemed to exist because Citicorp had submitted "documentary evidence demonstrating that the vessel in question has been chartered prior to August 2nd."[117] Contrary to this assertion, there is nothing in the administrative record which documents Citicorp chartering of the ship.

In order to make a determination as to reliance, Customs would have had to examine the charter-party and determine whether Citicorp was bound by its terms.[118] Moreover, if its indicated date is reliable, the confidential memorandum [RD 70] is nothing more than a post-hoc rationalization for the Service's decision on August 7, 1985 [RD 6] to permit Citicorp to import some eight million gal-

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[113] *See* RD 51 at 9. The price was to be mutually agreed upon and consistent with a prior contract also contained in the record.

[114] Citicorp Exhibit 10.

[115] *See* Trial Brief of Citicorp, p. 18, n. 54.

[116] Customs has an obligation to collect duties. The business decisions of importers as to how to allocate payment of those duties are generally beyond the ken of the Service.

[117] RD 70, p. 2. This confidential memorandum indicates that one Boyden Gray either influenced, or attempted to influence, the Service's acquiescence in Citicorp's claim of reliance.

The 1985-1986 Congressional Directory lists (at page 445) C. Boyden Gray as Counsel and Deputy Chief of Staff in the Office of the Vice President of the United States. Apparently, Mr. Gray had had a meeting on July 26, 1985 with "Brazilian Guests" and "Citibank Officers", among others, to discuss the "Brazilian Ethanol Export Program to [the] US". *See* RD 50 at 5.

[118] At trial, Citicorp offered a copy of a charter-party [Exhibit 9], but the cost of demurrage in that document is much less than the $450,000 mentioned by the Director of Classification and Value. Furthermore, Citicorp trial Exhibit 12 (letter from Citicorp counsel to Harvey B. Fox dated August 7, 1985) was not part of the certified record before the decisionmaker.

lons of fuel ethanol from Brazil without payment of the item 901.50 duty. Since the decisionmaker had no documentary proof of the terms of the charter-party,[119] the court concludes that his acquiescence in the claim of reliance was arbitrary, capricious and an abuse of discretion.

The third Citicorp shipment, consisting of approximately 11 million gallons of ethanol/gasoline from Brazil, was entered in late October 1985. Customs determined to grandfather this shipment on the basis of Citicorp's purported reliance.

Citicorp claimed that it had entered into a contract with several Brazilian suppliers at a meeting on July 26, 1985. *See* RD 50, Exhibit 1. The administrative record, however, only shows that a letter of intent, subject to confirmation, was entered into on that day. On August 1st and 2nd, Citicorp telexed the proposed suppliers to confirm the sales agreement. *See* RD 49, Exhibits 5–7. One of those suppliers responded on August 2nd in a telex:

> I want to advise you that it is not possible to reconfirm the sales agreement at this moment because we are not sure about the consequences in terms of the general agreement that we are doing with the American government. Otherwise, we need our minister's confirmation. I'm trying to get a solution today but I think that it will not be possible. I will be contacting you again this coming Monday. RD 49, Exhibit 8.

Citicorp did not submit to Customs anything substantiating that the agreement was ever confirmed. *See* Roth Deposition, p. 184. In its trial brief, page 10, Citicorp admits that the suppliers were unable to confirm as of August 2nd, the day Customs revoked its ruling letter. On their part, the defendants take the position that the downstream contract was not reduced to a signed writing until August 6th. *See* Defendants' Memorandum of Law, p. 25.

In entering into a contract after it knew of the revocation of its ruling letter, Citicorp assumed the risk of having the item 901.50 duty imposed. Moreover, Citicorp, which was well aware in July that Customs was considering revoking its ruling,[120] carefully protected itself by drafting *force majeure* clauses into its proposed agreements to purchase[121] and to sell the ethanol. A Vice President of Citicorp International testified that, at a meeting with the various suppliers and the proposed downstream purchaser of July 26th, "there were substantial discussions relating to force majeure and it was explicitly stated to exclude changes in Customs law, government regulations and similar type of actions." Berry Deposition, p. 25.

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[119] Reference to the chartering of a vessel in the record is contained in a letter from Citicorp's attorney dated August 5, 1985 that accompanied documents submitted to Customs. *See* RD 51, p. 2.

[120] *See, e.g.*, Trial Brief of Citicorp, p. 11.

[121] The original memorandum that was prepared for the purchase of the fuels from the Brazilians apparently did not contain a *force majeure* clause, but there was an understanding among all of the parties that a change in the Customs ruling would provide a vehicle for the renegotiation of the agreement. *Compare* RD 50, p. 9 *with* transcript of deposition of Charles L. Berry on December 12, 1985 [hereinafter cited as Berry Deposition], p. 26.

In light of the lack of binding contracts as of August 2, 1985 and of Citicorp's ability to avoid these agreements on the ground of revocation of its ruling letter, there does not appear to be a rational basis for the Customs Service's decision to grandfather shipments made pursuant thereto. Therefore, this court concludes that that decision was arbritrary, capricious and an abuse of discretion.

C. *Customs Post-Revocation Notifications Not Ruling Letters*

Subsequent to revocation on August 2 (and 7), 1985 of its earlier ruling letters, Customs began notifying Citicorp, RAJ and other importers, commencing with a letter to Citicorp on August 7th [RD 6], that they could import the specified quantities of fuel ethanol without payment of the item 901.50 duty until November 1, 1985 based on their presentations as to reliance.[122] The defendants posit the issue as follows at page 3 of their memorandum:

> Assuming, *arguendo*, that the Customs Service had authority to permit entry of ethanol blends without payment of the duty provided by item 901.50, TSUS, whether the August 7, 23, and 27, 1985 decisions to do so were in derogation of law.

For their part, Citicorp and RAJ now argue that these notifications from Customs constitute "ruling letters."[123] Under its regulation, 19 C.F.R. § 177.9(a), ruling letters bind the Service. Such a letter's function is to state what Customs believes is "the proper classification of an article under the provisions of the Tariff Schedules of the United States." 19 C.F.R. § 177.9(b)(2).

The letters at issue in this case did not do this. Rather, they simply notified the importers of Customs' intent to disregard what it then knew to be the mandated classification and rate of duty for fuel ethanol. Clearly, those notifications were not ruling letters.

Section 177.1(d) of Title 19, C.F.R. defines a ruling letter as "a ruling issued in response to a written request therefor and set forth in a letter addressed to the person making the request or his designee." A ruling letter issued prior to the filing of entry documents is a letter that is capable of being "attached to the documents filed in connection with that transaction with the appropriate Customs Service field office or otherwise br[ought] * * * to the attention of the appropriate Customs officer." 19 C.F.R. § 177.8(a)(2).

An examination of the grandfather decisions herein shows that at least some of them required additional documentation by the importers before Customs would issue a letter that could be attached to the import documents. For example, the August 27 notice sent to Citicorp stated that, prior to any entry, the importer would have to provide Customs with

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[122] *See* RD 2 (Certified Oil Company—Aug. 12, 1985); RD 15 (RAJ— Aug. 23, 1985); RD 1 (Certified), RD 5 (Citicorp), RD 14 (RAJ), RD's 24, 25 (Valley Green International Trading Corp.) and RD 39 (Southern Missouri) Aug. 27, 1985); RD 121 (Southern Missouri—Oct. 11, 1985); and RD 131 (Citicorp—Oct. 18, 1985).

[123] *See e.g.*, Trial Brief of Citicorp, pp. 13 and 48 and RAJ Reply Brief, p. 56

> written notification identifying the name of the vessel, the quantity of mixture to be unladed, the port of entry, the importer number, and the agreement under which such shipment was made. This information should be sent to the Director, Classification and Value Division, U.S. Customs Room 2216, 1301 Constitution Ave., NW., Washington, D.C. 20229. We will examine this information and, if the shipment is found to be made pursuant to and in accordance with the agreement(s) you have previously provided us, *we will provide you with a letter to be presented to Customs port officials at the time the shipment is entered.* A separate letter must be obtained for each shipment. RD 5, pp. 1-2 (emphasis added).

On its face, this notice was incapable of being presented with the entry documents. It merely advised that, if further information were supplied, Citicorp would receive a letter that could be presented to Service officers.

Citicorp sent a letter with details on September 4, 1985,[124] and Customs responded on September 6th with letters to be presented upon entry. *See* RD 63. The September 4 letter to Customs and the September 6 letters to Citicorp cannot be construed as a request for, and the issuance of, ruling letters since this case had already been commenced on August 29th. According to 19 C.F.R. § 177.7(b), no ruling letter will be issued with respect to any matter which is pending before this Court of International Trade.

Finally, contrary to citicorp's contention,[125] the defendants have not characterized their decisions to grandfather as ruling letters. In fact, their counsel in this case has carefully refrained from deeming those decisions ruling letters.

The intervenor-defendants argue that it would be inequitable to make them now remit the correct duty in view of their reliance on the advice of Customs. This argument has little merit with regard to the August 27 decisions, as the degree of reliance by the importers is minimal, if not non-existent. Indeed, Brazil imposed an embargo on shipments of ethanol on the day of those decisions which remained in effect at least until September 13, 1985. *See* Sept. 13 Tr. at 37. Also, by that point, the importers were clearly on notice that there was a serious challenge to the validity of those decisions.

Similarly, RAJ could not have relied much on the notification it received dated August 23, 1985 since it had shipped the ethanol around August 8th. In other words, its shipment was already on the high seas. Arguably, RAJ would not have entered that shipment without a decision from Customs, but the vessel arrived on September 4th, or after this case had been commenced. At that point, RAJ could have decided not to enter the ethanol—an option it may well have originally contemplated.

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[124] *See* RD 62.

[125] Citicorp asserts at page 49, n. 132 of its trial brief that the "Customs Service regards the August 7 and 27 letters as ruling letters". It cites the deposition testimony of Harvey B. Fox, page 10, line 4, to page 11, line 7, but that transcript does not support the assertion.

One of Citicorp's shipments left Brazil after Customs had determined on August 7th to grandfather it. Citicorp, however, assumed the risk of paying the correct duty when it entered the fuel ethanol after this case had been brought. The importer still had the option not to enter the shipment.

Just prior to the filing of the case, a so-called Ad Hoc Committee of the Ethanol Importers had urged Customs in a legal memorandum dated August 27, 1985 to comply with the requrements of 19 U.S.C. § 1315(d) and 19 C.F.R. § 177.10(c) for the following reason, among others:

> ADM is likely to challenge any delayed effective date. Therefore, a procedurally defective delay gives no assurance to the importers. If it is intended that the importers be treated fairly in light of their reasonable reliance on valid letter rulings, any delayed effective date must of necessity be procedurally defensible or the importers risk judicial reversal of the delayed effective date The risk of such a reversal is unacceptably large if no legal basis exists to support the delayed effective date. Thus, giving a delayed effective date without sound legal underpinning is to give nothing.[126]

In summary, whether the reliance issue is reviewed as a whole or in individual detail, the record is short of substantiation of the kind of good faith contemplated by the Customs regulation governing the effect of revocation of ruling letters. On the contrary, the record reflects the type of arbitrary and capricious behavior[127] that the Administrative Procedure Act was enacted to remedy. Stated another way, the Service's judgment is not anchored in the language and spirit of its own regulation. *Cf. Freeport Minerals Co.* v. *United States,* 776 F.2d 1029, 1032 (Fed. Cir. 1985).

V

Both RAJ and Citicorp argue that, if the plaintiffs are entitled to any relief, it should be prospective only.[128] Inherent in their argument, of course, is the concept that liquidation of the contested September and October fuel ethanol entries retroacts to the period before revocation; that is, the entries are the equivalent of those

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[126] Plaintiffs' trial Exhibit 2. As indicated above, this court denied supplementation of the administrative record as against the defendants. This exhibit is referred to only in connection with any attempted portrayal of the intervenor-defendants as unwitting importers.

Indeed, page 2 of the list of documents attached to the Roth Affidavit indicates that this document was forwarded to the defendants under cover of a letter from Citgo's counsel dated August 27, 1985. The same list also indicates that a 5-page document in the name of the Ad Hoc Committee was forwarded to the defendants at the same time by counsel for RAJ. In its reply brief, pages 61-62, RAJ now argues that the Ad Hoc Committee submission was an attempt to persuade the Service to institute notice and comment procedures before reconsidering the original ruling letter. Such a lobbying effort by importers hardly amounts to a recognition that the grandfather rulings were unlawful.

[127] The court notes in passing that the agency record contains a letter from the defendant Commissioner to Senator Dole [RD 95] wherein the author states in the context of the "ethanol classification issue":

> My experience as Commissioner of Customs, has been, that certain importers are often ingeniously clever at developing methods or schemes to avoid paying the appropriate duties on products they import * * *. Oftentimes * * * importers find a loophold or other methods of manipulating the tariff schedules to their benefit * * *.

[128] *See, e.g.*, RAJ Reply Brief, pp. 58, 64; Reply Brief of Citicorp, pp. 39, 43.

RAJ and Citicorp entries which occurred before August, the liquidation of which at the incorrect 5% *ad valorem* rate of duty is not challenged in this case.

The question of retroactivity can be complex,[129] but no such problem is presented here. In view of the facts and circumstances discussed in preceding Part IV, as well as the traditional standard that the rate and amount of duty assessable in liquidation are to be determined by the law in force at the time of importation,[130] this court concludes that genuine retroactivity is not at issue in this case.

Nevertheless, RAJ places great emphasis on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). In that personal injury case under the Outer Continental Shelf Lands Act, the Supreme Court conceded that its decision in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), "entirely changed the complexion" [131] of *Huson* in that a one-year state period of limitation, rather than the admiralty doctrine of laches, was applicable. Since that state period had expired, the question left was application of this change in judicial doctrine to the individual tort plaintiff. In resolving this issue in favor of nonretroactive application, the Court summarized its prior holdings as follows, 404 U.S. at 106–07:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe* v. *United Shoe Machinery Corp.*, *supra*, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen* v. *State Board of Elections*, *supra*, at 572. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, *supra*, at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, *supra*, at 706.

However, even if this case were an appropriate one for analysis of the foregoing factors, such analysis would not lead to a determination not to impose the correct duty on the fuel ethanol entered in September and October. Certainly, this opinion neither overrules clear past precedent on which the litigants may have relied nor

[129] *See, e.g.*, Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U.Pa.L.Rev. 47 (1977).
[130] *See, e.g.*, *United States* v. *Miles*, 57 CCPA 1, 4, C.A.D. 967, 416 F.2d 973, 975 (1969).
[131] 404 U.S. at 99.

does it decide an issue of first impression of the kind resolved in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), where the purview of a section of the newly-enacted Voting Rights Act of 1965 was at issue.

As to the second *Huson* factor, RAJ argues that this court "should determine whether retroactive application of th[is] decision will promote the purpose of the rule in question." RAJ Post-Trial Brief, p. 100. The classic case cited by the Supreme Court, *Linkletter* v. *Walker*, 381 U.S. 618 (1965), decided that the exclusionary rule, made applicable to state criminal proceedings by *Mapp* v. *Ohio*, 367 U.S. 643 (1961), should not govern other cases finally resolved prior to *Mapp*. Of course, the purpose of that rule is as "the only effective deterrent to lawless police action." 381 U.S. at 636. No judicial rule of such moment is at issue in the case at bar, which simply seeks imposition of the duty on imports of fuel ethanol *after* the Customs Service's reconfirmation of the correct, applicable rate.

Thirdly, both RAJ and Citicorp contend that the equities favor nonimposition of the item 901.50 duty. The Court concluded in its opinion in *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969), that "[s]ignificant hardships would be imposed on cities, bondholders, and others connected with municipal utilities" if its decision invalidating property-taxpayer votes to approve the issuance of revenue bonds were given full retroactive effect. No such broad-scale hardship is conceivable here, but payment of the applicable duty will no doubt be painful. Recently, however, the Supreme Court was constrained to remind the government's adversary that:

> Justice Holmes wrote: "Men must turn square corners when they deal with the Government." *Rock Island, A.&L.R. Co.* v. *United States*, 254 U.S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.[132]

The Court's footnote to this reminder quotes from *Federal Crop Insruance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) to wit:

> * * * Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, prop-

[132] *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984).

> erly exercised through the rulemaking power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

That footnote also cites *United States* v. *California*, 332 U.S. 19, 39–40 (1947); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *United States* v. *San Francisco*, 310 U.S. 16, 31–32 (1940); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123–124 (1935); *Utah* v. *United States*, 284 U.S. 534, 545–546 (1932); *Jeems Bayou Fishing & Hunting Club* v. *United States*, 260 U.S. 561, 564 (1923); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Pine River Logging & Improvement Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Hart* v. *United States*, 95 U.S. 316, 318–319 (1877); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1869); *Lee* v. *Munroe*, 11 U.S. (7 Cranch) 366, 368–69 (1813).

The cases are indeed legion on this point. For example, in *Atlantic Richfield Company* v. *Hickel*, 432 F.2d 587 (10th Cir. 1970), the holder of leases pursuant to the Mineral Leasing Act of 1920 had paid royalties for more than 13 years before the Department of the Interior (and ultimately its Secretary) demanded additional royalties based on an interpretation of the statute at odds with the ruling of the Acting Director of the Geological Survey originally given and relied on during the intervening years. The court of appeals referred to

> the established principle that the United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the Untied States be waived by unauthorized agents' acts. As harsh as the tenet is under practical application, an administrative determination running contrary to law will not constitute an estoppel against the federal government. 432 F.2d at 592 (footnote omitted).

Dixon v. *United States*, 381 U.S. 68, 72–73 (1965), states:

> In *Automobile Club of Michigan* v. *Commissioner*, * * * we held that the Commissioner [of Internal Revenue] is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions. He may do so even where a taxpayer may have relied to his detriment on the Commissioner's mistake. See *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129. This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due. [footnote omitted]

The Court's opinion then quoted at 381 U.S. at 74 from its *Manhattan General Equipment Co.* decision as follows:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. 297 U.S. at 134.

While the tax law has changed over the years since these decisions, the foregoing principles enunciated by the Supreme Court have not. *See e.g., Consolidated Edison Company of New York, Inc.* v. *United States,* 782 F.2d 322, 325 (2d Cir. 1986):

> * * * [E]ven if the 1976 ruling could be construed as some discernible modification of the tax law, such modification would still properly apply to Con Ed's 1972–76 taxes, given the Commissioner's board authority to apply correct rulings retroactively.

Here, of course, a defendant is the Commissioner of Customs (and not of Internal Revenue), and he is making no apparent attempt to collect the duties prescribed by Congress. That is, there seems to be an abdication of the mission of the Customs Service to collect and protect the revenues and to enforce the laws.[133] *See generally* Department of the Treasury, U.S. Customs Service, *Fundamentals of Customs Tariff & Trade Operations,* pp. ii–iii (May 1983). It is this void which the plaintiffs are attempting to remedy.

It is argued at length, however, by Citicorp that the plaintiffs lack standing to obtain relief from the failure to collect the proper duty. *E.g.,* "No case of which we are aware supports plaintiffs' position." Reply Brief of Citicorp, p. 38. But this argument overlooks *Zenith Radio Corp.* v. *United States,* 710 F.2d 806 (Fed. Cir. 1983), wherein the court sustained the domestic interested party's standing to obtain suspension of liquidation of earlier entries on the following ground, among others:

> * * * Even though the '79–'80 imported articles have already been sold and the increased duties (if Zenith ultimately prevails) will go to the government, not Zenith, Zenith still has a strong, continuing, commercial-competitive stake in assuring that its competing importers will not escape the monetary sanctions deliberately imposed by Congress. Defeat of that strong congressionally recognized competitive interest and the

[133] The court in *Coalition to Preserve the Integrity of American Trademarks.* v. *United States,* No. 84-5890 (D.C. Cir. May 6, 1986), pointed out [slip op. at 32] that "the Customs Service has historically enforced what it regards to be the law so relentlessly that it required an amendment to the statute to permit tourists to bring items intended for personal use back into the country with them."

> abrogation of effective judical review are sufficient irreparable injury here.[134]

Or, the Supreme Court stated 150 years ago in another Customs case, *Tracy* v. *Swartwout*, 35 U.S. 80, 95 (1836):

> * * * It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.

Much more recently, the Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), sustained the standing of taxpayers to sue to enjoin the disbursement of federal funds appropriated under Title I of the Elementary and Secondary Education Act of 1965 for the benefit of nonpublic schools, and *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985), affirmed the taxpayers' right to a permanent injunction against use of those funds in sectarian schools. *Cf. Felton* v. *Secretary, United States Department of Education*, 787 F.2d 35 (2d Cir. 1986). As for collection of taxes, the court in *Abortion Rights Mobilization, Inc.* v. *Regan*, 544 F.Supp. 471 (S.D.N.Y. 1982) and 603 F.Supp. 970 (S.D.N.Y. 1985), has twice upheld the standing of certain plaintiffs to seek a permanent injunction against continued exemption from taxation under 26 U.S.C. §501(c) of two organizations.

The defendants and intervenor-defendants have argued from the outset that the only avenue to legal redress of issues of the kind raised by the plaintiffs is via a petition under the Tariff Act of 1930, 19 U.S.C. § 1516. To the extent this argument is still pressed now, however, it disregards this court's conclusion in Slip Op. 85–119 and repeated here that this case entails causes of action independent of the Tariff Act, to wit:

> There is no doubt that a petition pursuant to Section 1516 is the primary and traditional means of challenging the classification or rate of duty upon designated imported merchandise, but the foregoing absolutist argument seemingly disregards the precise nature of this action. Here, the defendants have accepted plaintiffs' position that item 901.50, TSUS applies, *i.e., there is no dispute as to classification or rate of duty within the meaning of Section 1516.* Rather, the controversy stems from defendants' determination to deviate from the duty. The plaintiffs seek to counteract this transitory digression, in part through declaratory judgment and mandamus, both federal-

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[134] 710 F.2d at 810. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976), the Court stated that the necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." In discussing the "prudential" component of standing in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80–81 (1978), the Court stated:

> * * * Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying standing are generally satisfied when the constitutional requisities are met. See, *e.g., Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

In the case at bar, plaintiffs ADM and A.E. Staley meet these standards.

court remedies of long standing and independent of remedies prescribed by the Tariff Act of 1930.[135]

Subsection (c)(1) [of 28 U.S.C. § 2643] is a general grant of authority for the Court of International Trade to order any form of relief that it deems appropriate under the circumstances. It is the Committee's intent that this authorization be deemed to grant the Court of International Trade remedial powers co-extensive with those of a federal district court. This provision makes it clear that the court may issue declaratory judgments, writs of prohibition and mandamus, orders of remand, and preliminary or permanent injunctive relief * * *[136]

RAJ and Citicorp (as well as Certified), over the government's opposition, intervened as parties in this case, raising in their papers a panoply of issues, including the applicability of item 901.50, TSUS and their obligations, if any, to the United States as a result of their importation of the Brazilian fuel ethanol.[137] RAJ and Citicorp, having voluntarily submitted themselves to the jurisdiction of the court, actively joined issue with the plaintiffs and availed themselves of their rights to be heard and to present evidence in support of their positions.

After carefully considering those positions, this court concludes that they do not insulate the fuel ethanol entries at issue from payment of the full duty prescribed by Congress for importation of that substance. To the extent Customs has not yet liquidated those entries, the Service will be enjoined from doing so at a rate other than that mandated under item 901.50, TSUS. RAJ and Citicorp are obligated to remit the additional duties on their entries already liquidated.

Judgment will enter in accordance with this opinion which represents the court's findings of fact and conclusions of law.

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[135] 623 F.Supp. at 1268 (emphasis added). If there were a dispute with Customs as to classification and rate of duty, Section 1516 confers automatic standing on domestic interested parties such as ADM and A.E. Staley to file an administrative protest. The absence of such a dispute herein has forced these complainants to satisfy a higher standard for relief, namely, proof of actual injury within the meaning of Article III of the Constitution.

For many years, domestic interested parties have been permitted to compel enforcement of tariffs. *See, e.g., Bradford Co.* v. *American Lithographic Co.*, 12 Ct. Cust. App. 318, T.D. 40318 (1924); *United States* v. *Nylonge Corp.*, 48 CCPA 55, C.A.D. 764 (1960). In fact, the tradition of third-party involvement began prior to the enactment of Section 1516. *See, e.g., Wakem* v. *United States*, T.D. 25827 (C.C.N.D.III. 1904); *United States* v. *Schwartz & Co.*, 3 CT Cust. App. 24, 49, T.D. 32315 (1912); *But compare Fletcher* v. *United States* 25 CCPA 195, T.D. 49294, 92 F.2d 713 (1937), *with Luggage and Leather Goods Manufacturers of American* v. *United States* 7 CIT 258,588 F.Supp. 1413 (1984).

[136] H.R. Rep. No. 1235, 96th Cong., 2d Sess. 61 (1980). Moreover, subsection (a) of 28 U.S.C. 2643 provides:

> The Court of International Trade may enter a money judgment—
>
> (1) for or against the United States in any civil action commenced under section 1581 or 1582 of this title; and
>
> (2) for or against the United States or any other party in any counterclaim, cross-claim, or third-party action under section 1583 of this title.

The Committee report indicates that the intent of subsection (a) is to bypass reliquidation in appropriate cases. *See id.* at 60.

The facts and circumstances herein clearly show that this is an appropriate case by bypass reliquidation. To the extent the defendants are bound by 19 U.S.C. 1514, 28 U.S.C. 2643(b) empowers the court to hold a hearing on the correct amount of duties owed—if the parties herein prove unable to compute them independently.

[137] November 1, 1985 was the last day of the Service's grace period. Although Citicorp did not formally seek to intervene before the end of this period, it was aware of proceedings herein since at least September 11, 1985 when Mr. Kellogg and its attorney were both present with defendants' counsel during the hearing on the temporary restraining order. *See* transcript of September 11, 1985, p. 4. Mr. Kellogg also addressed the court during the hearing on the preliminary injunction application but chose not to make a formal appearance. *See* Sept 13 Tr. at 168.

RAJ filed its motion to intervene on September 6, 1985, and it too has been privy to this case from the outset.

(Slip Op. 86-56)

AMERICAN CUSTOMS BROKERS CO., PLAINTIFF *v.* U.S. CUSTOMS SERVICE, DEFENDANT

Court No. 86-04-00526

OPINION AND ORDER

[Plaintiff's motion for preliminary injunction granted.]

(Decided May 27, 1986)

Law Offices of Leonard M. Fertman (*Leonard M. Fertman* and *Donald A. Rezak*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, and *Nancy Reich*, Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff American Customs Brokers (ACB) is a licensed customhouse broker. As such, it enters goods as an agent of the importer of record or as the importer of record itself. When immediate delivery is involved, it exercises the immediate delivery privileges of its principal, the importer of record, in the first instance, and it exercises its own immediate delivery privileges in the latter case.[1] In late March, the United States Customs Service (Customs) discontinued plaintiff's immediate delivery privileges for an indefinite period, ostensibly because ACB listed erroneous social security or tax identification numbers on entry papers of a number of automobiles which were entered under bond pending installation of emissions control and automobile safety equipment meeting U.S. standards.[2] In addition, ACB was denied the right to act as a broker on any transaction involving the immediate delivery privileges of any other party acting as importer of record. Approximately one month after the discontinuance of the privileges, plaintiff filed a complaint seeking a temporary restraining order, and preliminary and permanent injunctions reinstating these privileges. The court issued a temporary restraining order on April 30, 1986, barring Customs from continued implementation of the revocation

[1] 19 U.S.C. § 1448(b) (1982) authorizes the Secretary of the Treasury to provide by regulation for the issuance of special permits for delivery, prior to formal entry. The holder of an immediate delivery privilege may secure the immediate release of imported goods by submitting certain documentation to the customs inspector for examination at the port of entry. If the documents are in order, the merchandise is released immediately without advance payment of the duty. In some situations a bond must also be posted to obtain release. The documents are then returned to the broker, who must thereafter complete the entry documents and pay the duty. 19 C.F.R. §§ 142.21-142.29 (1985).

[2] Other charges including failure to maintain power of attorney forms on file have been made. The information provided the court by the government on the additional charges is minimal and the standards for preliminary injunction were not discussed in terms of those charges.

pending disposition of plaintiff's motion for a preliminary injunction, now before the court.

The parties do not dispute the following facts underlying the action. In May of 1985, Customs seized two vehicles entered by ACB because the entry identification numbers were not social security numbers issued by the Social Security Administration.[3] Shortly thereafter, ACB provided the correct numbers and the vehicles were released. On November 27, 1985, ACB received a letter from Customs informing it that an audit of the firm would be conducted by Customs on December 12, 1985, to determine compliance with customs regulations. Upon completion of the audit, Customs concluded that of the 242 entries into the Los Angeles, California district that contained erroneous social security numbers in identifying importers of record, 102 were entries in which ACB had acted as broker.[4] In response to this finding, Customs decided to take the action challenged here. On March 28, 1986, Aileen Colon, Chief Inspector of Customs at Terminal Island, orally informed representatives of ACB of Customs' decision. Subsequently, plaintiff's representatives had several discussions with Customs in an attempt to identify reasons for the discontinuance and to persuade Customs to reinstate the privileges. When these discussions proved unsatisfactory to plaintiff, plaintiff filed suit in this court.

Plaintiff contends that, at a minimum, it was entitled to written notice and an opportunity to respond before Customs could discontinue its privileges. It claims that the procedures followed by Customs deprived it of its rights to procedural due process, rendering the discontinuance invalid. Thus, plaintiff seeks to have its privileges reinstated until the matter can be resolved on the merits.

The Court of Appeals for the Federal Circuit has defined the criteria for issuance of a preliminary injunction as follows:

> (1) the threat of immediate irreparable harm;
> (2) the likelihood of success on the merits;
> (3) whether the public interest would be better served by issuing rather than denying the injunction; and
> (4) whether the balance of hardships on the parties favors issuing the injunction.

Zenith Radio Corp. v. *United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *S. J. Stile Associates, Ltd.* v. *Snyder*, 68 CCPA 27, 30, 646 F.2d 522, 525 (1981); *Azurin* v. *United States*, 10 CIT ——, Slip Op. 86-30 at 5 (Mar. 17, 1986).

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[3] A person or entity engaged in Customs transactions is required to file Customs Form 5106 with its first formal entry or the first request for services that will result in the issuance of a bill or a refund check. Customs then issues an identification number, which can be the Internal Revenue Service employer number, a social security number, or a number assigned by Customs. 19 C.F.R. § 24.5 (1985). Because of the three digit, two digit, four digit pattern of the numbers submitted on the entry forms of plaintiff, Customs understood a social security number to be used.

[4] It is not clear from the record whether the number of noncomplying numbers submitted by plaintiff was 102 or 104. This minor discrepancy is not material.

To demonstrate irreparable injury, plaintiff must prove that unless the injunction is awarded, some harm will result to it that cannot be reasonably redressed in a court of law. *National Juice Products Association* v. *United States*, 10 CIT ——, 628 F. Supp. 978, 984 (1986) (citing *Manufacture de Machines du Haut Rhin* v. *Von Raab*, 6 CIT 60, 569 F. Supp. 877, 881–82 (1983)). In making this determination, the court must focus on the immediacy of the harm and the adequacy of future corrective relief. *S. J. Stile*, 63 CCPA at 30, 646 F.2d at 525 ("A presently existing, actual threat must be shown."); *Azurin*, 10 CIT at ——, Slip Op. 86-30 at 5 ("An injury is irreparable if it cannot be undone through monetary remedies."); *National Juice Products*, 10 CIT at ——, 628 F. Supp. at 984 (the magnitude of the injury is not critical, rather the immediacy of the injury and the adequacy of the future relief).

It does not appear to be disputed here that immediate delivery privileges are an important part of plaintiff's operations. In addition, plaintiff has submitted affidavits (and has produced detailed testimony) that demonstrate that it has lost existing business accounts and has had to forego business opportunities due to the revocation of its immediate delivery privileges. There appears to be evidence of substantial harm to business good will, business reputation and a significant loss of new business. *See Lois Jeans & Jackets, U.S.A., Inc.* v. *United States*, 5 CIT 238, 242, 566 F. Supp. 1523, 1527 (1983) (Customs order to redeliver goods enjoined where loss of past and future sales and injury to reputation as a reliable supplier constituted irreparable injury); *cf. Mutual of Omaha Insurance Co.* v. *Novak*, 775 F.2d 247, 249 (8th Cir. 1985) (court affirmed finding of irreparable injury based on injury to business reputation and good will arising from alleged trademark infringement). It is very difficult to accurately access these types of damage for purposes of monetary recovery. In addition, it is doubtful that the defendant would be subject to suit for the actions alleged here. *See* 28 U.S.C. § 2680 (1982). "The possibility that adequate compensatory or other corrective relief will be available at a later date * * * weighs heavily against a claim of irreparable harm." *National Corn Growers Association* v. *Baker*, 9 CIT at ——, 623 F.2d 1262, 1275 (1985) (quoting *Sampson* v. *Murray*, 415 U.S. 61, 90 (1975), quoting *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 425 (D.C. Cir. 1958)). Inasmuch as plaintiff has offered substantial evidence on this point and defendant has offered no evidence to the contrary, the court concludes that plaintiff has suffered and will continue to suffer irreparable harm if its immediate delivery privileges are further discontinued.

The second element of the test of whether a preliminary injunction is warranted is an examination of whether plaintiff is likely to succeed on the merits of the case. The court notes that the likelihood of success need not be shown to be a "mathematical probability." *Azurin*, 10 CIT at ——, Slip Op. 86-30 at 6 (quoting *American*

Institute for Imported Steel, Inc. v. *United States*, 8 CIT 314, 600 F. Supp. 204, 209 (1984), citing *Committee to Preserve American Color Television* v. *United States*, 4 CIT 202, 204, 551 F. Supp. 1142, 1144 (1982)).

The regulation in question, § 19 C.F.R § 142.25(a), allows the district director of customs to revoke an importer's immediate delivery privileges under certain circumstances.[5] Defendant argues that this section applies to brokers, as well, and the court agrees. Inasmuch as brokers may obtain special permits under regulations allowing "importers" to be granted immediate delivery privileges, Customs' argument that the discontinuance provisions of section 142.25 also applies to brokers is entirely reasonable.[6] The question then arises as to whether section 142.25 applies to the denial of a broker's ability to use a separate importer of record's immediate delivery privileges where that importer is the principal in the transaction, assuming other requirements, such as the proper power of attorney, are met. The answer to this question does not appear on the face of section 142.25. In addition, there is the issue of whether either penalty was imposed according to the proper procedures.

In assessing whether procedural due process was accorded to plaintiff, the case of *Gallagher & Ascher Company* v. *Simon*, 687 F.2d 1067 (7th Cir. 1982), is instructive. In that case, a limited suspension of the immediate delivery privileges of a broker for failure to make timely entries was upheld, but the broker in *Gallagher*, unlike plaintiff here, remained free to use the importer's/principal privileges. The Seventh Circuit found that 5 U.S.C. § 558(c)[7] was

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[5] 19 C.F.R. § 142.25(a) (1985) reads as follows:

§ 142.25 Discontinuance of immediate delivery privileges.

(a) *Authority of district director.* The district director may discontinue immediate delivery privileges if the importer:

(1) Has failed repeatedly to file the applicable Customs documentation set forth in § 142.22(b) timely without justification, or

(2) Has not taken prompt action to settle a claim for liquidation damages issued under § 142.27 for failure to file the applicable Customs documentation set forth in § 142.22(b) timely. "Prompt action" means that the importer, within the time specified in a claim for liquidated damages shall petition for relief or pay the amount claimed and, file the applicable documentation and deposit estimated duties, if any.

(3) Has repeatedly delivered documentation required by § 142.22(b) which is incomplete or which contains erroneous information.

[6] Plaintiff has directed the court's attention to 19 C.F.R. § 142.25(c), which uses the term "brokers" with regard to discontinuance of immediate delivery privileges. This provision reads as follows:

(c) *Brokers; restriction.* A broker shall not circumvent an action taken under this section by applying for the immediate release of the importer's merchandise in the broker's name and under the broker's bond.

The existence of this provision does not preclude the inclusion of brokers within the term "importers" as used in § 142.25(a), however. Instead, the regulation appears to be addressing the two different roles a broker can play in import transactions, i.e., the broker can act as an agent for another party who is the importer of record or the broker can itself be the importer of record. The broker cannot move into the latter category merely for the purpose of assisting an importer to avoid the penalties imposed under § 142.25.

[7] 5 U.S.C. § 558 (1982) reads in pertinent part as follows:

§ 558 Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

applicable in that the permit granting immediate delivery privileges was a form of license.[8] The court held that a full adjudicatory hearing was not required under section 558(c) and need only be provided when another statute requires a hearing. *Id.* at 1074. The court observed, however, that section 558(c) allows a "second chance" to be provided the offending party. *Id.* at 1074, 1075. Under section 558(c) a written warning with opportunity to demonstrate compliance or to amend conduct accords a broker a second chance before discontinuance of its immediate delivery privileges. In this case, unlike the *Gallagher* case, ACB did not receive the formal warning contemplated by section 558(c). Defendant argues that plaintiff was warned when the two automobiles were seized approximately one year ago and when, subsequently, plaintiff received written notice that an audit was to be commenced. The audit letter, however, mentioned no allegations of wrongdoing and no specific adverse action by the agency was mentioned. This would appear inadequate to satisfy section 558(c).

Nonetheless, the second chance opportunity of section 558(c) may be omitted if plaintiff's conduct is willful or if public health and safety so requires. 5 U.S.C. § 558 (1982) (*see supra* note 7). Plaintiff contends, and its does not appear to be disputed, that thus far plaintiff's actions have not aided any evasion of health and safety laws. Furthermore, defendant has not alleged any facts which would demonstrate any likelihood that plaintiff's conduct even threatens noncompliance with emissions standards or otherwise endangers health or safety. If such a likelihood existed, plaintiff's rights to section 558(c) notice and opportunity to comply might be precluded. Whether plaintiff's errors over the past year were willful appears to be a genuinely disputed issue.[9] The parties have not briefed the issue of the standard of review applicable to a determination of willfulness. Of course, plaintiff has no fair chance of demonstrating even arbitrary action, unless it is advised of the facts surrounding the revocation. The record is somewhat unclear as to the extent and timing of information provided, but plaintiff has indicated that it only received a list of the nonconforming numbers on the day before oral argument. Unless the charge of willfulness cannot reasonably be disputed, the statutory scheme requires defendant, at some time close to the time of revocation, to advise

[8] Although defendant does not concede this point, it did not substantially brief the issue, and the court finds no reason to disagree with the Seventh Circuit on this point.

[9] Plaintiff disputes that its omissions and misstatements were intentional or were made in careless disregard of statutory requirements. Defendant contends that it had sufficient facts upon which to base a finding of willfulness, citing *Goodman* v. *Benson*, 268 F.2d 896 (7th Cir. 1961). The court finds *Goodman* distinguishable. The court in *Goodman* observed that petitioner Goodman had been informed by his attorney that the limit on rye futures was 500,000 bushels, and had been rebuked by the Commodity Exchange Authority for exceeding the limit. Some time later, but apparently without any change in circumstances, Goodman again exceeded the limit. From these facts, and after affording plaintiff a full opportunity to show that the agency acted unreasonably, the court found that plaintiff knew the correct limit and had "willfully" failed to comply with it. First, plaintiff has not had an opportunity to make its case here, largely because defendant has been reluctant to provide plaintiff with detailed information. Second, although defendant argues that one of plaintiff's employees allegedy admitted to knowingly filing entry papers containing incorrect information, this person is no longer employed by ACB. Thus, it is possible that plaintiff had though that it had eliminated the source of previous problems.

plaintiff of the basis of the willfulness claim, in sufficient detail for plaintiff to confront it.

The question remaining unanswered is whether the prohibition of use of importers' privileges by the broker here is unwarranted under the very terms of 19 C.F.R. § 142.25. The court acknowledges the principle "that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 185 (1973) (quoting *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 112 (1946) (quoting *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194 (1941))). Such deference is not warranted, however, if the remedy chosen is "unwarranted in law or . . . without justification in fact." *Butz*, 411 U.S. at 185–86 (quoting *American Power*, 329 U.S. at 112–13). The court does not rule out the possibility that in some cases failure to limit the broker's use of others' immediate delivery privileges would risk substantial harm or would controvert the intendment of section 142.25, but no such examples have been given. It is somewhat difficult to uphold an agency's interpretation of its own regulation which at first glance seems contrary to the language of the regulation and which has not been supported by any substantial arguments concerning the needs of the agency or public policy. The court need not decide this issue nor the issue of whether the agency's conduct was within constitutional bounds [10] inasmuch as Customs apparently has failed to comply with section 558(c). Thus, the court finds a sufficient likelihood of success in establishing lack of statutory due process in discontinuing ACG's privileges.

In determining whether the public interest lies in favor or against the granting of the preliminary injunction, the court must weigh the public interest in due process against the potential harm to the public of allowing plaintiff to continue to enter merchandise using its immediate delivery privileges. Clearly, the public has a strong interest in ensuring that the constitutional and statutory or regulatory procedural due process is provided prior to discontinuance of a customhouse broker's privileges. On the other hand, it has not been demonstrated that deprivation of the privileges will have a significant positive impact on the public welfare. As discussed above, defendant has not demonstrated any likelihood that plaintiff's failure to accurately report the importers' tax or social security numbers has resulted, or will result, in the release (or increased threat of release) of automobiles into the country that fail to meet motor vehicle safety and emission standards. Therefore,

[10] In ffinding no need for a formal hearing the *Gallagher* court observed, citing *Mathews* v. *Eldrige*, 424 U.S. 319 (1976), that the various interests of the parties must be balanced in deciding if the procedures used were sufficient to provide procedral due process. The penalties imposed here were broader than those imposed in *Gallagher*. They are also narrower thant he penalties allowed by 19 U.S.C. § 1641 (1982 & Supp. II 1984), which requires notice and a formal hearing.

the action chosen by Customs, that is, revoking all immediate delivery privileges, results in a basically punitive sanction which will not remedy any immediate harm to the public. While the court does not question the importance of accurate reporting of information on Customs entry documents for many purposes, the public interest in due process outweighs the need to impose immediate sanctions in this case.

Finally, the court must consider whether the balance of the hardships on the parties favors issuance of the injunction. Defendant has not proffered any scenario under which the temporary restoration of plaintiff's immediate delivery privileges will result in hardship to Customs. While the court recognizes that inaccurate information provided to Customs eventually may impair the efficiency of the agency in processing the entries and undertaking its enforcement efforts, defendant could not identify any instances in which the incorrect numbers provided by plaintiff resulted in an inability to ensure that the automobiles in question were properly converted to meet U.S. standards or caused any serious and immediate record keeping problems. In addition, at oral argument defendant acknowledged that in the past few weeks plaintiff's compliance with the regulations has improved considerably. On the other hand, the court has already noted the cognizable irreparable injury that will result to plaintiff if the privileges continue to be revoked. The court concludes that any minor administrative difficulties experienced by defendant are outweighed by the irreparable injury that would result to plaintiff.

Having considered the four criteria for issuance of a preliminary injunction, the court concludes that all four factors favor plaintiff's position that such should be granted. So ORDERED.

(Slip Op. 86-57)

W.Y. MOBERLY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-9-01259

Before DICARLO, *Judge.*

Plantiff challenges Customs classification of structural components of oil drilling rigs as "lattice masts * * * and other structures and parts of structures" under item 652.98, TSUS, and its successor provision, item 652.99, TSUS. Plaintiff alleges (1) the merchandise is classifiable as "other boring machinery * * * and parts thereof" under item 664.05, TSUS, on the grounds that that provision is more specific, and (2) if the Court finds the articles are parts of structures, they are more specifically provided for as "columns, posts, beams, girders and similar structural units" under item 652.94, TSUS.

Held: Applying General Interpretative Rule 10(ij), which provides that a part of a part is more specifically provided for as a part of that part (structures) than as a part of a whole (boring machinery), the Court finds that the merchandise, except for the sheaves, is properly classified as parts of structures. The mast components, when assembled, are "lattice masts." Since the merchandise is not of unitary con-

struction, it is not classifiable under item 652.94, TSUS. The sheaves are properly classified as pulleys under item 680.50, TSUS.

[Judgment for defendant.]

(Decided May 28, 1986)

Ross & Hardies (*Joseph S. Kaplan, John B. Pellegrini* and *Eric S. Palles*), for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice (*John J. Mahon*), for defendant.

Memorandum Opinion and Order

DiCarlo, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of disassembled components of oil drilling rigs as "lattice masts * * * and other structures and parts of structures * * * of iron or steel * * * other" under item 652.98, Tariff Schedules of the United States (TSUS), and 652.99, TSUS, the successor provision to item 652.98, TSUS.

Plaintiff claims the merchandise is properly classified as "boring * * * machinery * * * for earth, minerals or ores * * * and parts thereof" under item 664.05, TSUS, or alternatively, as "columns, pillars, posts, beams, girders, and similar structural units * * * other" under item 652.94, TSUS.

Defendant argues that Customs classification of the merchandise invoiced as "sheaves" was erroneous, and that the sheaves are properly classifiable as "pulleys and shaft couplings, and parts thereof" under item 680.50, TSUS.

The Court holds that the parts of the mast, substructure, floor assembly, and engine stand are classifiable as parts of structures under items 652.98 or 652.99, TSUS, and that the sheaves are classifiable as pulleys under item 680.50, TSUS.

The questions presented are:

(1) Whether structural components of drilling rigs concededly described under tariff provisions for parts of structures and parts of boring machinery are classifiable as parts of structures under General Interpretive Rule 10(ij), which provides that part of a particular part is more specifically provided for as a part of that part (structures) than as a part of a whole (boring machinery), or as parts of boring machinery, under the principle that an article described by two provisions is classifiable under the item which more specifically describes it;

(2) Whether, if the imported merchandise is classifiable as parts of structures under General Interpretive Rule 10(ij), it is more specifically provided for as "columns, pillars, posts, beams, girders and similar structural units, under item 652.94, TSUS; and

(3) Whether under General Interpretive Rule 10(ij), the sheaves are specifically described as "pulleys", under item 680.50, TSUS.

The parties stipulate that:

(1) The merchandise involved in this civil action consists of fabricated components of three oil drilling rigs designated as Penrod 24, 25 and 27.

(2) Each imported fabricated component is a subcomponent of one or more of the following drilling rig sections:

(a) mast; (b) substructure; (c) floor assembly;
(d) engine stand.

(3) The oil drilling rigs of which the imported components are parts are transportable rigs. The components themselves, in their imported condition, are designed for and capable of repeated assembly and disassembly and transportation from site to site by truck.

(4) Certain of the imported components *i.e.,* deadline breakover sheave with rear raising frames with pins and safety pins, fastline breakover sheave and slingline equivalent function only in the course of assembly and disassembly of the rig. Each of the remaining components constitutes a subcomponent of one or more of the four major rig sections identified in paragraph 2 above.

(5) The imported components are dedicated to use as parts of a specific complete oil drilling rig and have no other utility.

(6) Except for the sheaves, which when in use rotate on an axis, the imported subcomponents and the major sections described in paragraph 2 into which they are made up, are stationary when in use in oil drilling.

(7) In addition to the imported components, the following components, which were not included in the imported merchandise, are part of the additional equipment needed in order to create a complete drilling rig: hook, block, drawworks, drill line, drill pipe, motive power, rotary table, catworks, catheads, tongs, hydraulic breakout devices, doghouse and drilling console.

(8) The section identified as the floor assembly, among other functions, supports the hook load of 1,125,000 lbs., the casing load of 1,000,000 lbs., and the drill pipe load of 600,000 lbs.

(9) The section identified as the engine stand, among other functions, supports the weight of the engines, 15,000 to 20,000 lbs., in addition to helping to support the hook load.

(10) The section identified as the mast, among other functions, supports the racking board, crown assembly, drill line, hook block, elevators, boom and the wind load.

(11) The section identified as the substructure, among other functions, supports the mast and in turn the hook load.

Pretrail Order, Schedule C.

It is not disputed that the imported articles, when assembled, comprise structural components of drilling rigs, and are described by the tariff provision for parts of structures. It is also undisputed that the drilling rigs are "boring machinery", and the imported merchandise are parts of boring machinery.

The dispute between the parties is essentially a legal one. Plaintiff argues that the merchandise is classifiable under the item that

more specifically describes the merchandise, and since the provision for parts of boring machinery is more specific than the provision for parts of structures, the merchandise is classifiable as parts of boring machinery. Plaintiff also argues that the *Nomenclature for the Classification of Goods in Customs Tariffs* (Customs Co-Operation Council, 1955) (Brussels Nomenclature) persuasively indicates that Congress provided for the merchandise in item 664.05, TSUS.

Defendant contends that under General Interpretative Rule 10(ij), TSUS, a provision for parts of a part prevails over a provision for parts of a whole, and since the merchandise consists of parts of structures that are parts of drilling rigs, the merchandise is classifiable as parts of structures.

General Interpretive Rule 10(ij), provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part."

Although the Brussels Nomenclature is a source for ascertaining legislative intent where the languages of the TSUS and Brussels are similar, *Toyota Motor Sales, U.S.A., Inc.* v. *United States,* 7 CIT 178, 585 F. Supp. 649, 655 (1984), *aff'd,* 753 F.2d 1061 (Fed. Cir. 1985); *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 875 n.2, *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984), the Court observes that the Brussels Nomenclature, published seven years before enactment of the TSUS by the Tariff Classification Act of 1962, Pub. L. 87-456, contains no instruction similar to General Interpretive Rule 10(ij) with respect to classification of parts, and therefore provides no guidance in this case.

Congress' intent in enacting General Interpretive Rule 10(ij) is found in the *Tariff Classification Study,* published November 15, 1960, prior to the enactment of the TSUS and considered an important source of legislative history. *See United States* v. *Andrew Fisher Cycle Co.,* 57 CCPA 102, 106-07, C.A.D. 986, 426 F.2d 1308, 13110 (1970). The *Tariff Classification Study* describes the purpose of General Interpretive Rule 10(ij) as follows:

> At the present time, much uncertainty exists in connection with the tariff treatment of parts of articles. In some instances, a mere provision for "parts" prevails over much more specific descriptions in the tariff schedules. Even certain "universal" components such as nuts, bolts, screws, and so forth, are sometimes classified as parts of a particular article according to their type and specific uses. *In the proposed schedules, specific provision is made for the more usual components of articles. Under the rule expressed in headnote 10(ij), these specific provisions will prevail over a mere provision for "parts" of a particular article.*

Tariff Classification Study of 1960, Submitting Report, at 19 (emphasis added). The Additional Explanatory Notes and Background

Materials of the *Seventh Supplemental Report* of the *Tariff Classification Study,* published a year after enactment of the TSUS, states at 99:

> General headnote 10(ij)—*Parts.* A provision for "parts" does not prevail over a specific provision for such part. Thus, a provision for "parts" is more specific than a provision for "articles, not specially provided for", but is not more specific than provisions such as the following for: "springs" (item 652.85), "illuminating articles" (items 653.30-.40) "pumps" (items 660.90-661.15), etc.

Plaintiff says cases cited by defendant as applying General Interpretive Rule 10(ij) "are based on the premise that the provision under which merchandise is correctly classifiable is the more specific of the competing provisions," *Plaintiff's Pretrial Legal Memorandum,* at 5, and argues in effect that General Interpretive Rule 10(ij) applies only where the provision for the "part" is more specific than the provision for "parts of the whole."

Plaintiff is correct that each of the cases cited by defendant in support of the principle that a part of a part is more specifically provided for as a part of the part than as a part of the whole also supports the proposition that an article described in two or more provisions is classifiable in the provision which most specifically describes it. *See Korody-Colyer Corp.* v. *United States,* 66 Cust. Ct. 337, C.D. 4212 (1971) (nozzles used as parts of fuel injection pumps incorporated into engines were properly classified as parts of pumps rather than as parts of engines); *Foster Wheeler Corp.* v. *United States,* 61 Cust. Ct. 166, C.D. 3556, 290 F. Supp. 375 (1968) (parts of converters used in a machine are classifiable as parts of converters, not parts of machines); *C.F. Liebert* v. *United States,* 60 Cust. Ct. 677, C.D. 3499 (1968) (parts of clutches used in winches classifiable as parts of clutches rather than as parts of winches).

But the "premise" of these cases is the principle of General Interpretive Rule 10(ij), not, as plaintiff states, that the merchandise is classifiable under the more specific provision. Further, plaintiff misreads the case it cites for the principle that parts are covered in the more specific provision, *Arthur J. Humphreys* v. *United States,* 59 Cust. Ct. 231, C.D. 3128, *aff'd,* 56 CCPA 67, C.A.D. 956, 407 F.2d 417 (1969). At issue in *Humphreys* was the classification of cabinets for radio-phonograph combinations. The Court found that the cabinets were furniture, but were also part of the radio-phonograph combination, and held the cabinets classifiable as part of the whole (radio-phonograph combination) rather than as a part (furniture). Plaintiff says the Court's holding is attributable to its finding that the provision for the whole was more specific than the one which described the part. In fact, the Customs Court held, and the appellate court affirmed, that General Interpretive Rule 10(ij) did not apply since the part provision was not a "specific provision" within General Interpretive Rule 10(ij). The part provision covered "furni-

ture, and parts thereof, *not specially provided for"* (emphasis added). Merchandise is not "specifically" described within the meaning of General Interpretive Rule 10(ij) by a "basket" provision for "articles, not specially provided for." *J.E. Bernard & Co.* v. *United States,* 62 Cust. Ct. 536, C.D. 3822, 299 F. Supp. 1129 (1969), *aff'd,* 58 CCPA 91, C.A.D. 1009, 436 F.2d 506 (1971); *Ideal Toy Corp.* v. *United States,* 63 Cust. Ct. 406, C.D. 3926 (1969), *aff'd,* 58 CCPA 9, C.A.D. 996, 433 F.2d 801 (1970).

Plaintiff argues, implicitly, that the provision for "structures and parts of structures" is so broad that it does not "specifically" describe the merchandise within meaning of General Interpretive Rule 10(ij). The Court disagrees.

Tariff items have been held to be "specific" under General Interpretive Rule 10(ij) where merchandise is covered by name or function. *See, e.g., J.E. Bernard & Co.* v. *United States,* 59 Cust. Ct. 31, 36, C.D. 3060 (1967) (electrical components specifically covered by "other electrical apparatus for making * * * or breaking electrical circuits" to preclude classification as parts of projectors).

"Structure" has been defined for tariff purposes as "anything composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use." *United States* v. *Paul M.W. Bruckmann,* 65 CCPA 90, 93, C.A.D. 1211, 582 F.2d 622 (1978), quoting *Simon, Buhler & Baumann, Inc.* v. *United States,* 8 Ct. Cust. App. 273, 276, T.D. 37537 (1918); *S.G.B. Steel Scaffolding and Shoring Co.* v. *United States,* 82 Cust. Ct. 197, 211-213, C.D. 4802 (1979).

This definition is broad, but the scope of the tariff provision is limited by application of the rule of *ejusdem generis.* Where there is an enumeration of specific words of description (*e.g.,* "hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing, frameworks etc.") followed by a general term (*e.g.,* "other structures or parts of structures") *ejusdem generis* aids in statutory construction. *See Merck & Co.* v. *United States,* 19 CCPA 16, 18, T.D. 44852 (1931). Under the rule of *ejusdem generis,* which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word of phrase is held to refer to things of the same kind as those specified. *United States* v. *Damrak Trading Co.,* 43 CCPA 77, 79, C.A.D. 611 (1956). Thus, plaintiff's suggestion that parts of an oil drilling rig not typically considered to be structures—such as the hook, the travelling block, the draw works, and the drill line—would be classifiable as parts of "structures" under item 652.98, TSUS, is misguided, since those parts of the rig are not of the same kind as hangars, bridges, lock-gates, towers, and the other examples. *See S.G.B. Steel Scaffolding and Storing Co.,* 82 Cust. Ct. at 215-218.

The Court follows *J. Ray McDermott & Co.* v. *United States,* 69 Cust. Ct. 197, 208, C.D. 4394 (1972). In *McDermott* the merchandise at issue included an oil platform "jacket", a three-legged tripod-like

portion of an offshore drilling platform. The jacket was classified under item 652.98, TSUS, as "other structures or parts of structures." Plaintiff alternatively claimed classification as part of boring machinery under item 664.50, TSUS. The Court rejected that claim, stating:

> Even if the platform structure may be regarded as a part of boring machinery, which is doubtful, the jacket is more specifically provided for as a part of a structure than as part of boring machinery. A part of a particular part is more specifically provided for as a part of the part than as a part of the whole.

69 Cust. Ct. at 208 (footnote omitted).

Although, as plaintiff says, the articles in this action are undoubtedly parts of boring machinery, since the merchandise is integral to the drilling operation and has no commercial identity apart from parts of oil drilling rigs, *see Nissho Iwai American Corp.* v. *United States*, 8 CIT 264, 602 F. Supp. 88 (1984), this fact does not distinguish *McDermott* from this action. The "part of a part" principle applied in *McDermott* is equally applicable in this action. The Court holds that the provision for "structures and parts thereof" describes the function of the imported merchandise.

In the event the mast parts were not parts of structures the mast components would nonetheless be classifiable under items 652.98 and 652.99, TSUS, since the mast components, when assembled, are "lattice masts" which are *eo nomine* provided for in the superior heading to items 652.98 and 652.99, TSUS. "Lattice" is defined as "a framework or structure of * * * metal made by crossing laths or other thin strips so as to form a network." *Websters' Third New International Dictionary* 1277 (1961).

Plaintiff argues that the term "lattice mast" is not known to the petroleum industry, and therefore does not apply to the assembled imported components. Proof of commercial designation is a question of fact, *Tower & Sons* v. *United States*, 11 Ct. Cust. App. 261, T.D. 39080 (1922), for which plaintiff had the burden of proof, since the burden of establishing commercial designation rests upon the party arguing that the commercial meaning of a term differs from its ordinary meaning. *United States* v. *Simon Saw & Steel Co.*, 51 CCPA 33, 38, C.A.D. 834 (1964).

Plaintiff's witness Frederick Pheasey, Chairman of Dreco, Ltd. of Edmonton, Alberta, manufacturer of the merchandise, stated that the mast portion of assembled merchandise was not a lattice mast because the mast had a "rigid frame". Plaintiff's witness Donald W. Gaddy, Chief Engineer at Penrod Drilling Company of Houston, Texas, which purchased the merchandise, said that the mast was not a lattice mast because lattice masts are made of "tubular construction." Both Pheasey and Gaddy said the mast is known in the industry as a "cantilevered mast." Plaintiff's final witness, Joe Fowler, of Stress Engineering Services, Inc., a consulting engineer-

ing company based in Houston, conceded that the assembled mast had "some elements of a lattice structure," but said the mast was better described as a "space frame" or "built-up column." The Court finds the testimony of these witnesses inconsistent and ambiguous.

The Court finds more persuasive the testimony of defendant's witnesses, Dr. Augusto L. Podio, Professor of Petroleum Engineering at the University of Texas at Austin, and Paul Borg, Vice-President of Pyramid Manufacturing Company of Houston, a manufacturer of drilling equipment, who testified that the mast when assembled, met the following specifications of the American Petroleum Institute (API) for Drilling and Well Servicing Structures 4E:

> *3.8 Portable Mast Without Guylines-Static.* A portable mast without guylines is generally a rectangular cross section structure, *latticed on three or four sides,* of welded, bolted or pinned construction; is assembled at or near ground level; attached to a substructure; is raised as a unit to the drilling position and is not dependent upon external guying for stability [emphasis added].

The specification for "Portable Mast Without Guylines-Dynamic" contains the same language as to latticing *i.e.,* "latticed on three or four sides."

The Court holds that plaintiff has failed to establish a commercial meaning of "lattice masts" different than the common meaning and which would exclude the assembled imported merchandise.

Plaintiff also argues that even if the assembled components are a lattice mast within the common meaning of the term, the fact that the assembled articles are known as "cantilevered masts" in the trade precludes classification as "lattice masts". But the term "lattice masts" is generic, and the fact that the merchandise may be commercially known by a specific name ("cantilevered masts") is insufficient to exclude the merchandise from classification under the generic term ("lattice masts"). *See S.G.B. Steel Scaffolding & Shoring Co.* v. *United States,* 82 Cust. Ct. 197, 210, C.D. 4802 (1979). *Heads & Threads, Division of MSL Industries, Inc.* v. *United States,* 60 Cust. Ct. 308, 314 C.D. 3374, 282 F. Supp. 484, 489-90 (1968). According to plaintiff's witnesses Pheasey and Gaddy the term "cantilevered mast" in the trade refers to masts assembled horizontally and then raised to the vertical position. The imported mast components could be described as parts of "cantilevered lattice masts."

If the components of the masts were not classifiable as parts of structures, the Court would hold that they are parts of "lattice masts" which are *eo nomine* provided for in the superior heading to items 652.98 and 652.99, TSUS. Applying General Interpretive Rule 10(ij), the Court alternatively holds that the imported components of masts are properly classifiable under items 652.98 and 652.99, TSUS, as parts of lattice masts which are in turn parts of oil well drilling rigs.

Plaintiff argues that if the imported articles are parts of structures, they are parts of structures more specifically provided for as "columns, pillars, posts, beams, girders and similar structural units" under item 652.94, TSUS. This claim also fails.

Plaintiff makes two arguments that the merchandise is within item 652.94, TSUS. First, plaintiff says that the merchandise when assembled, comprise "built-up columns." But the merchandise did not enter as complete articles and, since item 652.94, TSUS, has no provision for parts, this claim fails.

Second, plaintiff says that the various components of the mast, substructure, floor assembly and engine stand, in their condition as imported, are "columns, pillars, posts, beams, girders, and similar structural units," within item 652.94, TSUS.

Since there is no provision for parts in item 652.94, TSUS, this provision has been interpreted to require that the imported merchandise be "*a unitary element* providing * * * support to a building or structure." *Laurence Myers Scaffolding Co.* v. *United States,* 57 Cust. Ct. 333, 340, C.D. 2809, 259 F. Supp. 874, 879, (1966) (emphasis added). *See Frost Railway Supply Co.* v. *United States,* 39 CCPA 90, C.A.D. 469 (1951). Merchandise is not of "unitary construction" if it "consist[s] of more than one piece of metal." *Id.* at 95.

In its proposed findings of fact, plaintiff proposes no factual findings with respect to its claims under item 652.94, TSUS. If a unitary element was contained in any of the entries, plaintiff does not indicate in its post-trial brief which of the examples contained in item 652.94, TSUS, it believes describes a unitary element, nor does plaintiff cite to any testimony which supports the classification of any particular fabricated component in its condition as imported under item 652.94, TSUS. The Court finds that the merchandise in this action is not of unitary construction, but consists of various pieces joined by means of lugs, pins or welding, and holds the merchandise is not classifiable under item 652.94, TSUS.

Finally, defendant urges that Customs classification of the sheaves is incorrect and that the sheaves are properly classified as "pulleys * * * and parts thereof" under item 680.50, TSUS. Plaintiff's witnesses Pheasey and Gaddy testified that sheaves are pulleys. Plaintiff does not oppose this classification in its post-trial brief. Applying General Interpretive Rule 10(ij) the Court holds that the sheaves are specifically provided for as pulleys under item 680.50, TSUS.

To conclude, the Court holds that plaintiff has failed to overcome the presumption of correctness that attaches to Customs classification and applying General Interpretive Rule 10(ij) the parts of the mast, substructure, floor assembly, and engine stand are classifiable as parts of structures under items 652.98 or 652.99, TSUS; and that the sheaves are classifiable under item 680.50, TSUS, as pulleys.

Judgment will be entered accordingly. So ordered.

(Slip Op. 86-58)

CERAMICA REGIOMONTANA, S.A., ET AL., PLAINTIFFS AND INTERNACIONAL DE CERAMICA, PLAINTIFF-INTERVENOR *v.* UNITED STATES, ET AL., DEFENDANTS AND TILE COUNCIL OF AMERICA, INC., DEFENDANT-INTERVENOR

Before RE, *Chief Judge.*

Court No. 84-3-00387

MEMORANDUM OPINION AND ORDER

Plaintiffs, joined by plaintiff-intervenor, move for judgment on the agency record pursuant to Rule 56.1. Plaintiffs contend that countervailing duty rate determination by the International Trade Administration (ITA) is not supported by substantial evidence and is not in accordance with law.

Held: The methodology employed by the ITA in calculating the countervailing duty rate is in accordance with law, and its determination is supported by substantial evidence. Therefore, plaintiffs' motion is denied, and the action is dismissed.

[Plaintiffs' motion is denied; and the action is dismissed.]

(Decided May 29, 1986)

Brownstein Zeidman and Schomer (Irwin P. Altschuler, Steven P. Kersner, and *David R. Amerine)* for the plaintiffs.

Wilkie Farr & Gallagher (Noel Hemmendinger, Walter J. Spak, and *Jeffrey W. Carr)* for the plaintiff-intervenor.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer)* for the defendant.

Howrey and Simon (David C. Murchison, John F. Bruce, Kevin P. O'Rourke, and *Rosemary Henry)* for the defendant-intervenor.

RE, *Chief Judge:* Plaintiffs, Ceramica Regiomontana (Ceramica) and Industrias Intercontinental (Industrias), contest the final results of an administrative review by the International Trade Administration (ITA) of the Commerce Department of a countervailing duty order for ceramic tile from Mexico. 49 Fed. Reg. 9,919 (1984). The administrative review was conducted pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (1982). Plaintiffs are joined in their motion by plaintiff-intervenor Internacional De Ceramica (Interceramica).

Plaintiffs have moved for judgment upon the agency record, pursuant to Rule 56.1 of the Rules of this Court. Defendant, United States, opposes this motion, and urges that the ITA's determination be upheld. Defendant-intervenor, Tile Council of America, also opposes the plaintiffs' motion.

Plaintiffs contend that the methodology used by the ITA to calculate the countervailing duty rates was improper and not supported by substantial evidence. After reviewing the administrative record, the pleadings and contentions of the parties, and the supporting papers, this Court holds that the determination made by

the ITA is supported by substantial evidence on the record, and is in accordance with law. Consequently, plaintiffs' motion for judgment on the agency record is denied.

Administrative Proceedings

On May 10, 1982, the ITA issued its *Final Affirmative Countervailing Duty Determination; Ceramic Tile from Mexico and Countervailing Duty Order*, with respect to imports of ceramic tile manufactured, produced and exported from Mexico. 47 Fed. Reg. 20,012 (1982). The ceramic tile covered in the investigation included nonmosaic, glazed and unglazed ceramic floor and wall tile classifiable under items 532.24 and 532.27 of the Tariff Schedules of the United States (TSUS). In this investigation, commenced in response to a petition filed by the defendant-intervenor Tile Council of America, the ITA determined that three programs implemented by the Mexican Government constituted countervailable subsidies. These programs are CEDI, FOMEX, and CEPROFI.

Pursuant to the first program, Certificado de Devolucion de Impuesto (CEDI), a certificate is issued by the government of Mexico in an amount equal to a percentage of the value of exported merchandise. The CEDI certificates may be used to pay a variety of federal tax liabilities, such as payroll taxes, value added taxes, federal income taxes, and import duties. From January 1, 1982 through August 25, 1982, the CEDI rate was 15 percent of the value of exports, and zero for the remainder of 1982 because the Mexican Government suspended the CEDI program for all exports on or after August 26, 1982.

The Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX) is the second program found by the ITA to constitute a countervailable subsidy. FOMEX is a trust fund established by the Mexican Treasury Department, with the Bank of Mexico acting as trustee. Through financial institutions, the Bank of Mexico makes FOMEX loans available at preferential rates to manufacturers and exporters for pre-export production and export financing.

Certificates of Fiscal Promotion (CEPROFI), the third program, are tax certificates which are used to promote the goals of the National Industrial Development Plan. These certificates are granted in conjunction with investments in designated industrial activities and geographic regions, and may be used to pay a wide range of federal tax liabilities.

Plaintiffs do not contend that these programs are not countervail-able subsidies. Instead, plaintiffs object to the methodology employed by the ITA in calculating a single countervailing duty rate for all Mexican exporters of ceramic tile to the United States who received benefits under any of the three programs. Specifically, plaintiffs challenge the ITA's calculation of the country-wide duty rate attributable to CEDI benefits.

On January 18, 1983, the ITA notified the Mexican Government that it was conducting its periodic administrative review of the countervailing duty order on ceramic tile from Mexico, pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a). The ITA asked the Mexican government to complete a countervailing duty questionnaire pertaining to ceramic tile exports for 1982. The ITA requested information regarding the rate of CEDI benefits applicable to exports of ceramic tile in 1982. The ITA also requested a list of all firms that received CEDI benefits during 1982 and the amounts received by each firm. The ITA further requested a list of FOMEX loans and loan terms granted to ceramic tile firms during 1982. With respect to CEPROFI benefits, the ITA requested a listing of each ceramic tile firm receiving these benefits and the amount of benefit received in 1982. The ITA informed the Mexican government that firms that did not receive any subsidy benefits could avoid the countervailing duty deposit rate by applying for a zero deposit rate. To qualify for a zero deposit rate, firms were required to certify that they did not apply for or receive benefits under the CEDI, FOMEX or CEPROFI programs, and would not apply for these benefits in the future.

The Mexican government responded to the ITA's questionnaire on March 14, 1983. The Mexican government stated that it did not maintain consistent statistics on ceramic tile exports because these products were grouped with others in its export records. Nevertheless, it attemped to compile the requested data. The Mexican government reported that 29 firms exported ceramic tile to the United States in 1982. According to the Mexican government, six of these firms received CEDI benefits. CEDI benefits were provided, the Mexican government stated, at a rate of 15 percent of the export value. The goverment requested that 15 of the 29 firms receive the zero duty deposit rate because they did not receive benefits under any countervailable program.

From April 26, 1983 through May 6, 1983, ITA personnel conducted a verification investigation in Mexico of the information provided by the Mexican government. These officials met with representatives of the Mexican government and with officials of various ceramic tile firms to verify the countervailing duty questionnaire responses. The Mexican government confirmed that the CEDI rate for 1982 had been increased from 10 percent to 15 percent in March 1982, retroactive to January 1, 1982. The government also confirmed that the CEDI benefit program was suspended on August 25, 1982, and did not apply to any shipments exported on or after August 26, 1982.

At verification, ITA officials reviewed the records of the two largest exporters of ceramic tile to the United States, plaintiffs Ceramica and Industrias. During review of Industrias, a significant discrepancy was discovered between the amount of CEDI benefits reported by the Mexican government and the figures kept by Indus-

trias. Officials at Industrias informed the ITA that the correct CEDI figure for exports to the United States was much higher than the figure the Mexican government had originally reported. Industrias then provided the ITA with a revised amount of CEDI benefits the firm received in 1982. In June 1983 the Mexican government provided the ITA with revised figures on the CEDI benefits received by Industrias. The ITA, however, was not able to verify these figures as accurate. Also at verification, officials at both Ceramica and Industrias indicated that their firms took full advantage of the CEDI program.

The ITA issued the preliminary results of the administrative review on September 26, 1983. 48 Fed. Reg. 43,705 (1983). the ITA determined that ten firms met the zero duty certification requirements. The ITA also determined that the net total subsidy for 1982 under the CEDI program was equal to 10.27 percent *ad valorem*. 48 Fed. Reg. at 43,706. An internal ITA memorandum, dated July 14, 1983, explained the methodology used to arrive at the 10.27 percentage rate:

> *CEDI.* This is a subsidy available on all exports. The rate was 15% for exports from January 1–August 25, 1982. CEDI was suspended for all exports from Mexico on or after August 26, 1982. Rather than issuing two separate rates, I calculated a weighted average for the year. I took the IM 146 import statistics for January–August 1982 times 15 percent to get the theoretical maximum CEDI benefit for 1982, and divided that by the total IM 146 import figures for 1982 to get the weighted average of 10.27 percent.

A.R. 443–44. The effect of the weighted average, therefore, was to reduce the 15 percent benefit to 10.27 percent to account for the termination of CEDI benefits, effective August 26, 1982.

The final results of the 1982 administrative review were published on March 16, 1984. 49 Fed. Reg. 9,919 (1984). The ITA basically used the same methodology it utilized in its preliminary determination, with two exceptions. First, the ITA eliminated data covering imports prior to February 23, 1982, to coincide with the period under review. Second, the ITA included data concerning advance CEDI benefits. In light of these adjustments, the ITA determined that the total subsidy benefit under the CEDI program was 9.19 percent *ad valorem*, with a combined total under all the programs of 16.49 percent *ad valorem*. 49 Fed. Reg. at 9,920. The ITA also confirmed its preliminary determination that ten firms were eligible for a zero deposit rate. 49 Fed. Reg. at 9,920. In explaining its calculation of CEDI benefits, the ITA stated:

> [S]ince all firms received the maximum rate (15 percent) upon approval of their applications for individual shipments, we applied the maximum rate while providing for a certification process that would allow zero rates for firms not applying for or receiving any countervailable benefits. To calculate a

> weighted-average CEDI rate (reflecting suspension of the program in August 1982), we used U.S. import statistics since there were no consistently calculated figures from the Mexican Government which we could break down * * *.

49 Fed. Reg. 9,919.

Plaintiffs filed the present action on March 22, 1984 in this Court, challenging the ITA's results of the administrative review. This Court is authorized to review determinations of the ITA which impose a countervailing duty on foreign exporters of products into the United States. 19 U.S.C. § 1516a(a)(2)(B) (West Supp. 1985). In reviewing determinations of the ITA, this Court will hold such findings unlawful only when the conclusions reached by the ITA are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

Plaintiffs contend that the methodology used by the ITA in reaching the countervailing duty assessment rate for the CEDI program is not in accordance with law, and not supported by substantial evidence. The question presented in this case is whether the ITA properly applied the standard 15 percent CEDI benefit, as adjusted by weighted average to account for termination of the program, in calculating a country-wide countervailing duty rate for the CEDI benefit program.

Standard of Review

In reviewing a countervailing duty rate determination by the ITA, the standard of review is not *de novo*. Rather, it is the role and function of the Court of International Trade to determine whether the methodology used by the ITA is in accordance with law, and whether the ITA's conclusion is supported by substantial evidence on the record.

Pursuant to well established principles of administrative law, a reviewing court must accord due weight to an agency's interpretation of a statute that it administers. *See, e.g., United States* v. *City of Fulton*, — U.S. — , 106 S. Ct. 1422, 1428 (1986); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450–51 (1978); *American Lamb Co.* v. *United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). Thus, this Court will defer to the agency's interpretation of the statute, provided the interpretation is "sufficiently reasonable." *See, e.g., Federal Elec. Comm.* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *American Lamb Co.* v. *United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). The extent or degree to which the Court should defer to the agency is dependent upon a number of factors. As the Supreme Court explained in a leading case,

> We consider that the rulings, interpretations and opinions of the [administrative official], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judg-

> ment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The deference granted or extended to the agency's interpretation of its statutory mandate also applies to the methodology that the agency employs in fulfilling its lawfully delegated mission. *American Lamb Co.*, 785 F.2d at 1001; *Consumer Products Div., SCM Corp.* v. *Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985); *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984). In order for the ITA effectively to administer the countervailing duty laws, it is necessary to permit some methodological flexibility. As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Abbott* v. *Donovan*, 6 CIT 92, 570 F. Supp. 41, 46-47 (1983).

Of course, this Court will not allow an agency, under the guise of lawful discretion, to contravene or ignore the intent of the legislature or the guiding purpose of the statute. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.A. 837, 843-44 (1984); *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, — U.S. —, 106 S. Ct. 681, 686 (1986). As the Supreme Court has emphasized, "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 48 (1983) (emphasis in original) (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167 (1962) and *New York* v. *United States*, 342 U.S. 882, 884 (1951) (Douglas J., dissenting)). Indeed, it may be said that deference to an agency's interpretation represents a *judicial* determination that the agency's interpretation falls within the scope of the authority that has been properly delegated by the Congress. *See Montana* v. *Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 246 (1985). Thus, in reviewing a countervailing duty rate determination by the ITA, the court must ensure that the ITA's methodology is a reasonable means of assessing the net benefit received as a result of the illegal subsidy or grant. *See Industrial Fasteners Group, American Importers Ass'n* v. *United States*, 710 F.2d 1576, 1580-81 (Fed. Cir. 1983).

The court must also ensure that the agency's conclusions are supported by substantial evidence on the record as a whole. Substantial evidence is something more than a "mere scintilla," and must be enough reasonably to support a conclusion. *Consolidated Edison Co.* v. *United States,* 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co.* v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984); *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983).

VERIFICATION

In this case, the ITA's verification trip to Mexico revealed that the Mexican government's response to the countervailing duty questionnaire was inaccurate as to both total exports and total CEDI benefits. The Mexican government's figure for total exports to the United States was approximately 25 percent less than what the U.S. import statistics revealed. Furthermore, the ITA discovered that plaintiff Industrias actually received benefits under the CEDI program almost 25 times the amount reported by the Mexican government.

Reviews under section 751 are conducted annually upon request, and must be completed within stringent deadlines. *See* 19 U.S.C. § 1675(a) (West Supp. 1985). In conducting a review under section 751, the ITA is required to verify all information relied upon in its determination. *See* 19 U.S.C. § 1677e(a) (1982) (amended 1984). Hence, when the ITA requests information, it is vital that accurate information be provided promptly to allow the agency sufficient time for review. *See Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984). When the ITA "is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action * * *." 19 U.S.C. § 1677e(a) (West Supp. 1985). Section 776(b) of the Tariff Act of 1930 provides:

> (b) *Determinations to be made on the best information available.*—In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(b) (1982).

In this case, the ITA determined that the statistics submitted by the Mexican government with respect to CEDI benefits did not provide an adequate basis accurately to assess benefits under this program. In an export market comprised of 29 firms, it would be impractical for the ITA to verify information pertaining to each individual firm. Thus, the ITA must sample representative firms. If the information received at the representative firms proves, as here, inaccurate in significant and material respects, it would be point-

less to require that the ITA nevertheless use all information not proven incorrect. The Court will not require the ITA to use portions of the information received from the Mexican government and apply it to some firms, while relying on U.S. statistical figures for other firms in calculating the countervailing duty rate. Since the information supplied by the Mexican government was found, upon verification, to be inaccurate in important respects, the ITA was under no obligation to use it even though some of it had not been proven inaccurate. Thus, the ITA's decision to employ the standard 15 percent CEDI rate, in conjunction with U.S. import statistics, as the best information available was supported by substantial evidence, and in accordance with law.

Calculation of Benefits

In calculating the subsidy benefits under the CEDI program, the ITA used the standard 15 percent rate because benefits were provided at that rate upon approval of the exporter's application. There is substantial evidence on the record to support the ITA's conclusion that the full 15 percent was granted to all importers who applied and conformed to certain minimal, technical requirements. Plaintiffs contend that the ITA has overstated the net benefit received under the CEDI program because some exporters of ceramic tile who did not qualify for the zero deposit rate did not apply for or receive CEDI benefits on all export shipments. Plaintiffs argue that the ITA should have calculated a national average CEDI benefit rate, rather than applying the 15 percent rate to all exporters who did not receive zero deposit status.

To calculate a national average, the ITA would have to compare total value of CEDI benefits granted as reported by the Mexican government with the total exports to the United States to arrive at an average. This average would then be applied to all firms not eligible for zero duty deposit status. However, since the ITA was unable to verify the Mexican government's figure for total CEDI benefits, this proposed methodology would require the ITA to rely on unverified information in contravention of the statute. Instead, the ITA chose to use the full 15 percent of export value for CEDI benefits, adjusted to 9.19 percent to account for the program's cessation in August 1982.

In the absence of verified information, the Court cannot say that the ITA erred in assuming maximum utilization of available benefits. The fact that some small ceramic tile firms, for reasons of convenience, or otherwise, did not always apply for CEDI benefits does not alter this conclusion. Indeed, the past administrative practice of the ITA has been to assume maximum utilization of countervailable programs where benefits were provided upon the fulfillment of certain ministerial or minimal requirements. *See, e.g., Ferroalloys from Spain*, 48 Fed. Reg. 4019, 4020 (1983); *Vitamin K from Spain*, 48 Fed. Reg. 40770, 40770–71 (1983); *Chains and Parts There-*

of, of Iron or Steel from Spain, 48 Fed. Reg. 37505, 37505 (1983). Moreover, both Ceramica and Industrias acknowledge taking full advantage of the CEDI benefit program.

There are limitations on the resources of the ITA which do not permit the agency to undertake a firm-by-firm review in order to establish and apply specific duty rates to every firm. These limitations include strict time constraints, budgetary restrictions, and the availability of qualified personnel. To require the ITA to analyze and investigate the books and records of every firm that disputes a countervailing subsidy deposit rate would, in effect, handicap or impede the agency by severely decreasing its ability to function effectively and efficiently. It is for these reasons that it is the general practice of the ITA to calculate a country-wide countervailing duty rate. A country-wide duty rate allows the ITA to establish one deposit rate for all exporters from a particular country, rather than attempting to determine the actual benefit received by each firm and setting separate rates. Country-wide rates are particularly useful where, as here, a large number of companies are involved. As the ITA stated in its final determination, "[w]e cannot possibly hope to conduct timely administrative reviews under section 751 unless we generally impose country-wide countervailing duty rates." 49 Fed. Reg. at 9,920.

It may be noted that Congress has endorsed the practice of publishing a country-wide countervailing duty rate by enacting a legislative presumption in favor of a country-wide rate. *See* Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 607, 98 Stat. 2948, 3029 (codified at 19 U.S.C. § 1671(e)(2) (West Supp. 1985)). The legislative history of the Act indicates that:

> This provision is intended to lessen the administrative burden on the administrative authority stemming from implementing company-specific rates. The amendment continues to permit individual company rates for significant differences in benefits. The administrating authority is expected to determine under what conditions company-specific rates are appropriate * * *.

H.R Rep. No. 1156, 98th Cong., 2d Sess. 180, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5297. While courts are reluctant to attribute undue significance to the opinion of a later Congress as to a previously enacted statute, the unequivocal ratification of an established administrative practice is persuasive. *See, e.g., Bob Jones University* v. *United States*, 461 U.S. 574, 599-602 (1983); *Haig* v. *Agee*, 453 U.S. 280, 300-01 (1981); *Nissho-Iwai American Corp.* v. *United States*, 10 CIT ——, Slip Op. 86-27, at 14-16 (1986). In this case the establishment of a country-wide rate is clearly consistent with prior administrative practice, and well within the permissible scope of the agency's discretion. This Court finds that the ITA's utilization of a country-wide duty rate, which excluded firms that received no countervailable subsidies, was reasonable and proper.

It is noted that not all Mexican firms who did not qualify for zero deposit status received benefits under all three countervailable programs. For example, in 1982, Ceramica did not receive any FOMEX export loans and Industrias did not receive any benefits under the CEPROFI program. In calculating benefits under the FOMEX and CEPROFI programs, the ITA relied on information received by the Mexican government as to benefits actually dispensed under these programs. The ITA averaged the net benefits received among all firms receiving benefits, and included an average for each program in the country-wide duty rate.

Plaintiffs do not contest these calculations, but argue that the ITA was inconsistent in averaging the Mexican government's figures for FOMEX and CEPROFI, while using a weighted average based on the standard benefit for CEDI.

The Court finds this argument without merit. The ITA's decision to rely on the government figures to calculate a net average benefit for CEPROFI and FOMEX was clearly based on a reasoned determination that the information pertaining to these programs was verified and reliable. On the other hand, it is equally clear that the ITA made a reasoned determination that the figures complied by the Mexican government were not a sufficient basis from which to calculate an accurate national average for CEDI benefits. Thus, the ITA chose not to attempt to compile a national average of CEDI benefits received, but rather applied the 15 percent standard benefit as the basis for its calculations. On the record in this case, the Court cannot hold that this decision was not in accordance with law or unsupported by substantial evidence.

Plaintiffs' proposed national average would result in a downward adjustment of the 15 percent benefit available, and would provide plaintiffs, Ceramica and Industrias, with a windfall. By utilizing the 15 percent rate, the ITA has established a system which prevents the larger Mexican firms, who admit receiving maximum CEDI benefits, from paying a reduced countervailing duty rate because some smaller firms did not apply for subsidies. It is not the function of this court to formulate a specific methodology for an administrative agency, but rather to ensure that the methodology used by the ITA is in accordance with the law.

Conclusion

The evidence on the record indicates that all Mexican exporters of ceramic tile who applied timely for CEDI benefits received the maximum benefit of 15 percent. Since it was impossible to verify the total CEDI benefits dispensed by the Mexican government, the ITA assumed that those firms that received benefits received the full 15 percent. The agency established the zero duty deposit rate for firms that did not receive benefits under any of the Mexican subsidy programs. Any other method to obtain a more precise calculation of benefits to individual firms would have been both

unduly burdensome and unverifiable. Moreover, the method proposed by the plaintiffs would have been much less precise, and would have resulted in a gross undervaluation of the benefits these plaintiffs received.

In view of the foregoing, the Court concludes that, under the circumstances, the ITA's methodology is reasonable, and is consistent with the purposes of the countervailing duty law to protect domestic producers from import competition which has benefited from illegal bounties or grants. In addition, the Court finds that substantial evidence on the record supports the agency's conclusion. Therefore, the determination of the ITA is affirmed, and plaintiffs' motion for judgment on the agency record is denied.

(Slip Op. 86-59)

UNITED STATES OF AMERICA, PLAINTIFF *v.* SCOPE IMPORTS, INC. AND RICHWAY STORES, INC., DEFENDANTS

Court No. 85-05-00646

MEMORANDUM AND ORDER

[Defendants' motions for more definite statements denied.]

(Dated June 2, 1986)

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sheila N. Ziff*) for the plaintiff.

Givens, Kelly and Shaw (*Robert T. Givens*) for defendant Scope Imports, Inc.

Givens, Kelly and Shaw (*Sharon Steele Doyle*) for defendant Richway Stores, Inc.

AQUILINO, *Judge:* In response to the original complaint, the defendants interposed essentially identical motions for more definite statements pursuant to CIT Rule 12(e). The plaintiff thereafter served and filed an amended complaint, wherein three counts charge defendant Scope Imports, Inc., in the alternative, with fraud, gross negligence and negligence within the meaning of 19 U.S.C. § 1592(a)(1). A fourth count alleges negligence on the part of defendant Richway Stores, Inc.

The precatory language of Rule 12(e) is "pleading * * * so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading". To the extent fraud is alleged, CIT Rule 9(b) applies as follows:

> In all averments of fraud * * * the circumstances constituting fraud * * * shall be stated with particularity.

This requirement of particularity, however, does not abrogate the general rules of pleading set forth in CIT Rule 8, nor does it require the pleading of detailed evidentiary matter. *See, e.g.,* 2A Moore's Federal Practice § 9.03, at 9-28 to 9-30 (1979).

The proposed orders presented by the defendants in conjunction with their motions clearly indicate that they seek the revelation of evidentiary matter as opposed to learning the nature of plaintiff's claims. Furthermore, the court concludes after review of the amended complaint that the allegations therein meet the criteria of the above-cited rules of practice. That is, plaintiff's pleading is not so vague or ambiguous that the defendants herein cannot reasonably be required to frame responsive pleadings. As for the fraud claim(s), the circumstances are pleaded with sufficient particularity. *See generally United States* v. *F.A.G. Bearings Corporation*, 8 CIT 201, 615 F. Supp. 562 (1984). *Cf. Simcox* v. *San Juan Shipyard, Inc.*, 754 F.2d 430, 439 (1st Cir. 1985); *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 405 (7th Cir. 1984), *aff'd on other grounds*, 105 S. Ct. 3291 (1985); *Seville Industrial Machinery Corp.* v. *Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985).[1]

In view of the foregoing, it is

ORDERED that defendants' motions for more definite statements be, and they hereby are, denied; and it is further

ORDERED that the defendants shall have until June 23, 1986 in which to answer or otherwise respond to plaintiff's First Amended Complaint; and it is further

ORDERED that counsel for each of the parties be available for a scheduling conference by telephone pursuant to CIT Rule 16(b) at 11:30 a.m. EDT on June 30, 1986.

(Slip Op. 86-60)

DOMINION VENTURES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 79-8-01292

Before DICARLO, *Judge.*

Plaintiffs challenge the United States Customs Service's classification of commemorative labels as articles of gold under item 656.10, Tariff Schedules of the United States (TSUS).

Held: Although gold is the component material of chief value at the time of manufacture, the merchandise consists essentially of printed matter, and is classifiable as "pictorial matter produced by relief or stencil printing process" under item 274.70, TSUS.

[Judgment for plaintiffs.]

(Decided June 5, 1986)

Donohue and Donohue (John P. Donohue) for the plaintiffs.

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[1] The rule under review in each of those circuit cases was 9(b) of the Federal Rules of Civil Procedure which is verbatim the CIT rule and interpreted in the same manner. *See, e.g., United States* v. *Priscilla Modes, Inc.*, 9 CIT ——, Slip Op. 85-122 at 3 (Nov. 27, 1985).

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice (*Kenneth N. Wolf*) for the defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs contest the United States Customs Service (Customs) classification of merchandise imported from the United Kingdom as "Articles of precious metal, including rolled precious metal: * * * of gold, including rolled gold" under item 656.10, Tariff Schedules of the United States (TSUS). Plaintiffs claim that the merchandise is properly classified as "pictorial matter produced by relief or stencil printing process * * * and not specially provided for * * * Other," under item 274.70, TSUS, or as "Printed matter not specially provided for: * * * Other," under item 274.90, TSUS. The Court holds that Customs classification is incorrect, and that the merchandise is properly classified under item 274.70, TSUS.

At trial plaintiffs produced five witnesses and defendant none. On the basis of the stipulated facts, the testimony and exhibits offered at trial, the Court's assessment of the credibility of the witnesses, and its examination of the merchandise, the Court makes the following factual findings.

The articles in issue resemble postage stamps and are known in the philatelic trade as Staffa stamps or labels (labels). Staffa is a small, uninhabited and privately-owned island located off the coast of Scotland. The labels are not issued by a governmental body, but are produced privately and sold in the United States as collectibles.

The labels consist of a paper backing to which a gold surface is affixed. Gold is the component material of chief value at the time of manufacture. The merchandise is produced by a relief or stencil printing process variously known as embossing, steel dye engraving, blind embossing or printing in relief. The labels are each sold at retail in the United States at prices ranging from $20 to $25, and were entered at values ranging from $4.50 to $5.00 per piece. The labels each contain a few cents worth of gold. Although the larger labels contain a larger gold surface, there is no difference in price between large and small labels. There is no correlation between the price of gold and the value of the labels, and it is commercially unfeasible to remove the gold from the labels.

The textual matter on the labels identifies Staffa as the issuing authority, the denominational value, the fact that it is 23 karat gold, and additional words or phrases that vary depending on the theme of the label. The center portion of each label carries pictorial matter pertinent to some commemorative event as, for example, seals of each of the original Thirteen Colonies or a reproduction of a king, queen or flag.

The merchandise is sold at retail in the United States principally through direct mail marketing. The labels are marketed either as a

single offering or as part of a group of labels united by a common theme, which is communicated by the textual and pictorial elements on the labels. Sales vary depending on the popularity of the theme depicted on the labels.

The sales brochures used to promote the merchandise place overwhelming emphasis on the gold content of the labels, suggesting that they have intrinsic value as gold articles. Since the labels actually offer no practical investment potential as gold articles, the brochures are misleading and some possibly fraudulent.

The issue presented is whether the merchandise consists "essentially of textual or pictorial matter produced by any printing process" within the meaning of Schedule 2, Part 5, headnote 1. Defendant concedes that if it does, the merchandise is more specifically provided for under one of the provisions of Schedule 2, Part 5 than under the classified provision.

Defendant argues that the gold content of the merchandise and the manner in which it is sold preclude a finding that the labels consist essentially of textual or pictorial matter. In *Norman G. Jensen, Inc.* v. *United States,* 84 Cust. Ct. 76, C.D. 4846, *aff'd,* 68 CCPA 5, C.A.D. 1255, 634 F.2d 1345 (1980), merchandise virtually identical to that in this case was held properly classifiable as articles of gold under item 656.10, TSUS. The Court first rejected the claim that the labels were entitled to duty free entry as postage and revenue stamps since the merchandise did not come within the common meaning of the term postage stamps. The Court also held that the merchandise was not classifiable as pressure sensitive strips under item 790.55, TSUS, or as gold leaf under item 644.52, TSUS.

With respect to the tariff items claimed by plaintiffs in this case, the *Jensen* Court held that the labels could be considered "printed matter" within the purview of Schedule 2, Part 5, TSUS. It held that the merchandise could not be so classified, however, since plaintiffs had failed to prove that the labels consisted *"essentially* of" textual or pictorial matter, under Schedule 2, Part 5, headnote 1:

> The excerpts from the advertising brochure, which the court finds to be the only evidence offered pertinent to the inquiry concerning the essential character of the Staffa stamps, indicate to the court that the desirability of the merchandise is derived equally, if not principally, from the gold as a source of monetary value having an excellent investment potential and as a unique and novel substrate for the design thereon. It cannot be said that the essential character of the merchandise is imparted from the printed matter.

84 Cust. Ct. at 93. On appeal, the Court of Customs and Patent Appeals affirmed, adopting the reasoning of the Customs Court. 68 CC PA at 8, 634 F.2d at 1347.

The Court follows the legal holding in *Jensen* that "for an article to be 'printed matter' under part 5 [of schedule 2], the essential character of the article must be imparted by the textual and pictorial matter contained thereon." 84 Cust. Ct. at 92. But this case differs from *Jensen*, in that the brochures introduced at trial do not constitute the sole evidence pertinent to the essential character of the merchandise. While the manner in which merchandise is advertised and marketed is a factor to be considered in determining its classification, it is not controlling. *Nadel & Sons Toy Corp.* v. *United States*, 4 CIT 20, 22 (1982); *see Guardian Industries Corp.* v. *United States*, 3 CIT 9, 15 n.12 (1982). The Court is not bound by a decision involving similar merchandise where new evidence demonstrates that it should not be followed. *United States* v. *Stone & Downer Co.*, 274 U.S. 225 (1927); *Schott Optical Glass, Inc.* v. *United States*, 750 F.2d 62 (Fed. Cir. 1984).

Defendant argues that the following excerpts from the brochures show that the labels are marketed as gold articles:

> See how suprisingly little it now costs to acquire gold.
>
> A rare series of stamps for collectors and investors minted from pure 23 KARAT GOLD.
>
> A clearly attractive investment that adds to the philatelic value of rare postage stamps the monetary value of genuine gold.
>
> * * * combines the joy of collecting exquisitely worked stamps with the secure feeling of owning precious gold.
>
> * * * it affords you the sound basic investment value of *real gold* as well.
>
> * * * the very first investment to combine the value of stamps and gold to such a high degree.
>
> * * * combines the value of gold and the value of a collectible both.
>
> Precious metal has always been favored as a hedge against inflation. Especially when worked into items that have artistic value as well. A Picasso plate in sterling, for example, has double value. Its artistic value as a Picasso *and* its monetary value as silver.
>
> * * * [the official-seal stamps] have exceptional collector's value because they are extraordinarily rare stamps—minted by hand in high relief, not merely printed. *And* they have definite monetary value as well, because they are made of *pure 23k gold instead of paper.*
>
> * * * the first series of gold stamps ever made in the world. And they are wonderfully oversized—containing *over nineteen square centimeters of 23k gold in each* [emphasis in original].

The Court has examined the brochures and finds that they are at best misleading and have little probative value in determining the essential character of the merchandise. Defendant argues that Customs classification should be upheld since the descriptions of the merchandise in the brochures constitute admissions contrary to the interest of the importer. But it is not the function of the Court to

sustain a higher rate of duty to punish an importer for puffery or even outright fraud. In order to preserve uniformity in Customs law, the Court is bound to ascertain objectively the essential character of the merchandise at the time of importation. *See Peter J. Schweitzer Division, Kimberly-Clark Corp.* v. *United States*, 54 CCPA 44, 45-46, C.A.D. 902 (1967); *F.W. Myers & Co.* v. *United States*, 9 CIT ——, 615 F. Supp. 569, 573 (1985); *PPG Industries, Inc.* v. *United States*, 4 CIT 143, 148 (1982).

Having rejected the brochures as evidence that the labels are properly classified as articles of gold, the Court finds that the evidence demonstrates that the imported articles are pictorial labels, and do not derive their value from their material components. The surfaces of the labels contain only a miniscule amount of gold, offering no practical investment potential as gold articles. The evidence is sufficient to overcome the presumptive correctness of the government's classification and to show that the labels are essentially printed matter under Schedule 2, Part 5, TSUS.

The labels are produced by a relief of stencil printing process within the meaning of the superior heading to item 274.70, TSUS. The labels are collectibles which commemorate themes or events. The essential characteristic of each label is the pictorial matter depicted thereon. The pictorials are the essential characteristics of the labels regardless of the fact that they are printed on paper containing a slight amount of gold.

The merchandise consists essentially of printed matter under Schedule 2, Part 5, headnote 1 TSUS. The labels are more specifically described by item 274.70, TSUS, than by the classified provision or item 274.90, TSUS, since the essential feature of the labels is the pictorial material rather than the related textual matter.

Judgment will be entered accordingly. So ordered.

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Parts 10, 24, 112, 123, 134, 144, 145, 148, 162, 172, 191

(T.D. 86-118)

Conforming Amendments to the Customs Regulations

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: In accordance with Customs policy of periodically reviewing its regulations to ensure that they are current, this document makes certain conforming changes which are necessary because of various executive, legislative, and administrative actions. Several of the changes are the result of Customs continuing efforts to reduce the paperwork burden on the public. The changes merely conform the regulations to existing law or practice. They are nonsubstantive and essentially are precedural.

EFFECTIVE DATE: June 20, 1986.

FOR FURTHER INFORMATION CONTACT: Marvin M. Amernick, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8237).

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to keep its regulations current, the Customs Service has determined that various executive, legislative, and administrative actions require conforming amendments to the Customs Regulations contained in Chapter I, Title 19, Code of Federal Regulations (19 CFR Chapter I). Following is a list of these actions, the affected sections of the regulations, and the necessary changes.

Discussion of Changes

1. Section 10.7(a), Customs Regulations (19 CFR 10.7(a)), relating to substantial containers or holders used for the transportation of merchandise, begins with the phrase, "Except as provided for in

§ 10.2(b)". T.D. 75-230, published in the Federal Register on September 18, 1975 (40 FR 43021), amended Part 10, Customs Regulations (19 CFR Part 10), by deleting § 10.2. Section 10.7 is being amended to remove reference to this deleted section.

2. Section 10.74, Customs Regulations (19 CFR 10.74), provides procedures relating to animals which stray or are driven across a U.S. border. Before such animals may be returned, they must be held for such inspection and treatment as deemed necessary by a representative of the Agricultural Research Service of the Department of Agriculture. Customs has been informed that such inspections are now conducted by the Animal Plant and Health Inspection Service of the Department of Agriculture. Therefore, § 10.74 is being amended accordingly.

3. Section 10.76, Customs Regulations (19 CFR 10.76), concerns the importation of game animals and birds. Customs Form 3315, Declaration for Free Entry of Game Animals or Birds Killed by United States Residents, has been in use to facilitate the admission into the U.S. of dead game animals and birds, free of duty without entry. The volume of use of CF 3315 averages only 21,000 per year and functionally duplicates U.S. Fish and Wildlife Service Form 3-177, Declaration for Importation or Exportation of Fish or Wildlife. Therefore, the Customs Regulations are being amended to remove reference to CF 3315, which is now obsolete. U.S. Fish and Wildlife Service Form 3-177 will be substituted in its place.

4. Section 10.177, Customs Regulations (19 CFR 10.177), contains criteria to be used in establishing whether or not a product was produced in a beneficiary developing country for purposes of the Generalized System of Preferences (19 U.S.C. 2461 *et seq.*). It has been noted that rather than just quoting the word "country", in § 10.177(a), the phrase, "produced in the beneficiary developing country" should be quoted. Therefore, § 10.177(a) is being amended accordingly.

5. Section 24.17, Customs Regulations (19 CFR 24.17), sets forth the schedule of reimbursable expenses that parties-in-interest must repay to Customs for services rendered by Customs officers or employees. Section 24.17(f) refers to the reimbursement to Customs to cover the Medicare costs of employees. By T.D. 85-70, published in the Federal Register on April 17, 1985 (50 FR 15271), the percentage of reimbursable compensation expenses that must be repaid to cover Customs share of Medicare costs was raised from 1.3 to 1.35. Section 24.17(f) is being amended accordingly.

6. Section 112.15, Customs Regulations (19 CFR 112.15), states that approvals and discontinuances of carriers' bonds will be published from time to time in the weekly CUSTOMS BULLETIN. However, information on the status of bonded carriers is now available on-line at the district and port offices through the Automated Commercial System (ACS) computer. In addition, a monthly computer listing is mailed to the Customs offices. This on-line bonded carrier

system efficiently disseminates bonded carrier information to the offices needing such information and makes continued publication in the CUSTOMS BULLETIN unnecessary. Therefore, § 122.15 is being removed. In addition, the automated bond control system which went into effect with the revision of the Customs bond structure by T.D. 84-213, published in the Federal Register on October 19, 1984 (49 FR 41152), further eliminates the need for the bond lists and also instruments of international traffic bond lists. Accordingly, § 10.41a, Customs Regulations (19 CFR 10.41a), relating to instruments of international traffic, where reference is made to the publication of these bond lists in the CUSTOMS BULLETIN, is also being amended.

7. Section 123.72, Customs Regulations (19 CFR 123.72), provides for the admission into the U.S. without entry or payment of duty of allegedly stolen or embezzled vehicles, trailers, airplanes, or component parts of any of them, being returned from Mexico. This provision was based on an agreement between the U.S. and Mexico dated October 6, 1936. A new agreement entitled, "The Convention between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft" (Treaties and Other International Agreements [TIAS] 10653), which entered into force on June 28, 1983, now controls this situation. Section 123.72 is being amended to update the reference.

8. Section 134.55, Customs Regulations (19 CFR 134.55), refers to the compensation of Customs officers and employees who are assigned to supervise the exportation, destruction, or marking of articles so as to exempt them from the application of marking duties for failure to either mark articles or their container with the name of the country of origin of the article in accordance with § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304). Section 134.55(b) incorrectly states that the compensation is to be figured according to § 19.5(b), Customs Regulations (19 CFR 19.5(b)). The correct reference is § 24.17(a)(3), Customs Regulations (19 CFR 24.17(a)(3)), which states that importers of such merchandise shall be charged the full compensation and authorized travel and subsistence expenses of such officers or employees from the time they leave their official station until they return thereto. Section 134.55(b) is being amended accordingly.

9. Section 108 of Pub. L. 95-410 (92 Stat. 888), the Customs Procedural Reform and Simplification Act of 1978, amended §§ 557 and 559, Tariff Act of 1930, as amended (19 U.S.C. 1557 and 1559), to permit merchandise to remain in a Customs bonded warehouse at the owner's expense for a period of up to 5 years, without any futher extension. By T.D. 79-221, published in the Federal Register on August 9, 1979 (44 FR 46794), § 144.5, Customs Regulations (19 CFR 144.5), was amended to establish a 5-year time limit, commencing from the date of importation, on the storage or merchan-

dise in a bonded warehouse. An exception was made for merchandise in the bonded warehouse on the date of enactment of Pub. L. 95-410, October 3, 1978. For such merchandise the 5-year period began on that date. Since the 5 years covered by this exception have expired, and no extensions are allowed, §§ 144.5 and 144.36 are being amended to remove these exceptions.

10. Section 144.32, Customs Regulations (19 CFR 144.32), contains procedures for making withdrawals from Customs bonded warehouses. Section 144.32(c) refers to applications by "proprietors" to make withdrawals. It has come to Customs attention that some confusion may result from the word since persons other than warehouse proprietors can make applications for withdrawals, and in fact, proprietors usually are not the persons making the applications. Accordingly, § 144.32(c) is being amended to remove the word, "proprietors".

11. Section 206 of Pub. L. 98-573, the Trade and Tariff Act of 1984, amended § 498(a)(1), Tariff Act of 1930, as amended (19 U.S.C. 1498(a)(1)), by increasing the informal entry limit from $250 to $1,250. However, it exempted all articles valued in excess of $250 classified in Schedule 3, parts of Schedule 7, and Parts 2 and 3 of the Appendix of the Tariff Schedules of the United States Annotated or any other article for which formal entry is required without regard to value. Under 19 U.S.C. 1498(a)(1), the Secretary of the Treasury may specify the exact amount of the informal entry limit. The limit may vary for different classes or kinds of merchandise or different classes of transactions. After thorough consideration of the issue, it was determined that, with the exception of the specific exclusions, the informal limit for all articles would be set initially at $1,000, with the option to increase it to $1,250 in the future. This change was reflected by amending various sections of the Customs Regulations as part of another document published as T.D. 85-123 in the Federal Register on July 13, 1985 (50 FR 29949). It has now been determined that §§ 145.4 and 148.23, Customs Regulations (19 CFR 145.4, 148.23), must also be amended to reflect this change.

12. Section 115 of Pub. L. 97-446 amended Subpart A of Part 2 of Schedule 8 of the Tariff Schedules of the United States Annotated (19 U.S.C. 1202), to raise the personal exemption allowed residents returning to the U.S. Items 813.30 and 813.31, TSUS, were amended to raise from $300 to $400 the exemption allowed residents returning, and from $600 to $800 for residents arriving directly or indirectly from American Samoa, Guam, or the Virgin Islands of the U.S. This change requires numerous amendments to Part 148, Customs Regulations (19 CFR Part 148).

13. In § 162.75, Customs Regulations (19 CFR 162.75), relating to limitations on seizures for violations of § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), an error was made in the numbering of some paragraphs. Paragraphs currently numbered § 162.75(d)(3) (1)

and (2) should be designated § 162.75(d)(3) (i) and (ii). The section is being corrected accordingly.

14. Part 172, Customs Regulations (19 CFR Part 172), contains provisions relating to liquidated damages incurred under the provisions of any bond posted with Customs. Section 172.33(c)(1) erroneously refers to the payment of "penalties and withheld duties" prior to filing a second supplemental petition contesting a decision concerning liabilities under a bond. The phrase should be "liquidated damages". Section 172.33(c)(1) is being amended accordingly.

15. Part 191, Customs Regulations (19 CFR Part 191), contains the general provisions and specific procedures relating to drawback claims. Throughout Part 191, various forms have been used to document transactions to determine their compliance with the drawback regulations. Customs has recently begun use of a new form, Customs Form 331, Manufacturing Drawback Entry and/or Certificate, which replaces nine forms previously used. Several sections within Part 191 are being amended to remove references to the obsolete forms.

Inapplicability of Public Notice and Delayed Effective Date Provisions

Inasmuch as these amendments merely conform the Customs Regulations to existing law or practice, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Executive Order 12291

Because this document will not result in a "major rule" as defined by § 1(b) of E.O. 12291, the regulatory analysis and review prescribed by the E.O. is not required.

Inapplicability of Regulatory Flexibility Act

This document is not subject to the provisions of §§ 603 and 604 of Title 5, United States Code, as added by § 3 of Pub. L. 96-354, the "Regulatory Flexibility Act". That Act does not apply to any regulation, such as this, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551, *et seq.* or any other statute.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects

In General
Customs duties and inspection, Imports, Exports.
19 CFR PART 10
Packaging and containers, Wildlife.
19 CFR PART 24
Accounting, Wages.
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Mexico.
19 CFR PART 134
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Administrative practice and procedure, Seizures and forfeitures.
19 CFR PART 172
Administrative practice and procedure.
19 CFR PART 191
Drawback.

AMENDMENTS TO THE REGULATIONS

Parts 10, 24, 112, 123, 134, 144, 145, 148, 162, 172, and 191, Customs Regulations (19 CFR Parts 10, 24, 112, 123, 134, 144, 145, 148, 162, 172, and 191), are amended as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1623, 1624.

§ 10.41a also issued under 19 U.S.C. 1322.

§§ 10.171–10.178 also issued under 19 U.S.C. 2461 *et seq.*

2. Section 10.7(a) is amended by removing the opening phrase, "Except as provided for in § 10.2(b),", and by changing the word "substantial" to "Substantial".

3. Section 10.41a is amended in the following manner:

(a) In paragraph (c), introductory text, the sentence, "The fact of approval and discontinuance of bonds on Customs Form 301, containing the bond conditions set forth in § 113.66 of this chapter will be published in the weekly CUSTOMS BULLETIN.", is removed.

(b) In paragraph (c)(1), the phrase, "published in the weekly CUSTOMS BULLETIN", is removed, and the word, "established" inserted in its place.

(c) In paragraph (c)(2), the phrase, "published in the weekly CUSTOMS BULLETIN", is removed from both places it appears, and the word, "established", inserted in both those places.

(d) In paragraph (c)(3), the word, "published" is removed from both places where it appears, and the word, "established" inserted in both places.

4. Section 10.74(c) is amended by removing the phrase, "Agricultural Research Service" and inserting, in it's place, "Animal Plant and Health Inspection Service".

5. Section 10.76(d) is amended by removing "Customs Form 3315", and inserting, in its place, "U.S. Fish and Wildlife Service Form 3-177, Declaration for Importation or Exportation of Fish or Wildlife".

6. Section 10.131 is amended by removing the phrase, "or Part 54 of this chapter".

7. Section 10.177(a) is amended by removing the quotation marks from the word "country" and placing quotation marks around the phrase, "produced in the beneficiary developing country" so the phrase appears as it does in the paragraph heading.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624; 31 U.S.C. 9701.

§ 24.17 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562; 46 U.S.C. 2110, 2111, 2112.

2. Section 24.17(f) is amended by removing the number, "1.3" and inserting, in its place, "1.35".

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1551, 1565, 1624.

2. All other statutory authority cited at the end of the index and various sections in Part 112 is removed.

3. Part 112 is amended by removing § 112.15.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for Part 123 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

§ 123.1 also issued under 19 U.S.C. 1459;

§ 123.2 also issued under 19 U.S.C. 1460;
§ 123.3 also issued under 19 U.S.C. 1459;
§ 123.4 also issued under 19 U.S.C. 1484, 1489;
§ 123.7 also issued under 19 U.S.C. 1498;
§ 123.8 also issued under 19 U.S.C. 1448, 1450–1454, 1459;
§ 123.9 also issued under 19 U.S.C. 1460, 1584, 1618;
§ 123.11 also issued under 19 U.S.C. 1465;
§§ 123.12–123.18 also issued under 19 U.S.C. 1322;
§§ 123.21–123.23, 123.25–123.29, 123.41, 123.51 also issued under 19 U.S.C. 1554;
§ 123.24 also issued under 19 U.S.C. 1551;
§§ 123.31–123.34, 123.42, 123.52, 123.64 also issued under 19 U.S.C. 1553;
§ 123.63 also issued under 19 U.S.C. 1461, 1462;
§ 123.71 also issued under 19 U.S.C. 1595.

2. All other statutory authority cited at the end of the index and various sections in Part 123 is removed.

3. Section 123.72 is revised to read as follows:

§ 123.72 Treatment of stolen vehicles returned from Mexico.

District directors shall admit without entry and payment of duty allegedly stolen or embezzled vehicles, trailers, airplanes, or component parts of any of them, under the provisions of The Convention between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft (Treaties and Other International Acts Series [TIAS] 10653), of June 28, 1983, if accompanied by a letter from the U.S. Embassy in Mexico City containing:

(a) A statement that the Embassy is satisfied from information furnished it that the property is stolen property being returned to the U.S. under the provisions of the convention between the U.S. and Mexico concluded January 15, 1981, and

(b) An adequate description of the property for identification purposes.

PART 134—COUNTRY OF ORIGIN MARKING

1. The authority citation for Part 134 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1304, 1624.

2. Section 134.55(b)(1) is amended by removing, "§ 19.5(b)", and inserting, in its place, "§ 24.17(a)(3)".

PART 144—WAREHOUSE AND REWAREHOUSE ENTIRES AND WITHDRAWALS

1. The authority citation for Part 144 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1484, 1557, 1559, 1624.

§ 144.3 also issued under 19 U.S.C. 1563;
§§ 144.33, 144.37 also issued under 19 U.S.C. 1562.

2. All other statutory authority cited at the end of the index and various sections in Part 144 is removed.

3. Section 144.5 is revised to read as follows:

§ 144.5 Period of warehousing.

Merchandise shall not remain in a bonded warehouse beyond 5 years from the date of importation.

4. Section 144.32(c) is amended by removing the word, "proprietors".

5. Section 144.36(a) is amended by removing the comma and the phrase, "including any lawful extension thereof." after the word, "period", and inserting a period.

PART 145—MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

§ 145.4 also issued under 18 U.S.C. 545; 19 U.S.C. 1618.

2. Section 145.4(c) is amended by removing "$250" and inserting, in its place, "$1000".

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The authority citation for Part 148 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1498, 1624. The provisions of this part, except for Subpart C, are also issued under 19 U.S.C. 1202 (Gen. Hdnote 11).

§ 148.51 also issued under 19 U.S.C. 1321.

2. Sections 148.12, 148.17, 148.31-148.38, 148.51, 148.101, 148.104, 148.111 and 148.113 are amended by removing "$300" or "$600", wherever they appear and inserting, in their place, "$400" or "$800", respectively.

3. Section 148.23(c) is amended in the following manner:

(a) In the heading to subparagraph (1), "$250" is removed, and, "$1,000 (with exceptions)" is inserted, in its place.

(b) In subparagagph (1), "$250" is removed, and, "$1,000 (except for articles valued in excess of $250 classified in Schedule 3, Parts 1, 4A, 7B, 12A, 12D and 13B of Schedule 7; items 772.30 and 772.35; and Parts 2 and 3 of the Appendix of the Tariff Schedules of United States Annotated)", is inserted, in its place.

(c) In the heading to subparagraph (2), "$250 but not over $500" is removed, and, "$1,000 (with exceptions)" is inserted, in its place.

(d) In subparagraph (2), "$250 but not over $500" is removed, and, "$1,000 (except for articles valued in excess of $250 classified in Schedule 3, Parts 1, 4A, 7B, 12A, 12D and 13B of Schedule 7; items 772.30 and 772.35; and Parts 2 and 3 of the Appendix of the

Tariff Schedules of the United States Annotated)" is inserted, in its place.

PART 162—RECORDKEEPING, INSPECTION, SEARCH AND SEIZURE

1. The authority citation for Part 162 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624. Subpart G also issued under 19 U.S.C. 1466, 1584, 1592, 1613, 1618.

2. Section 162.75 is amended by redesignating paragraphs (d)(3)(1) and (d)(3)(2), as (d)(3)(i) and (d)(3)(ii), respectively.

PART 172—LIQUIDATED DAMAGES

1. Tha authority citation for Part 172 continues to read as follows:

AUTHORITY: 5 U.S.C. 66, 1623, 1624.

2. Section 172.33(c)(1) is amended by removing "penalties and withheld duties", and inserting, in its place, "liquidated damages".

PART 191—DRAWBACK

1. The authority citation for Part 191 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1313, 1624.

2. Section 191.2(h) is amended by removing the last sentence, and inserting, in its place, "Depending on the type of drawback applied for, entries are filed on Customs Form 331, 7512, or 7539".

3. Section 191.2(p) is amended by removing the last sentence, and inserting, in its place, "A Manufacturing Drawback Entry and/or Certificate, Customs Form 331, when properly completed, may serve as an abstract of manufacturer's record".

4. Sections 191.62(a)(1) and (2) are revised to read as follows:

§ 191.62 Filing Procedure.

(a) *Manufacturing Drawback Entry and/or Certificate.*—(1) *Customs Form 331.* The drawback claimant shall file with the appropriate district director the manufacturing drawback entry and/or certificate in duplicate on Customs Form 331, if claiming under 19 U.S.C. 1313(a) or (b). The district director may require an additional copy for administrative use.

(2) *Customs Form 331—Additional Uses.* The drawback claimant shall file with the appropriate district director the original drawback entry on Customs Form 331 in the two instances listed below. The district director may require an additional copy for administrative use.

(i) *Certificates of manufacture filed prior to entry.* When the drawback claimant files a certificate of manufacture prior to the

filing of the entry, he shall file the entry on Customs Form 331 and refer to the certificate of manufacture in the entry by the official number instead of describing the particulars of importation and manufacture.

(ii) *Purchase of manufactured articles for exportation.* A purchaser of a completely manufactured article who exports it and claims drawback shall file an entry on Customs Form 331.

(3) * * *

(4) * * *

* * * * * * * *

5. Section 191.65 is revised to read as follows:

§ 191.65 Certification of delivery.

(a) *When required.* If the merchandise used in the manufacture of the exported articles was not imported by the manufacturer of the articles, no drawback shall be allowed until the drawback claimant files with the regional commissioner where the claim is to be liquidated a manufacturing drawback entry and/or certificate in duplicate on Customs Form 331, or official evidence of the existence of the form filed at another place. The form must describe the merchandise delivered, tracing it from the custody of the importer to the custody of the manufacturer.

(b) *Intermediate transfer.* If the merchandise was not delivered directly from the importer to the manufacturer, each intermediate transfer shall be described on the manufacturing drawback entry and/or certificate (Customs Form 331), certified by the person through whose possession the merchandise passed.

(c) *Consignee as importer.* When the consignee named in an entry summary declares another person to be the actual owner, the consignee shall be considered the importer for drawback purposes, even though the consignee files an owner's declaration under § 485(d), Tariff Act of 1930, as amended (19 U.S.C. 1485(d)). The drawback claimant shall file a manufacturing drawback entry and/or certificate (Customs Form 331), showing the initial transfer from the consignee to the person to whom delivery was made.

(d) *Warehouse transfer and withdrawals.* The person in whose name merchandise is withdrawn from a bonded warehouse shall be considered the importer for drawback purposes. No manufacturing drawback entry and/or certificate (Customs Form 331) is required covering prior transfers of merchandise while in a bonded warehouse.

6. Section 191.66 is revised to read as follows:

§ 191.66 Certificates of manufacture and delivery.

(a) *When required.* If the imported merchandise has undergone some process of manufacture before delivery, and the wholly or partially manufactured article thereafter is used in the manufacture of some other article for exportation, or when completely manufactured articles are purchased for exportation without further

manipulation, the drawback claimant, whether the manufacturer or the exporter, shall file a manufacturing drawback entry and/or certificate on Customs Form 331.

(b) *Subcontractors.* If a subcontractor performs work, which for drawback purposes does not constitute a manufacture or production, with the use of merchandise the principal plans to make the subject of a drawback claim, and if there is a problem in identifying the merchandise the subcontractor returns to the principal from the merchandise received from the principal, the subcontractor shall complete a manufacturing drawback entry and/or certificate (Customs Form 331). If there is no problem of identification, the subcontractor shall complete only the delivery section of the form. If complementary records are maintained by a subcontractor's principal (see § 191.22(d)), and Customs determines no problems of identification exist, it may waive the filing of Customs Form 331 for transfers between principal and subcontractor, whether the subcontractor's operation involves manufacture or not.

(c) *Identifying manufacturing drawback entry and/or certificates.* Drawback claimants may identify the relevant manufacturing drawback entry and/or certificates on drawback entries covering the exported articles rather than describe the importation and manufacture.

(d) *Certification of immediate transfer.* Any intermediate transfer of manufactured articles shall be certified on the manufacturing drawback entry and/or certificate (Customs Form 331).

(e) *Entry filed at place other than where certificate filed.* If the drawback entry is filed at a place other than where the manufacturing drawback entry and/or certificate (Customs Form 331) is on file, the regional commissioner may transmit to the place where the drawback entry is filed an extract on Customs Form 4537.

(f) *Special requirements for agency transactions.*—(1) *Requirement of agent.* Each agent manufacturer who conducts operations under § 191.34 shall furnish the principal for whom it processed merchandise a manufacturing drawback entry and/or certificate (Customs Form 331) completing only the portion applicable to the operation so conducted, relating to the substituted or designated merchandise, and identifying the owner of the articles for whom processing was conducted.

(2) *Requirements of principal.* The principal for whom processing was conducted under § 191.34 shall complete and file a manufacturing drawback entry and/or certificate (Customs Form 331) and attach it to the forms from its agents or agent.

7. Section 191.82(e) is revised to read as follows:

§ 191.82 Procedure.

* * * * * * *

(e) *Customs Form.* The Manufacturing Drawback Entry and/or Certificate (Customs Form 331) shall be used in place of the corre-

sponding forms used in the case of articles manufactured with the use of imported merchandise.

* * * * * * *

8. Section 191.84(c) is revised to read as follows;

§ 191.84 Alcohol, Tobacco and Firearms certificates.

* * * * * * *

(c) *Request accompanied by Customs Form 331.* If the request is accompanied by Customs Form 331 showing any of the information required by paragraph (d) of this section, that information need not be repeated in the request.

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 2, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 20, 1986 (51 FR 22513)]

U.S. Customs Service

General Notices

Importations Bearing Recorded U.S. Trademarks; Solicitation of Public Comment on Gray Market Policy Options

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Solicitation of public comment on "gray market" policy options.

SUMMARY: This document solicits public comment concerning the importation of parallel imports, or so-called gray market goods, which are products manufactured overseas bearing genuine trademarks that are purchased from foreign retailers of wholesalers and imported into the U.S without the permission of the individual or corporation who owns the rights to the trademark in the U.S. market. Customs regulations traditionally have interpreted existing U.S. law to permit these goods to enter the U.S. when the foreign and American owners of the trademark are "related." Three U.S. Courts of Appeal have reached different conclusions concerning the validity of the regulations.

A previous solicitation for comments on the economic effects of gray market imports was published in the Federal Register on May 21, 1984 (49 FR 21453), and an extension of the comment period was published on July 20, 1984 (49 FR 29509).

This notice solicits information regarding two alternative approaches to the gray market that have been suggested which might address certain of the economic problems created by parallel imports. The alternatives are mandatory labeling and mandatory removal of the trademarks (i.e., demarking) of such imports. Information is sought on the economic soundness of these alternatives, including the possible ways to implement them, the problems and costs associated with their implementation, and the relative effectiveness of the approaches. We are soliciting information whichu will facilitate a cost-benefit analysis to determine whether mandatory demarking or labeling is in the public interest.

DATE: Comments and/or data are requested on or before August 18, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Steven Pinter, Entry, Licensing & Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The statutory framework affecting the importation of foreign articles bearing registered trademarks, so-called "parallel imports" or "gray market goods", is contained in § 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526) and § 42 of the Lanham Trademark Act (15 U.S.C. 1124). The Customs Regulations implementing these statutes are set forth in Part 133 of Title 19, Code of Federal Regulations (19 CFR Part 133). The Customs Regulations permit any person to import foreign manufactured articles bearing genuine trademarks where: (1) Both the foreign and U.S. trademark are owned by the same person or business entity; (2) the owners of the foreign and domestic trademarks are parent and subsidiary companies or are otherwise subject to common ownership or control; or (3) the articles bear a trademark applied under authorization of the U.S. trademark owner. Otherwise the regulation prohibit importations of such articles without the consent of the U.S. trademark owner and provide for the seizure and forfeiture of such articles.

The controversy over these gray market goods prompted Customs, in cooperation with other government agencies, to publish a notice soliciting economic data on the short and long term effects of such importations. A previous solicitation for comments on the economic effects of gray market imports was published in the Federal Register on May 21, 1984 (49 FR 21453), and an extension of the comment period was published on July 20, 1984 (49 FR 29509).

Two alternatives to the gray market situation have been suggested that might address certain of the economic problems allegedly created by parallel imports. The alternatives are mandatory labeling and mandatory removal of the trademarks (i.e., demarking) of such imports. The purpose of this notice is to solicit information on the economic soundness of these alternatives, including the possible ways to implement them, the problems and costs associated with their implementation, and the relative effectiveness of the approaches. We are soliciting information that will facilitate a benefit-cost analysis to determine whether mandatory demarking or labeling is in the public interest.

U.S. trademark law encourages investment in the manufacture and distribution of products by protecting the reputation or goodwill established by trademark owners. It also protects the public from mistake, deception, and confusion with regard to a product's

source. U.S. trademark owners obtain protection against imported goods that infringe their trademarks through a Federal registration system which gives persons or corporations owning trademarks in the U.S. the right to have the Customs Service exclude at the U.S. border imports that bear marks that would copy or simulate a trademark registered with the Patent and Trademark Office in the U.S.

Sometimes separate entities own the U.S. and foreign rights to a particular trademark. Since 1922, U.S. law has prohibited the importation of products manufactured overseas bearing genuine trademarks that are registered in the U.S. unless express consent is received from the owner of the U.S. trademark at the time the product enters the U.S. The Customs Service, in its regulations, however, has traditionally interpreted the law to recognize a "related party" exception to this general statutory prohibition. This exception permits products manufactured overseas bearing genuine trademarks to enter the U.S. without the permission of the U.S. trademark owner in cases where the foreign manufacturer is "related" to the U.S. trademark owner, e.g., is a parent, subsidiary, or licensee. (See 19 CFR 133.21). This frequently results in importations by third parties who are typically beyond the contractual control of the foreign manufacturer and its related U.S. trademark owner. These genuine trademarked products are imported into the U.S. and are often sold to U.S. consumers at discount prices. The volume and scope of these imports have increased in recent years due, in part, to the comparatively high value of the U.S. dollar, making the Customs "related party" exception a contentious issue with U.S. trademark owners.

Section 133.21, Customs Regulations, was upheld in *Vivitar Corp.* v. *United States*, 761 F.2d 1552 (Fed. Cir. 1985), cert. denied, 106 S. Ct. 791 (1986) and in *Olympus Corp.* v. *United States*, No. 85-6282 (Second Cir. June 9, 1986), but were found unlawful in *Coalition to Preserve the Integrity of American Trademarks* v. *United States*, No. 84-5890 (D.C. Cir. May 6, 1986) (COPIAT). Proceedings in the *COPIAT* and *Olympus* cases are still ongoing.

Proponents and opponents of maintaining the traditional Customs policy have each contended that their approach will best serve the interests of U.S. consumers. Proponents of maintaining the "related party" exception contend that the regulation frustrates efforts by multinational firms to price discriminate against U.S. consumers. If such firms seek to charge consumers in the U.S. a higher price than their foreign counterparts charge for the same trademarked product, the "related party" exception allows arbitrage, i.e., the resale or transfer of the product by unrelated third parties from the foreign country to the U.S., where it is sold at prices below those charged by dealers authorized by the U.S. trademark owner. In such cases, the traditional Customs policy results in greater availability of the trademarked product and lower prices

to U.S. consumers. Proponents argue further that if the "related party" exception did not exist, the Federal government would become the *de facto* enforcer of multinational firms' decisions to price discriminate against U.S. consumers.

On the other hand, opponents of traditional Customs policy contend that the "related party" exception harms American consumers in two ways. First, opponents contend, it discourages U.S. trademark owners from investing in marketing or servicing of trademarked products by permitting others to "free ride" on these investments. For example, a U.S. trademark owner or a U.S. distributor of a trademarked good may be discouraged from investing in services, such as comprehensive warranty service for the product, if "free riders" can sell and distribute the same trademarked product without bearing the costs of such warranty. Second, opponents argue that the influx of gray market goods may deceive or confuse consumers about the source of trademarked products and therefore about the quality or availability of warranties on those products. Consumers may assume that all goods bearing a particular trademark are covered by uniform service warranties or are uniformly backed by the reputation of the same firm, regardless of who resells or distributes them.

Policy Options

Labeling and demarking have been proposed as policy alternatives as a means of preserving most or all of the beneficial arbitrage effect, while at the same time ameliorating undesirable free rider and consumer confusion effects that might exist. As a result, the Economic Policy Council seeks additional information on the following:

(1) *Labeling:* Mandate Federal labeling requirements on parallel imports, either on the imported goods or at the retail place of purchase.

(2) *Demarking:* Require the trademark on parallel imports to be "demarked," i.e., removed or obscured, prior to importation to the U.S.

Questions

The Economic Policy Council has asked that the following questions with regard to the labeling and demarking options be published for public comment.

In responding to these questions, commenters are strongly advised to provide, to the fullest extent possible, systematic, verifiable data (and sources) that give more than anecdotal support for any arguments or positions presented. Commenters are encouraged to provide data or information for as broad a range of product markets as possible.

Labeling. The following questions relate to mandatory labeling of parallel imports.

1. What is the most effective, practical approach for mandatory labeling of parallel imports?

a. What information should the label provide?

b. Should the label requirements be uniform for all parallel imports or differ depending upon the product involved?

c. Should the label be affixed to the product, container or both?

d. Who should be required to affix the label and how should it be affixed?

e. Who would perform the enforcement function? How would it be performed? Where would it be performed?

f. What remedies and/or penalties should be available for failure to label properly a parallel import?

g. Describe any other factor that should be addressed in considering regulations or legislation mandating labeling.

2. What are the costs of mandatory labeling?

a. What would be the increased cost to the government, to the importer, to the distributor, to the manufacturer, to the consumer?

b. What would be the volume of goods affected?

c. What would be the effect of the labeling requirement on the ability of parties to purchase trademarked goods abroad, import them into the U.S. and sell them at a cost lower than that of the authorized distributor? Does it vary among different goods? Are there any goods for which the effect would be to halt or significantly impair the parallel imports?

d. Are there any other costs associated with mandatory labeling?

3. What are the benefits of mandatory labeling?

a. Describe the evidence demonstrating the existence and significance of any consumer information problems that may result from the gray market. To what extent would the requirement address consumer confusion or deception problems resulting from parallel imports? Would these labels be read? To what extent would the existence of the label change consumers' purchasing decisions?

b. How easy would it be to circumvent a mandatory labeling requirement?

c. Are there any other benefits that should be considered?

4. Are there any other factors that are relevant to or affect parallel imports that have not been cited herein but that should be taken into account when formulating a policy on labeling of such goods?

Demarking

5. What is the most effective, practical approach for demarking parallel imports?

a. Should the demarking requirement be uniform for all parallel imports or differ depending upon the products involved?

b. How should products be demarked? Should demarking apply to the product, its container, or both? Must the trademark be removed or would covering it be sufficient? Must the covering be permanent?

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c. Are there products that cannot be demarked at all or cannot be demarked without doing serious damage to the product? If so, how should these products be treated?

d. Who would enforce the demarking regulation? How would it be enforced? Where would it be enforced?

e. What remedies and/or penalties should be available for failure to properly demark a parallel import?

6. What are the costs of mandatory demarking?

a. What is the increased cost of demarking to the government, to the importer, to the distributor, to the manufacturer, to the consumer?

b. What would be the volume of goods affected?

c. What would be the effect of the demarking requirement on the ability of firms to purchase trademarked goods abroad, import them into the U.S. and sell them at a cost lower than that of the authorized distributor? Would it vary among different goods? Are there cases where the effect would be to halt or significantly impair parallel imports?

d. Would a demarking requirement affect the manner or extent to which owners apply trademarks to goods? Would it affect the design of products?

e. Are there any other costs associated with mandatory demarking?

7. What are the benefits of mandatory demarking?

a. Describe the evidence demonstrating the existence and significance of any consumer information problems that may result from the gray market. To what extent would mandatory demarking address the free rider or consumer confusion or deception problems resulting from parallel imports? What relevant information could retailers tell consumers (in advertisements or face-to-face) concerning a parallel import? Could the product be advertised as identical to the trademarked product? How would the ability to provide this information affect any potential benefits of demarking?

b. How easy would it be to circumvent this requirement?

c. Are there any other benefits that should be considered?

8. Are there any other factors that are relevant to or affect parallel imports that have not been cited herein but that should be taken into account when formulating a policy on demarking of such goods?

Comparison of Labeling and Demarking

9. Compare the costs, and benefits of mandatory labeling and mandatory demarking. Which of these approaches would be better?

COMMENTS

Comments and/or data submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), §1.4, Treasury Department Regulations (31 CFR 1.4), and §103.11(b), Customs Regulations (19 CFR 103.11(b)), between

9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The background explanation and questions contained in this document were prepared by the President's Economic Policy Council. However, personnel from the Customs Service and Treasury Department participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 13, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 17, 1986 (51 FR 22004)]

Performance Review Boards: Appointment of Members

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces the appointment of additional members of the U.S. Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4313(c)(4). The purpose of the PRB's is to review senior executive employees' performance and make recommendations regarding performance ratings and performance awards.

DATE: The additional memberships on the Performance Review Boards are effective as of this date.

FOR FURTHER INFORMATION CONTACT: Jerry L. Padalino, Director, Office of Human Resources, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 1134, Washington, D.C., (202) 377-9205.

SUPPLEMENTARY INFORMATION: There are two Performance Review Boards in the U.S. Customs Service. The additional members will serve on the Performance Review Board that reviews Senior Executives rated by the Commissioner and Deputy Commissioner. By Notice published in the Federal Register on May 15, 1986 (51 FR 17849), the U.S. Customs Service identified the other individuals who will serve as members. The additional members are as follows:

Raymond A. Fontaine, Comptroller, General Services Administration;

Joseph H. Linnemann, Associate Comptroller, U.S. Department of State;

Michael T. Schmitz, Chief Counsel, U.S. Customs Service;

Stuart I. Smith, Executive Director, Public Buildings Service, General Services Administration.

Dated: June 11, 1986.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

[Published in the Federal Register, June 17, 1986 (51 FR 22005)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-735)

UNITED STATES OF AMERICA, APPELLEE *v.* PRIORITY PRODUCTS, INC., and WALTER L. AND ROSALIE E. HUSS, APPELLANTS

Stephen Delgiudice, of Washington, D.C., argued for appellants. *Michael R. Totaro* and *Maureen J. Shanahan*, Totaro and Shanahan, of Beverly Hills, California, were on the brief for appellants.

Platte B. Moring, III, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General and *David M. Cohen*, Director, *Patricia Olson*, District Counsel, U.S. Customs Service, of Seattle, Washington, of counsel.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

(Appeal No. 86-735)

UNITED STATES OF AMERICA, APPELLEE *v.* PRIORITY PRODUCTS, INC., and WALTER L. AND ROSALIE E. HUSS, APPELLANTS

(Decided June 16, 1986)

Before MARKEY, *Chief Judge*, NEWMAN, *Circuit Judge*, and SWYGERT, *Senior Circuit Judge*.*

SWYGERT, *Senior Circuit Judge*.

The issue presented in this case is whether the United States Customs Service's failure to name corporate officers in their individual capacities in written administrative pre-penalty and penalty notices issued pursuant to 19 U.S.C. § 1592(b) (1982) precludes suit against them in the Court of International Trade to recover a penalty originally assessed only against the corporation. The trial judge held that it did not, and we affirm.

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*Honarable Luther Merritt Swygert, U.S. Senior Circuit Judge for the Seventh Circuit, sitting by designation

OPINION

I

On October 1, 1982, pursuant to section 1592(b), the Portland, Oregon District Director of the United States Customs Service ("Customs Service") issued a pre-penalty notice regarding the allegedly fraudulent importation of bark tea from Brazil in September 1982. The notice was addressed and mailed to Priority Products, Inc. ("Priority"). On October 6, 1982 the Food and Drug Administration issued a notice of detention of the bark tea and hearing relating to the same transaction. At that time, Walter L. Huss and Jack Meligan each owned fifty percent of the shares of Priority. Walter Huss was chairman of the Board of Directors, Meligan was president, and Rosalie E. Huss (Walter's wife) acted as secretary. Priority had no other directors, officers, or employees.

On October 28, 1982 Walter and Rosalie Huss attended a meeting with the District Director of the Customs Service regarding the pre-penalty notice. By then Meligan had severed his relationship with Priority. Walter Huss became president, and the Husses were the sole shareholders of the corporation. After the October 28 meeting Walter Huss mailed a letter, which he signed as president of Priority, to the District Director acknowledging and summarizing the meeting and presenting his position.

On April 19, 1983 a summons to appear and produce records was issued addressed to "Mr. Walter Huss, Priority Products Corp." In response to the summons, on May 4, 1983, Walter Huss appeared at the offices of the Customs Service and submitted a written statement signed by "Walter Huss" to the special agent in charge of the investigation. In that statement, Huss wrote that he had hired an attorney as the special agent had advised, that the agent should contact Huss' attorney, and that Huss was aware that the agent had made a charge of "fraud" against him. He also stated that "my property" had been improperly seized and detained by the Customs Service. On May 17, 1983 the Customs Service issued a penalty notice to Priority, with a cover letter addressed to "Walter L. Huss, President," imposing a penalty of $61,301.

Mr. Huss' attorney filed a petition for relief on August 9, 1983 on behalf of Priority. In that petition Huss' attorney wrote that Huss had been informed by the United States Attorney that the Customs Service was recommending that Mr. and Mrs. Huss be prosecuted criminally for fraud in connection with the importation. Huss' attorney addressed the minimal role the Husses had played in Priority's operations prior to November 1, 1982, and the exculpatory nature of the Husses' involvement in the importation. On that same day Huss also submitted a petition for relief to the United States Attorney in Portland, Oregon; it is unclear in what capacity he signed that petition. In it he wrote first that the District Director of Customs has alleged that the "Defendant, Walter Huss," is

guilty of fraud and second that the "administrative criminal charges of fraud * * * brought by the Government * * * are first against Walter Huss and only secondly * * * against Priority Products."

The Customs Service responded by letter dated January 30, 1984 to "Priority Products, Inc., attention Mr. Walter Huss," stating that it was referring the matter to Customs Service's headquarters for review and determination. On April 10, 1984 the Customs Service sent another letter to "Priority Products Corporation" indicating that the assessed penalty had been mitigated to $16,260 and that Priority had sixty days within which to pay the penalty. Within that sixty-day period Huss filed a "criminal complaint" and affidavit of information on behalf of himself against, *inter alia*, agents of the United States Customs Service. It is unclear whether Priority or the Husses refused to pay the penalty. But because the penalty remained unpaid by the end of the sixty-day period, on September 21, 1984, the United States ("the Government") brought suit against Priority, and against Mr. and Mrs. Huss, individually, in the Court of International Trade pursuant to 28 U.S.C. § 1582. At the time of the filing of the complaint, Priority was in involuntary dissolution. The Husses were each served with a copy of the complaint. Shortly thereafter, each of them signed their answer to the complaint "for Priority Products and themselves" in which they challenged the subject matter jurisdiction of the court.

The Husses subsequently filed a motion for summary judgment on the grounds, *inter alia*, that the court lacked subject matter jurisdiction over that part of the complaint against them because they had not been named in their individual capacities in the written pre-penalty and penalty notices. They also claimed that this failure violated their right to due process under the fifth amendment.

The Government responded, disputing these claims. However, it requested that, in the event the court found the Husses' arguments to be meritorious, the trial be delayed to permit the Customs Service to complete the administrative process with respect to the Husses.

The court denied the Husses' motion, holding that nothing in the statute, 28 U.S.C. § 1582 (1982), compelled compliance with the written notice procedures in 19 U.S.C. § 1592 as to every party that might ultimately be called upon to pay the penalty assessed against the corporation and that, in any event, the evidence demonstrated that the Husses had sufficient information from which a reasonable person would conclude that the Customs Service intended to pursue them in their personal capacities. The court further held that there had been no due process violation because the Husses had actual notice that they might be sued in their personal capacity and because they had taken advantage of every adminis-

trative remedy in their personal capacities that was available to them under section 1592 of Title 19.

The case proceeded to a trial before a jury, the first jury trial ever held in the Court of International Trade. In that case, the Government presented evidence that Rosalie Huss, with the consent of her husband but without Meligan's knowledge, attempted to import the bark tea into the United States. The Husses presented evidence that they were not personally responsible for the attempted importation. At the end of the presentation of all the evidence, the jury was instructed on the circumstances under which corporate officers such as the Husses could be held personally liable for actions taken in the name of a corporation. The jury found all three defendants, the Husses and Priority, jointly and severally liable for a penalty of $30,000.

II

On appeal the Husses do not complain about any errors in the conduct of the trial itself. They claim only that the judgment as to them must be reversed because the failure to name them individually in the written pre-penalty and penalty notices deprived the Court of International Trade of subject matter jurisdiction under 28 U.S.C. § 1582 and violated their right to due process.

A

The Husses' first argument is that the Court of International Trade lacked subject matter jurisdiction over the claim against them because the Customs Service failed to serve them individually with a written pre-penalty or penalty notice pursuant to 19 U.S.C. § 1592. In essence their argument is as follows. Section 1582 of Title 28 provided that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—(1) to recover a civil penalty under [19 U.S.C. § 1592] * * *." No "civil penalty" exists under 19 U.S.C. § 1592 against a particular defendant unless the Customs Service has complied with all of the procedures of section 1592(b), including written pre-penalty and penalty notices with respect to that particular defendant. Because the Husses were never served at the administrative level with written notice of their potential individual liability for the penalty, no civil penalty exists as to them over which the Court of International Trade can exercise jurisdiction. Because compliance with the procedures of section 1592(b) is a prerequisite to the exercise of subject matter jurisdiction under 28 U.S.C. § 1582, the fact that they may have had actual notice of their potential personal liability for the penalty is simply irrelevant.

We find this line of argument unpersuasive. The instant action falls within the literal terms of 28 U.S.C. § 1582. It is one that "arises out of an import transaction" and that was commenced by

the United States to recover "a civil penalty" imposed under section 19 U.S.C. § 1592, albeit a penalty originally assessed against Priority and not against the Husses personally. In addition, nothing in the statute or its legislative history demonstrates that Congress intended to narrowly circumscribe the subject matter jurisdiction of the Court of International Trade to encompass only those suits brought by the Government against parties expressly named in the administrative proceedings. In fact, the language of the statute appear to suggest otherwise. Section 1592(e)(1) provides that "in any proceeding * * * commenced for the recovery of any monetary penalty claimed under this section—(1) *all issues*, including the amount of the penalty, shall be tried *de novo*" (emphasis added). Thus it appears that so long as some "civil penalty exists" the Court of International Trade can assume jurisdiction over any complaint to recover that penalty, and the issue of who is ultimately responsible for payment of the penalty is subject to *de novo* consideration.

Other considerations also compel us to conclude that Congress did not intend that formal compliance with each procedure set forth in 19 U.S.C. § 1592 as to every party that might be called upon to pay the penalty be a jurisdictional prerequisite to suit under section 1582. First, the rule proposed by the defendants would place an unduly heavy administrative burden on the Customs Service. To preserve its right to sue all possible parties, the Customs Service would have to delve into the records of each corporation subject to possible penalty to uncover the names of all corporate directors, officers, and shareholders, serve them with notice and grant them an opportunity to contest their personal liability. All directors, officers, and shareholders would have to be served because it is unlikely that the Customs Service would have the time, legal expertise, or even necessary information to determine whether, in a particular case, a particular shareholder, officer, or director might be accountable for the liabilities of the corporation. The Customs Service regulations implicity recognize this limitation by providing that notice is to be mailed to a party who the *facts-of-record* indicate has an interest in the property. *See* 19 C.F.R. § 162.31(a) (1985) (emphasis added).

Second, this rule would also permit those directly responsible for a violation of the customs laws to avoid liability, or, at the very least, to unduly delay enforcement of those laws. Owners and officers might choose to alter the nature of the corporation by dissolving the corporation or selling the assets or shares of the corporation after the United States has commenced suit, thereby precluding the Government from recovering the penalty or forcing it to return to the beginning of the administrative process.

Third, failure to provide adequate notice or opportunity to participate at the administrative level is generally not perceived as a jurisdictional prerequisite to an enforcement action brought by the

agency. *See, e.g., Small Refiner Lead Phase-down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). Rather, these are perceived as mere procedural irregularities which are subject to harmless error analysis and which, unlike subject matter jurisdiction, are waivable.

Fourth, the defendants' claim here is in essence a claim that the agency has failed to exhaust administrative remedies. There is no doubt that the doctrine of exhaustion of administrative remedies applies to an agemcy seeking enforcement of administrative action prior to the completion of the administrative process. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-68 (1947). Exhaustion of administrative remedies is not strictly speaking a jurisdictional requirement and hence the court may waive that requirement and reach the merits of the complaint. *See generally* 4 K. Davis *Administrative Law* § 26.8 (1983) and cases cited therein. *But see Sims* v. *Schweiker*, 547 F. Supp. 752, 755 (N.D. Ill. 1982). In fact, Congress appears to have recognized this in cases such as the one at bar by granting the Court of International Trade some discretion to excuse the failure to exhaust administrative remedies. *See* 28 U.S.C. § 2637(d) ("In any civil action not specified in this action, the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies.") (emphasis added). *See also United States* v. *Bavarian Motors, Inc.*, —— F. Supp. ——, —— 4 C.I.T. 83, 86 (1982). In the case at bar, the trial court would have been amply justified in excusing the Government's failure to exhaust administrative procedures, if indeed its failure to individually notify the Husses in writing did constitute a failure to exhaust administrative procedures. *Cf. id.*, —— F. Supp. at ——, 4 C.I.T. at 86.

Finally, in our view, the defendants mistakenly characterize their lack of jurisdictional contention as one involving subject matter jurisdiction over the Government's claim in the Court of International Trade. Rather, their contention is more properly characterized as one involving personal jurisdiction. Even if such personal jurisdiction were a prerequisite at the pre-penalty notice stage, constructive notice would suffice or could be waived. Both of these elements were present here.

We therefore hold that the failure to serve corporate officers/directors/shareholders with written notice of their potential personal liability does not deprive the Court of International Trade of subject matter jurisdiction over a complaint against those persons to recover a civil penalty originally assessed against the corporation.

B

We also find no merit to the Husses' contention that they were deprived of due process by the Government's failure to serve them with written notice of their potential personal liability at the pre-penalty and penalty stages. We make this finding without deciding

whether the opportunity for a trial *de novo* afforded the Husses with all the process to which they were entitled. *See Nickey* v. *Mississippi*, 292 U.S. 393 (1934). Rather, we hold that Mr. and Mrs. Huss did receive due process at the administrative level.

As the trial court found, the record evidence demonstrates that Mr. Huss clearly had actual notice and understood that the Customs Service might sue him in his personal capacity to recover the penalty, and that he did present arguments to the District Director of Customs regarding his lack of personal culpability. He had also hired an attorney whom he apparently consulted regarding his personal participation in the attempted importation. As a result, his protestation on appeal that he has been prejudiced because he was unable to make an informed judgment regarding whether or not to pay the mitigated penalty is unavailing.

The record is less clear that Mrs. Huss had actual notice of her potential personal liability or that she had an opportunity to participate, as an individual, in the administrative proceedings. To be sure, the record shows that she did attend the first pre-penalty hearing with the Director and that Mr. Huss' attorney in his petition on behalf of the corporation did state that Mrs. Huss had been informed that she might be criminally prosecuted. This modicum of evidence, however, does not establish either actual notice or participation in any administrative proceedings in her personal capacity. In addition, the Government has suggested no reason why Mr. Huss' knowledge or activities on behalf of himself should be imputed to his wife. Thus we cannot agree with the trial judge that Mrs. Huss' due process objection can be dismissed because of her actual notice and personal participation at the administrative level.

Nonetheless on the narrow facts of this case, we uphold the trial judge's dismissal of Mrs. Huss' due process claim. At the time of the attempted importation, Mrs. Huss was one of only three officers of Priority and she concedes that she made the important decisions regarding the attempted importation. At this time Priority was a close corporation, with her husband being a fifty percent shareholder. Shortly thereafter, when the administrative proceedings were just under way, the Husses became the sole shareholders, employees, and officers of Priority. Although we recognize that the average person is not necessarily schooled in the legal intricacies of personal liability of officers and shareholders for a corporation's liabilities, we are of the view that as one of only two employees/officers/shareholders of a small family corporation, Mrs. Huss was or should have been aware that under certain circumstances she could be held accountable for Priority's liabilities.

It is also significant that she had access to the corporation's attorney whom she could have consulted, and perhaps did consult, regarding the probability of whether she might be called upon to pay some or all of the mitigated penalty. Under these limited facts, and in view of her admission that she was largely responsible for at-

tempting to import the bark tea, we believe that Mrs. Huss, at the very least, had constructive notice of her potential personal liability such that she should have consulted with Priority's lawyer about whether to pay the mitigated penalty or risk the imposition of a greater penalty at the trial court level. She was therefore accorded all of the process to which she was due.

The judgment of the trial court is affirmed.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–61)

SOUTH AFRICAN MARINE CORP., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-12-01757

OPINION AND ORDER

[Motion to dismiss granted.]

(Decided June 6, 1986)

O'Conner & Hannan (Myles J. Ambrose and *F. Gordon Lee)* for plaintiff.
Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, *Saul Davis,* Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff, South African Marine Corporation, Ltd. (SAM), a South African corporation engaged in the business of owning and operating ocean-going vessels, seeks to challenge the imposition of import fees on raw sugar it transported from Swaziland to the United States. Defendant moves to dismiss the claim for lack of jurisdiction. Defendant claims that plaintiff does not possess the statutory right to seek judicial review of the relevant administrative action.

The facts of this case are not in dispute. SAM entered into a contract with Swazi Sugar Corporation (Swazi), the exporter of record, to transport the subject sugar to the United States. Under the terms of the agreement, plaintiff guaranteed the arrival of the merchandise at the first sugar port in the United States before September 30, 1981.

Swazi then entered into a contract of sale for the full amount of the sugar with Czarnikow, Ltd. Czarnikow, Ltd., sold some of the sugar to Czarnikow, Inc., which sold the sugar to Philipp Bros., which sold the sugar to Imperial Sugar Co. (Imperial), the importer of record. Czarnikow, Ltd., sold the remainder of the sugar to Christman Trading Corp., which sold the sugar to Refined Syrups, which sold the sugar to Farr Man Co. Farr Man Co. sold some of the sugar to Imperial and the remainder to Coca Cola Co. Coca Cola sold the sugar to Imperial. All of the contracts involved pro-

vided that the sugar be sold on a duty-paid basis; consequently, each purchaser could deduct from the contract price any import fee imposed.[1] In this fashion, any import fee imposed on Imperial was to be passed up the chain of sale to Swazi.

Plaintiff's vessel containing the sugar arrived at the first United States port on October 1, 1981. A quarterly adjusted import fee became effective on the same date.[2] Consequently, the United States Customs Service (Customs) assessed an import fee against Imperial. Imperial paid the total import fee to Customs on October 1, 1981. On April 2, 1982, the entry was liquidated by Customs, resulting in a slight adjustment in the fee.[3] This adjusted fee was deducted from the contract price up the line of sellers to Swazi. In turn, pursuant to the contract between Swazi and SAM, SAM ultimately paid Swazi an amount based on the fee as damages for breach of contract.[4]

Plaintiff, Imperial, and Swazi jointly filed a protest challenging the imposition of the fee on June 29, 1982. Customs denied the protest on June 20, 1984. Plaintiff, independent of the other parties, brings this suit challenging the propriety of the imposition of the fee.[5]

Defendant claims that plaintiff does not fall within the statutory classes of parties who may protest an administrative decision and, subsequently, may contest denial of such a protest. Plaintiff counters that the government's failure to object to the propriety of the protest by SAM, at the time the protest was filed, prohibits it from now objecting on that basis to the filing of this action. Plaintiff contends that Customs was obligated to raise this issue when it considered and denied the protest. In addition, plaintiff contends that raising the issue at this stage in the proceedings is unduly prejudicial, presumably because the statute of limitations has run.

WAIVER

For plaintiff to bring a suit challenging the imposition of duties or fees, the suit must contest the denial of a valid protest filed by plaintiff. 28 U.S.C. §§ 1581(a), 2631(a) (1982). In *Shigoto International Corp.* v. *United States*, 66 Cust. Ct. 252, C.D. 4199 (1971), this

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[1] The Farr Man-Imperial contract does not contain a duty-paid clause. The parties agree, and close examination of the invoices involved demonstrates, however, that Farr Man and Imperial performed their obligations under the contract as if it contained a duty-paid clause.

[2] The import fee on raw sugar is charged at a fluctuating rate and is imposed in lieu of ordinary customs duties. Section 22 of the Agricultural Adjustment Act, as amended, authorizes the President of the United States to impose such fees by proclamation. 7 U.S.C. § 624 (1982). On December 28, 1978, President Jimmy Carter issued a proclamation providing for a quarterly adjusted fee on sugar. Proclamation No. 4631, 44 Fed. Reg. 1 (1978). See Section 22 Import Fees: Determination of Quarterly Import Fees on Sugar, 46 Fed. Reg. 48,274 (1981) for the calculation of the fees at issue in this case.

[3] The initial total import fee assessed was $540,136.80, based on a fee of 1.531 cents per pound on 35,280,000 pounds of sugar. The liquidation fee was $539,908.83, based on a discharge of 35,265,110 pounds of sugar. As a result, Customs issued a refund check of $227.97 following liquidation.

[4] Plaintiff actually compensated Swazi in the amount of $526,411.10, or 97.5% of the fee. As a result of an arbitration proceeding, Swazi accepted this sum from plaintiff in satisfaction of its prior contractual arrangement.

[5] Swazi was a plaintiff in this action when the summons was filed. SAM subsequently moved for amendment of the summons, striking Swazi as a plaintiff. Defendant noted no objection and the motion was granted.

court found, in a similar context, that the plaintiff lacked standing to protest a Customs decision because plaintiff was not among the parties listed in the statute as eligible to protest. *Id.* at 253. The court further found that the fact that the protest was denied on the merits did not affect this result because the Government's agent could not waive the statutory standing requirement for protest (and, consequently, suit), which it deemed jurisdictional.[6] *Id.*

This court has used the term "standing" to characterize this statutory issue in other cases as well. *See, e.g., Mohawk Recreation Products, Inc.* v. *United States,* 77 Cust. Ct. 180, 423 F. Supp. 932 (1976). Standing, however, is normally thought of as a judicially, rather than a statutorily, created precept. The standing requirement involves both considerations under the case and controversy provision of Article III of the Constitution and prudential questions as to whether plaintiff's interests fall within the zone of interests regulated or benefited by the statute or regulation being applied. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471–76 (1982) (defines and distinguishes constitutional and prudential tests of standing); *Florsheim Shoe Co.* v. *United States,* 744 F.2d 787, 790 & n.4 (Fed. Cir. 1984) (same). When the proper party plaintiffs are defined in specific terms by statute, characterizing disputes over who may sue as "standing" problems may lead to confusion.[7] However one characterizes the problem here, it remains one involving the *statutory* limits on who may sue and, consequently, what suits may be heard by the court. *Shigoto* clearly supports the principle that such statutory proscriptions may not be waived by acts of omission of government agents, such as failure to reject a protest.

Statutory Eligibility To Sue

The administrative protest, which is a prerequisite for suit under 28 U.S.C. § 1581(a), may challenge only certain actions by Customs, 19 U.S.C. § 1514(a)(1982 & Supp. II 1984), and may be filed only by certain classes of people. *Id.* § 1514(c)(1). The parties agree that the transaction at issue falls within one of two categorized subjects of protest: 1) the classification and rate and amount of duties chargeable, or 2) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury. *Id.* § 1514(a)(2) & (3). The parties disagree, however, as to whether plaintiff fits within any of the specified classes of persons who may file a protest. The parties do agree that the relevant classes of protestants are the importers or consignees shown on the entry papers, their sureties, any person paying any charge or exaction, or any authorized agent

[6] "Subject-matter jurisdiction * * * is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). Due to these characteristics, principles of estoppel do not apply. *Id.* at 702 (citing *American Fire & Casualty Co.* v. *Finn,* 341 U.S. 5, 17–18 (1951)).

[7] Closely related and often confused with standing are the concepts of "capacity" and "real party in interest." *See* 6 Wright and Miller, *Federal Practice and Procedure* Civil § 1542 at 639 (1971).

of any of the above persons. *Id.* § 1514(c)(1)(A), (B), & (E). Defendant contends that plaintiff is not within any of the specified classes. Plaintiff contends that it is a "person *paying* any charge or exaction."[8] *Id.* § 1514(c)(1)(B) (emphasis added). Therefore, at the outset, the court will determine whether or not plaintiff *paid* the fee within the meaning of the statute. If plaintiff did not *pay*, the court need not decide whether the fee is a charge or exaction or is a duty which is not a charge or exaction.[9]

The statute at issue, 19 U.S.C. § 1514(c) (1982), if described generally, permits persons who have a close relationship to an import transaction to protest, and thus, to sue. Therefore, it is important to determine exactly the natue of plaintiff's relationship to the transaction which is the subject of the challenged determination.

Plaintiff here was a shipper. It was not a seller in a chain of sales on a duty-paid basis and it was not directly involved in the entry or import process. Plaintiff paid an amount equivalent to 97.5% of the amount of the fee to a seller in the chain of sale, in satisfaction of a claim for late delivery of the goods; it did not pay anything directly to Customs. Certainly, plaintiff's status as a shipper did not render it legally or contractually obligated to pay the fee; it was only when its own conduct contributed to the imposition of the new fee on the goods that plaintiff's potential interest in the fee issue arose. Plaintiff's closest connection to the customs transaction is that it became obligated to pay an amount almost equivalent to the amount of the fee paid, as consequential damages for a breach of a contract term.

This court has stated that to contest the denial of a protest and to obtain a refund of customs duties, a party must have "some direct connection to the customs transaction at issue." *Parksmith Corp.* v. *United States*, 77 Cust. Ct. 102, 103, 428 F. Supp. 1094, 1095 (1976). Although one might argue that *Parksmith* is distinguishable from the case at hand in that it dealt with a voluntary purchaser of a chose-in-action of the entity entitled to protest, it is nonetheless instructive. *Parksmith* addressed the issue of the applicability of the Anti-Assignment Act, 31 U.S.C. § 203.[10] One purpose of the Anti-Assignment Act is to prevent a multiplicity of parties with whom the government must deal and to enable the government to know with whom it is dealing until the transaction is closed. *Hobbs* v. *McLean*, 117 U.S. 567, 576 (1886); *Patterson* v. *United States*, 354

[8] Plaintiff does not claim to be an importer, a consignee, a surety, an agent, or a subrogee of any of these persons.

[9] There is support for the proposition that the term "charge or exaction" excludes "ordinary duties," *see, e.g., Alberta Gas Chemicals* v. *Blumenthal*, 82 Cust. Ct. 77, 81–82, 467 F. Supp. 1245, 1249–50 (1979), but the cases which make the distinction arise in other contexts and do not discuss 19 U.S.C. § 1514(c), or its predecessors. Furthermore, in *United States* v. *Wedemann & Godknecht, Inc.*, 62 CCPA 86, 88, 515 F.2d 1145, 1147 (1975), the Court of Customs and Patent Appeals clearly assumed that for purposes of determining *who* could protest, the words "charges or exactions" included "duties." 19 U.S.C. § 1514 was amended in both 1970 and 1979. The legislative history of the amendments is not particularly illuminating as to whether *Wedemann* remains valid on this point.

[10] The Anti-Assignment Act was not addressed to any great degree by the parties here, and the limitations of § 1514(c) make it unnecessary to decide the direct relevance of the Anti-Assignment Act to the facts at hand.

F.2d 327, 329 (Ct. Cl. 1965). Section 1514(c) similarly operates to limit the number of parties who may bring suit, and presumably it has some of the same purposes as the Anti-Assignment Act. Conceivably, without the limitations of section 1514(c), the government might have been faced with protests from six or seven parties in this case. (Indeed, three parties protested.) Obviously, this could create administrative problems, as well as the problems associated with multiple-party litigation or successive suits.

Plaintiff argues that it is the only party interested in pursuing this challenge to the imposition of the import fee and that it must be allowed to proceed in the interest of justice, that is, that it is the only real party in interest. It seems all other parties in this chain of sale have been compensated, at least to 97.5% of the duties paid. Whether or not other parties remain interested, however, is not determinative. If the obligation of other parties to pursue this claim is not contractually implied, plaintiff arguably could have expressly contracted for the seller it dealt with to require the importer, through contracts with others in the chain of sale, to pursue any reasonable objections to fees imposed. Alternatively, plaintiff might have contracted as part of its latest agreement with Swazi for Swazi to do whatever it could to pursue the claim. Even if the court believed that these two options were unavailable and that as a matter of fairness plaintiff should be able to pursue its claim, the court cannot rewrite the statute.

Plaintiff cites *Pasco Terminals Inc.* v. *United States,* 65 CCPA 28, 567 F.2d 976 (1977), and *United States.* v. *Wedemann & Godknecht, Inc.,* 62 CCPA 86, 515 F.2d 1145 (1975), for the proposition that section 1514 should be liberally construed and that a real party in interest may protest and bring suit. First, plaintiff misapprehends the meaning of real party in interest. Because plaintiff is in the position similar to that of an assignee of a claim, and would appear to be the entity possibly benefiting from the suit, at first glance it would seem to fit into the real party in interest category. *See infra* discussion of CIT Rule 17(a) The real party in interest, however, is the entity which under sustantive law has the right sought to be enforced. 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 17.07 at 17-65 (2nd ed. 1985) (hereinafter cited as *Moore*). Inasmuch as the right to protest and sue is purely the creature of statute, the requirements of section 1514(c) are part of the applicable substantive law, and thus, section 1514(c) specifies who is a real party in interest.[11] Note, as well, that unlike the ordinary real party in interest, plaintiff here is not to be the direct recipient of any funds ordered paid. *See infra* note 14. Furthermore, the possibility of obtaining a benefit as a result of litigation does not make one a real party in interest. *Armour Pharmaceutical Co.* v. *Home Insurance*

[11] *Moore, supra,* ¶ 17.14 at 17-168, indicates that Fed. R. Civ. P. 17(a), mandating suit by the real party in interest, recognizes vesting of the substantive right to sue in a person statutorily authorized to sue.

Co., 60 F.R.D 592 (N.D. Ill. 1973) (Excess insurance carrier was not real party in interest.).

Second, both *Wedemann* and *Pasco* are factually distinguishable from the instant case. *Wedemann* involved a suit by a seller's broker which processed entries and paid duties through another broker. Although the majority opinion constructs an unusual agency relationship to fit the peculiarities of an earlier version of section 1514, [12] both the majority and concurring opinions voice concern that the entity overseeing the customs entry process should not be precluded from suit due to the technical error of not having its agent sign the protest. Note that in *Wedemann* the actual seller under the "duty paid" contracts, that is the one who would ultimately benefit from a judgment for plaintiff, is not even a party to the suit. *Wedemann* is very much concerned with defects in what is viewed by the court as "procedure" and there is no doubt that the court was convinced that Wedemann was substantially and directly involved in the import transaction. The court also notes that the person who was clearly entitled to sue under the statute had "ratified" the action and that there was no chance of double liability.[13] In fact, the court states that any refund would go to the second broker who actually *paid* Customs and not to plaintiff. Presumably, the broker, who was hired by Wedemann to pay Customs, would pass along any refund to Wedemann. There is no such clear relationship between the party who paid Customs and plaintiff here.[14] *Pasco* is similarly inapplicable. The *Pasco* court notes that Pasco paid the duties. Pasco did so either directly or through reimbursement in accordance with a direct contractual obligation to pay duties. The court virtually ignored the fact that Pasco was not, in an ordinary sense, an "agent of the person paying" as the then existing statute seemed to require, but rather focused on Pasco's relationship to the import transaction.

The statutory amendment enacted after the *Wedemann* and *Pasco* decisions, which eliminated the incongruity of a statute which seemingly allowed an agent, but not the principal, to protest, did not broaden section 1514 to allow any person affected by a duty obligation to protest. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 254, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 640. As amended, section 1514 allows importers, consignees, sureties, persons paying charges or exactions, or the agents of these persons to protest, and ultimately, to sue. If Congress wanted anyone with a possible financial interest in the outcome of the dispute to be able to

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[12] The pre-1970 version of 19 U.S.C. § 1514 allowed "the importer, consignee, or agent of the person paying such charge or exaction" to protest, seemingly indicating in the last case that the agent, but not the principal, may sue. The final "of" may have been a drafting error. *See Wedemann*, 62 CCPA at 93, 515 F.2d at 1150 (Miller, J., concurring).

[13] Presumably it is because of the unusual agency relationship found in *Wedemann* that the court found ratification applicable. That is, the party which ratified Wedemann's act was held, in essence, to be a principal of Wedemann, *See also Baylis Brothers Co.* v. *United States*, 75 Cust. Ct. 89, 400 F. Supp. 940 (1975). The majority opinion made no mention of Fed. R. Civ. P. 17(a) principles, although it is possible that it had such in mind.

[14] Under 19 C.F.R. § 34.36 (1985) any refund paid in this case would go to Imperial, as importer of record. Imperial is not under the control of plaintiff and is not its agent or principal.

protest and sue, it would have been easy enough to so provide, or it could have allowed judicially developed tests of real party in interest or standing to govern. As defendant has argued, the fact that the statute lists specific parties as eligible to bring suit and is silent with regard to other potential plaintiffs implies exclusion. This principle of statutory construction, *expressio unius est exclusio alterius*, is applicable here. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 457-58, *reh'g denied*, 415 U.S. 952 (1974). The court does not find the legislative history of the amendment to demonstrate an intent which is contrary to the language of the Statute. Congress clearly intended to eliminate a situation where an agent, but not its principal, could sue. The legislative history implies nothing more. Furthermore, *Wedemann* and *Pasco* stand for the principle that section 1514 should be liberally construed to avoid denying a party a day in court on a mere technicality where the essential intent of Congress is met. They do not stand for the principle that the categories set forth in section 1514 are meaningless. Plaintiff here has more than a technical problem. It paid damages calculated with regard to the section 22 fee, it did not pay the section 22 fee, and it may not protest or bring suit challenging the imposition of the fee.

CIT Rule 17(a)

In view of its conclusion that plaintiff is not a real party in interest under the statute, the court asked the parties whether CIT Rule 17(a) is applicable to this case.[15] Plaintiff argues that it is, and requests time to seek ratification by Imperial, a statutory real party in interest. Defendant asserts, in essence, that allowing ratification would contravene the purpose of the applicable statutes.

CIT Rule 17(a) is not merely a local rule of this court.[16] It mirrors Fed. R. Civ. P. 17(a), which has both Supreme Court and Congressional approval. Furthermore, the rule codifies longstanding equity practice. *Moore, supra*, ¶ 17.08 at 17-81. Nonetheless, Rule 17(a) may not be used to defeat Congressional intent as manifested in applicable statutes, but should be used to prevent forfeiture and injustice where the determination as to who may sue is difficult. *See* Notes of the Advisory Committee on 1966 amendment to Fed. R. Civ. P. 17 and *Moore, supra*, ¶ 17.14 at 17-168 to 17-169 and ¶ 17.15-1 at 17-182. Therefore, the issue is whether ratification

[15] CIT Rule 17(a) reads as follows:

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

[16] CIT Rule 17(a) has been utilized, although sparingly. *See, e.g., Zenith Radio Corp. v. United States*, 5 CIT 155 and 178 (1983).

here under Rule 17(a) is in accord with Congressional intent. This requires an examination of both the purpose and intent of Rule 17(a) and the relevant statutory provisions, specifically, 19 U.S.C. § 1514, 28 U.S.C. § 2631(a), and 28 U.S.C. § 2636(a), as applied in this case.

Initially, the court notes that 19 U.S.C. § 1514 (1982 & Supp. II 1984) has been satisfied. Imperial has protested along with plaintiff. Thus, Customs was not put in the position of processing an invalid protest. 28 U.S.C. § 2631(a) (1982) provides, however, that only persons who protest under section 1514, or their sureties, may bring this type of suit. Presumably, the purpose is to limit suit to those who exhaust their administrative remedies. Obviously, plaintiff is not such a person because, as indicated previously, it had no remedies to exhaust. Nonetheless, the statute would be met if Imperial, which exhausted its remedies, did join in the action.

This does not end the inquiry, however, because Imperial's rights have been curtailed by 28 U.S.C § 2636(a) (1982), the applicable statute of limitations, which has run. Nevertheless, courts have recognized that even where the United States is defendant, substitution of the real party in interest will relate back to the time of filing of the original complaint so as to prevent a bar by the intervening statute of limitations. *See Cummings* v. *United States*, 704 F.2d 437 (9th Cir. 1983), (insurer substituted for insured in suit under the Federal Tort Claims Act); *Wadsworth* v. *United States*, 511 F.2d 64 (7th Cir. 1975) (same). This is so, even if the statute of limitations is jurisdictional. *Executive Jet Aviation, Inc.* v. *United States*, 507 F.2d 508 (6th Cir. 1974). In each of these cases the statute of limitations policy of barring stale claims was not offended because plaintiff brought suit in a timely manner.[17] Note, however, that in these three cases, it was clear that the original plaintiff, at least at one time, possessed a claim against the United States. The original plaintiff merely lost its right to pursue the claim when its insurer paid the claim. *See also Scanwell Laboratories, Inc.* v. *Thomas*, 521 F.2d 941 (2nd Cir. 1975), *cert. denied*, 425 U.S. 910 (1976) (continuation of suit by original plaintiff/owner allowed after improper assignment rescinded and claim reverted to original owner). Thus, in these cases, notice within the limitations period of a potentially valid action was somewhat better than it would have been if a stranger to the cause of action had sued. In this case, plaintiff is essentially a stranger to the cause of action.

"The meaning and object of the real party in interest principle embodied in Rule 17 is that the action must be brought by a person who possesses the right to enforce the claim and who has a signifi-

[17] As stated in *Executive Jet*, 507 F.2d at 515, (quoting *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

cant interest in the litigation." *Virginia Electric & Power Co.* v. *Westinghouse Electric Corp.*, 485 F.2d 78, 83 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974). Furthermore, as the Advisory Committee on the Federal Rules of Civil Procedure stated with regard to the 1986 amendments to Rule 17(a):

> The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interest of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

In this case, Imperial had the statutory and regulatory right to bring suit and to obtain any refund ordered, but it has refused to sue in its own name in a timely manner and to date, it has refused to join in this action. Imperial is certainly not in the position of an assignee of a claim or a statutory representative with vital interests in the litigation. Adding Imperial to this action would be adding an uninterested party to the suit. In addition, there was no confusion here as to whether Imperial could sue. Imperial always had that option and it would not exercise it. Its failure to sue was not the result of inadvertence. Compare the case at hand to *Levinson* v. *Deupree*, 345 U.S. 648 (1953), where an administrator of a decedent's estate was allowed to continue suit although he was not validly appointed under Admiralty procedure until after the statute of limitations had run. Essentially, the *Levinson* court did not allow a technicality to work an injustice, but instead permitted a party concerned with the litigation, and fully authorized by law to pursue it, to proceed with suit.

The court is also mindful of one additional phrase in Rule 17(a). Under Rule 17(a), the court need only allow a reasonable time after objection for ratification or joinder.[18] Defendant's motion was made some months ago, although the basis for the motion was not phrased in the exact terms of a real party in interest objection. For that reason, plaintiff might argue that it was only notified of this problem when it was raised by the court a few weeks ago. Sufficient time has elapsed, however, for plaintiff and Imperial to have rectified any mere inadvertence or technicality. It is clear that the problems plaintiff seeks to correct are due to simple mistakes, and thus, are not those intended to be remedied by Rule 17(a).

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[18] Apparently, joinder or substitution is more common than ratification. *Moore*, *supra*, ¶ 17.15-1 at 17-184.

In view of all of the factors mentioned above, the court does not believe that waiting for plaintiff to bargain for the participation of Imperial will serve the purposes of Rule 17(a) or of the relevant statutes. Defendant's motion to dismiss is granted.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/89	DiCarlo, J. May 30, 1986	Pharmacia Inc.	73-12-03543-S	Item 711.88 11%	Item 661.95 5.5%	Pharmacia Fine Chemicals, Inc. v. U.S. S.O. 85-92	New York Sephadex Column KS 370, etc.
C86/90	DiCarlo, J. May 30, 1986	Pharmacia Inc.	74-4-00964	Item 711.88 or 774.60 10%, 11%, 8.5%, or 15%	Item 661.95 10%, 6.5% or 5.5%	Pharmacia Fine Chemicals Inc. v. U.S. S.O. 85-92	New York Column Segment KS 380/15 complete with lids
C86/91	Newman, S.J. May 30, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-5-00528	Item 682.25 12.5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/92	Newman, S.J. May 30, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-12-01704	Item 682.25 11.8%	Item 682.30 5.8%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/93	Newman, S.J. May 30, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-12-01722	Item 682.25 12.5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/94	Newman, S.J. May 30, 1986	Novatronics of Canada, Ltd.	84-4-00595	Item 682.25 9.6%	Item 682.30 5.1%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/95	Aquilino, J. June 4, 1986	IDEC Systems & Control Corp.	85-3-00331	Item 715.66 or 715.68 Various rates	Item 685.90 6.9% or 6.5%	U.S. v. Texas Instruments Inc., 673 F.2d 1375 (1982)	San Francisco Electronic timers

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/169	Aquilino, J. May 30, 1986	Ayerst Laboratories	85-2-00246	Transaction value	$223.74 per kilogram	Agreed statement of facts	Champlain Rouses Pt. Propranolol Hydrochloride Spheroids Bulk
V86/170	Watson, J. June 4, 1986	Eli E. Albert Inc.	R58/15347, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 162

(T.D. 86-119)

Customs Regulations Amendments Relating to Prior Disclosures of Violations of 19 U.S.C. 1592

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide for further clarifications and changes to the regulations relating to prior disclosures of violations of 19 U.S.C. 1592. The document provides that a person is presumed to have knowledge of the commencement of a formal investigation of a violation if, before the claimed prior disclosure of the violation, an import specialist, regulatory auditor, inspector, or other Customs officer, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1592, so informed the person concerning the type of or circumstances of the disclosed violation. However, this presumption may be rebutted by evidence that notwithstanding the notice, the person did not have such knowledge.

This change is necessary to provide for more effective enforcement of the regulations concerning 19 U.S.C. 1592 violations.

EFFECTIVE DATE: July 25, 1986.

FOR FURTHER INFORMATION CONTACT: Charles D. Ressin, Commercial Fraud & Negligence Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, (202-566-8317).

SUPPLEMENTARY INFORMATION:

Background

Section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), provides for penalties and penalties procedures when by fraud, gross negligence or negligence, merchandise is entered, introduced, or attempted to be entered or introduced into the commerce of the U.S.,

by means of any material false document, written or oral statement or act, and/or any material omission; or when a person aids or abets any other person in the entry, introduction, or attempted entry or introduction of merchandise by such means.

Section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), provides for the remission or mitigation of fines, penalties, and forfeitures by the Secretary of the Treasury.

By T.D. 84-18, published in the Federal Register on January 13, 1984 (49 FR 1672), Customs amended Part 162, Customs Regulations (19 CFR Part 162), relating to § 592 penalty and penalty procedures to, among other things, clarify the requirements and criteria applicable to prior disclosures of violations of § 592. As amended by T.D. 84-18, § 162.74(a), Customs Regulations (19 CFR 162.74(a)), provides that a prior disclosure may be made if the person concerned discloses the circumstances of a violation in writing to the district director before, or without knowledge of, the commencement of a formal investigation, and makes a tender of any actual loss of duties. Experience gained since then, however, reveals that further clarification and changes to § 162.74 are needed.

Section 162.74(f), Customs Regulations (19 CFR 162.74(f)), as amended by T.D. 84-18, provides that a person who claims lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. Pursuant to this section, a person is presumed to have had knowledge of the commencement of a formal investigation of a violation of § 592 if before the claimed prior disclosure of the violation:

(1) An investigating agent, having properly identified himself and the nature of his inquiry, had, either in person or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(2) An investigating agent, having properly identified himself and the nature of his inquiry, requested specific books and records of the person relating to the disclosed information.

The presumption of knowledge may be rebutted by evidence that, notwithstanding the inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

Section 162.74(f) is subject to the interpretation that the presumption of knowledge of the commencement of a formal investigation is limited to those circumstances where a Customs investigating agent, and not other Customs personnel, notifies the person of the type of or circumstances of a violation of § 592. To provide for more effective enforcement of the prior disclosure regulations, by notice published in the Federal Register on July 8, 1985 (50 FR 27829), Customs proposed that this presumption be extended to those circumstances where an import specialist, regulatory auditor, inspector, or other customs officer, having reasonable cause to believe that there has been a violation of § 592, so notifies the

person(s) concerning the type of or circumstances of the disclosed violation. It was proposed that § 162.47(f) be amended to include this provision.

Section 162.74(g), Customs Regulations (19 CFR 162.74(g)), as amended by T.D. 84-18, provides that a prior disclosure may not be made after a determination by an authorized Customs officer that there is reasonable cause to believe that there has been a violation of § 592 and that a claim for monetary penalty shall be issued without commencement of a formal investigation. Such determination is evidenced by any one or more of the following:

(1) By the issuance of a pre-penalty notice;

(2) By the issuance of a penalty notice if a pre-penalty notice is not required;

(3) In the case of violations involving merchandise accompanying persons entering the U.S. or commercial merchandise inspected in connection with entry, by oral notification to the person of the officer's finding of a violation; or

(4) In the case of the seizure of merchandise under § 592, by the act of seizure.

It was determined that the existing wording of this regulation unduly restricted Customs in the performance of its enforcement duties. The determination as to whether there exists reasonable cause to believe a violation of § 592 has occurred appeared to be limited to only certain authorized Customs officers. Often, however, this determination can be made by any Customs officer. Furthermore, § 162.74(g)(3) was limited to situations which generally involve only inspectors, thus denying other Customs officers who may have detected the violation from providing oral or written notification to the violator.

To remedy this problem, Customs proposed that § 162.74(g) be amended to clarify that a prior disclosure will be precluded, notwithstanding the fact that a formal investigation has not been commenced, after *any* Customs officer determines that there is a violation of § 592, and gives notice as evidenced by the four outlined circumstances. The violator, however, would still be allowed to make a prior disclosure of the circumstances of a violation which has not been discovered by Customs.

It was also noted in the proposal that § 162.74, as amended by T.D. 84-18, contained an error in paragraph (a)(1), in which parenthetical reference was made to § 162.71(e) of "§ 592, Tariff Act of 1930, as amended (19 U.S.C. 1592)". It was proposed that the reference to § 592 inside the parenthesis be removed and a reference to Part 162 inserted, in its place. The correct reference in the parenthesis should be to § 162.71 of Part 162.

In response to a request, by notice published in the Federal Register on September 9, 1985 (50 FR 36603), the time for the submission of comments on the proposal was extended from September 6, 1985, to October 6, 1985. Thirteen comments were received in re-

sponse to the notice proposing the changes. A discussion of the comments and our responses follow:

DISCUSSION OF COMMENTS

Comment: Eight commenters stated that the proposed § 162.74(g) goes beyond the authority of Customs as established by § 592. They claimed that Customs proposal to disallow a finding of prior disclosure notwithstanding the fact that a formal investigation has not been commenced and to broaden the commencement of a formal investigation to a notice, written or oral, given by any Customs officer who has reasonable cause to believe that a violation of § 592 has occurred, rather than by a Customs agent, is without legal authority. Further, they aver that Congress mandated that a formal investigation is required before the availability of the prior disclosure program is precluded.

Response: After careful consideration of the matter, we have determined not to amend § 162.74(g). Accordingly, it is unnecessary to discuss the comments relating solely to this issue.

Comment: One commenter asked what individuals were included in the phrase "other Customs officers" in proposed § 162.74(f)(1).

Response: The phrase includes the district director, the fines, penalties and forfeiture officer, and any other Customs officer who may be authorized to contact an alleged violator concerning a violation.

Comment: A commenter stated that if a Customs officer determines at the time of importation that there has been a violation of § 592, the importer should be informed and given the opportunity to develop the facts and submit a voluntary disclosure.

Response: We disagree. An importer so informed should not be entitled to the benefits of prior disclosure. However, the importer's cooperation with Customs would be considered as a mitigating factor in any penalty action against the importer.

Comment: Two commenters requested to know by what means a person may be notified by a Customs officer of a violation of § 592, under the provisions of proposed § 162.74(f)(1). Specifically, they wanted to know whether these means were the same as those listed in proposed § 162.74(g) for notifying an alleged violator of a § 592 violation.

Response: Section 162.74(g) states that a prior disclosure of the circumstances of a violation of § 592 is precluded after a determination by any Customs officer that there is reasonable cause to believe that such violation has been committed. This determination is evidenced by (1) the issuance of a pre-penalty notice; (2) the issuance of a penalty notice if a pre-penalty notice is not required; (3) oral or written notification to the alleged violator by the Customs officer who detected the violation; or (4) the act of seizure, under § 592(c)(5), of the merchandise involved in the violation. Notice under § 162.74(g) is limited to these four means.

However, because § 162.74(f)(1) involves only the circumstance wherein a Customs officer may *presume* knowledge on the part of an alleged violator, of the commencement of a formal investigation of the violation, notice under § 162.74(f)(1) can be effected by any means of oral or written communication. In this situation, Customs sees no reason to limit the method of notification.

Comment: It was stated that proposed § 162.74(f)(1) expands the role of Customs officers by making them investigation agents. This curtails the exchange of useful information between Customs officers and importers and is an unnecessary extension of Customs enforcement capabilities.

Response: We disagree. We are unpersuaded that allowing other Customs officers to presume knowledge of a violation of § 592 on the part of an alleged violator, and to notify that violator, curtails the exchange of information between Customs and importers. We believe that the proposal provides more effective enforcement of the regulations.

Comment: Under proposed § 162.74(f)(1), it is claimed that if an import specialist orally informs an importer that certain conduct on his part constituted a violation of § 592, the importer is presumed to have knowledge of the commencement of a formal investigation even though there was no such investigation opened under § 162.74(d). The presumption should begin to operate only if, in fact, a formal investigation has already been commenced.

Response: We disagree. Before a person can be presumed, under § 162.74(f)(1), to have had knowledge of the commencement of a formal investigation, the following events must have occurred:

(1) the violator must have made a disclosure of the circumstances of the violation;

(2) there must have been, prior to the disclosure, a commencement of a formal investigation; and

(3) one of the means of communication set forth in paragraph (f)(1) concerning the type of or circumstances of the disclosed violation must have occurred. It is not relevant whether the communication of the circumstances of an alleged § 592 violation is made to an importer before or after the commencement of a formal investigation. If the communication took place, there is an inference that the importer should have known, at the time of making the disclosure, that an investigation had commenced, or that there is a likelihood that an investigation would be commenced.

Comment: It was also claimed that if §§ 162.74(f) and 162.74(g) were amended as proposed, the two would cease to have any practical distinction. Under proposed paragraph (f)(1), an importer would lose his right to make a prior disclosure if a Customs officer had reasonable cause to believe that there had been a violation of § 592 and so informed the importer. Under proposed paragraph (g)(3), the importer would lose his right to make a prior disclosure if the Cus-

toms officer determined that there was reasonable cause to believe that a violation of § 592 had occurred and so notified the importer.

Response: We disagree. We believe there is a distinction between paragraphs (f) and (g). In the commenter's discussion of paragraph (g)(3), the importer would be precluded from making a prior disclosure of the circumstances of a § 592 violation because a Customs officer has (1) made a determination that there is a reasonable cause to believe a violation has occurred, (2) determined that a claim for a monetary penalty will be issued, without commencement of a formal investigation, and (3) notified the violator by any of the means set forth therein. In the commenter's discussion of paragraph (f)(1), the importer has made a disclosure of the circumstances of a violation after the investigation has commenced. The violator is only presumed to have knowledge that a formal investigation has been commenced. He may rebut this presumption and still be accorded the benefits of prior disclosure. In addition, Customs must establish that an investigation has commenced. To clarify that issue, we are amending the last sentence of § 162.74(f) to include this new presumption among those subject to rebuttal.

Comment: One commenter raised questions relating to the interpretation of the prior disclosure regulations such as what constitutes constructive knowledge and what constitutes reasonable cause to believe that a violation of § 592 has been committed.

Response: Since these issues are beyond the scope of the proposal, they are not appropriate for our consideration in this document. The information this commenter seeks is available through general legal research. In addition, he may avail himself of Customs legal precedent retrieval system keyword directory, which is available at all district and regional Customs offices.

DETERMINATION

After careful analysis of the comments received, and further review of the matter, it has been determined advisable to adopt the proposal with the modifications discussed above.

As discussed in the proposal, § 162.74, as amended by T.D. 84-18, contains an error in paragraph (a)(1), in which parenthetical reference is made to "§ 162.71(e) of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592)". The reference to § 592 inside the parenthesis is being removed and a reference to Part 162 inserted, in its place. The correct reference in the parenthesis is to § 162.71 of Part 162.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act, relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to these amendments because they will not have a significant impact upon a substantial number of small entities. Accordingly, it is certified under the provisions of § 3 of the Regula-

tory Flexibility Act (5 U.S.C. 605(b)), that this rule will not have a significant economic impact on a substantial number of small entities.

EXECUTIVE ORDER 12291

These amendments do not meet the criteria for a "major rule" as defined by § 1 of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 162

Customs duties and inspection, Administrative practice and procedures, Penalties.

AMENDMENTS TO THE REGULATIONS

Part 162, Customs Regulations (19 CFR Part 162), is amended as set forth below.

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for Part 162 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 66, 1624.

Subpart G also issued under 19 U.S.C. 1466, 1584, 1592, 1613, 1618.

2. Section 162.74(a)(1) is amended by removing the words "section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592)" inside the parenthesis, and inserting, in their place, the words "this Part."

3. Section 162.74(f) is revised to read as follows:

§ 162.74 Prior disclosure.

* * * * * * *

(f) *Proof of lack of knowledge.* A person who claims a lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. A person shall be presumed to have had knowledge of the commencement of a formal investigation of a violation if before the claimed prior disclosure of the violation:

(1) An import specialist, regulatory auditor, inspector or other Customs officer, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1592, so informed the person concerning the type of or circumstances of the disclosed violation; or

(2) An investigating agent, having properly identified himself and the nature of his inquiry, had, either in person or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(3) An investigating agent, having properly identified himself and the nature of his inquiry, requested specific books and records of the person relating to the disclosed information.

The presumption of knowledge may be rebutted by evidence that, notwithstanding the foregoing notice, inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 9, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 25, 1986 (51 FR 23047)]

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19 CFR Part 134

(T.D. 86-120)

Effective Date for Country-of-Origin Marking Requirement on Orange Juice Containers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule.

SUMMARY: This document informs the public that Customs has made its determination regarding an implementation date for the requirement that labels on frozen concentrated and reconstituted orange juice products which contain imported concentrate be marked to show the foreign country-of-origin of the products. The requirement for marking the products was recently upheld by the Court of International Trade. However, Customs was directed by the Court to seek comments from all interested parties before reaching a decision on an effective date for the requirement. The decision on implementation was made following careful analysis of the comments received in response to a published notice, as well as full consideration of the presentations made in a public hearing held on the subject of implementation.

The effective date for implementation of the marking requirement is February 1, 1987.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTAL INFORMATION:

BACKGROUND

In response to a formal request, Customs published a ruling dated September 4, 1985, in the CUSTOMS BULLETIN of September 25, 1985 (C.S.D. 85-47, 19 Cust. Bull. No. 39 at 21), stating that retail packages of orange juice containing imported concentrate must be labeled to comply with the country-of-origin marking requirements of § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304). The rationale for that decision is discussed in detail in the cited decision. That ruling was to be implemented for affected products entered for consumption or withdrawn from warehouse on or after January 1, 1986.

That implementation date was extended to March 1, 1986, by a notice published in the December 11, 1985, CUSTOMS BULLETIN (19 Cust. Bull. No. 50 at 15). The extension decision took into account the ruling's perceived economic impact on the manufacturing public, as well as the right of ultimate purchasers of affected juice products to be fully informed about the origin of those products. The March 1, 1986, date was nearly 6 months after the initial ruling had been issued, and was considered reasonable.

In a case brought by the National Juice Products Association, *et al.* challenging C.S.D. 85-47, *National Juice Products Association* v. *United States*, —— CIT ——, Slip Op. 86-13 (January 30, 1986), the Court of International Trade held that C.S.D. 85-47 was substantively valid. The Court, however, remanded the case to Customs for reconsideration of the effective date. The Court directed Customs to adhere to the notice and comment provisions of § 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)), and to carefully consider all possible issues relating to a reasonable time to implement the new ruling.

Accordingly, by notice published in the Federal Register on March 3, 1986 (51 FR 7285), Customs solicited comments related to the earliest practicable implementation date for the requirement that containers of orange juice in frozen concentrated or reconstituted forms, which contain imported concentrate, must be labeled to comply with the country-of-origin marking requirements of 19 U.S.C. 1304. Of particular interest was any information concerning the time it generally takes suppliers to provide new or changed labels and cans to the packagers of orange juice products, as well as the quantity of labels and printed retail containers usually kept in inventory. We also sought information as to whether the industry had already taken steps to procure new labels which satisfy the requirements of C.S.D. 85-47. The notice also announced that a public hearing was to be held on the implementation date issued at Customs Headquarters on March 28, 1986.

After careful analysis of the comments received in response to the notice, as well as full consideration of the presentations made

at the public hearing, a decision has been reached and an appropriate effective date determined. An analysis of the comments follows.

Analysis of Comments

Thirty eight comments were received in response to the notice, including written statements of the 13 witnesses who testified on this issue in the public hearing. Comments submitted on issues other than the effective date of C.S.D. 85-47 are outside the scope of the notice and therefore have not been addressed.

Most of the comments came from orange juice processors and label manufacturers. In addition, comments were received from various trade associations, one state agency, and other industry representatives. Although two commenters indicated that the implementation date has been extended enough to give the processing industry necessary lead time to comply with the requirements of C.S.D. 85-47, the remainder of the commenters advocated a substantial additional period of time to comply. The two reasons cited most often are that they need time to exhaust (or at least diminish) large inventories of non-complying packaging to avoid incurring large financial losses, and that they need time to obtain new labels. It is claimed that the necessary lead time to obtain new labels is directly effected by the so-called "supplier bottleneck". It is claimed that this "bottleneck" is created because the numerous firms engaged in orange juice processing in the U.S. use only a handful of labeling and packaging suppliers. Also, every company must change all their orange juice labels at the same time. These two factors are discussed in the following portions of this document.

Inventory

All of the label manufacturers and orange juice processors who commented indicated that they generally maintain substantial inventories of labels and packaging to meet their production needs and obtain quantity discounts. An analysis of the comments indicates that the time necessary to deplete these inventories ranges from about 2 months to one year, and that the cost of the inventory ranges from $20,000 to $9 million. The larger processors, because of their large production volumes, appear to have the largest inventories of non-complying packaging. It is argued that to the extent that the chosen implementation date does not permit full liquidation of existing inventories, processors' costs, and possibly consumer prices, will be increased.

Lead Time

Although both the label manufacturers and orange juice processors acknowledge that the normal lead time to obtain new labels generally is not more than 3 months (the actual time varying depending on the type of process that is used to manufacture the

label; rotogravure used for composite cans requiring the most time, pure-pak containers requiring the least time), it is claimed that two added factors will alter this considerably. The first is that each packager will have to redesign all of its labels at once. While some companies do not use many different labels, other companies, particularly those that distribute their products under private labels, use hundreds of different labels that will have to be changed. For example, one company indicates that it distributes orange juice under private labels or supermarkets across the country and uses 377 different containers. Another company, which sells under both private labels and its own brand name, indicates that it sells juice in 186 different types of cans and other containers. In order to change every label, it is claimed that a significant amount of time in addition to the normal lead time will be required.

The second factor that commenters indicate will alter the normal lead time is the "supplier bottleneck". It is claimed that there are only four or five major suppliers of labels for composite cans (the most widely used type of orange juice container) to service the entire industry. One of these suppliers indicates that it will take at least a year to make the necessary changes on its 225 labels for all its orange juice processor customers, while continuing to service its other customers. Another large label supplier estimates that it would take 2 years to make all necessary changes on its 525 labels while servicing other customers. Even if these companies were to devote all of their time to servicing their orange juice customers (an option which is claimed to be commercially unfeasible), it is claimed that the process would still take approximately 5 to 7 months to complete. One juice can manufacturer stated that it would require at least a year to change all 400 labels at once. Another packaging company indicated that it currently has a backlog of required sodium label changes and would not be able to start orange juice changes for at least 90 days.

One small orange juice processor expressed concern that it will be hurt unless Customs allows sufficient time for all companies to comply with the ruling. As orange juice processors compete for the attention of their labeling and packaging suppliers, there is speculation that the larger companies would be given priority.

The basic consensus of the commenters, with the exception of the two commenters that would like immediate compliance with the ruling, is that a minimum of one year is required to allow the industry's small number of packaging and labeling suppliers to meet orange juice processors' needs for new packaging bearing the required country-of-origin marking.

Lithographing the Ends of Cans

In order to address the problem of non-complying inventory and the lead time required to design all new labels, Customs, in response to a ruling request, authorized processors to lithograph the

top end of the can (*i.e.* the end which is opened by the consumer) with the country-of-origin information. It was our understanding that approval of such an alternative method of marking would shorten the time necessary for compliance. Many commenters addressed this point.

Although most commenters acknowledged that this alternative marking might be a useful short-term solution, they stated that it will not solve all the problems of complying with the ruling. First, some commenters indicated that this method of marking is not suited to certain types of containers (*i.e.* glass, pure-pak and plastic cup containers, and certain 6 and 12-ounce metal cans with adhesive pull tabs). An even greater concern was that such a method was not economically feasible. Although these commenters indicated that the initial start-up costs for lithography are not high, fixed costs would be incurred every time this operation was performed. (One company estimated that it would cost almost $100,000 a year; another company $190,000.) Conversely, it is argued that the cost of producing cylinders for new labels is a one time cost which could be amortized over millions of containers. Thus, the major processors indicated that with their large production volumes they would not benefit from this marking alternative. The consensus is that lithography would be most useful in short-term, small volume situations.

Other Comments

Several commenters indicated that Customs should adopt July 1, 1987, as the implementation date for C.S.D. 85–47. That is the next FDA-mandated "uniform effective date" for food labeling changes.

Finally, many commenters indicated that it would have been unwise to have taken substantial compliance efforts prior to the decision by the Court of International Trade on the legality of C.S.D. 85–47 and until Customs provided the industry with guidelines on some important compliance issues entailed in the September 4, 1985, ruling.

Customs Response

After carefully considering all the comments, we are satisfied that the industry needs additional time to comply with the requirements of C.S.D. 85–47. In view of the limited number of label and packaging suppliers, it would put a tremendous burden on the entire industry to establish an early compliance date. Because label suppliers cannot be expected to service only their orange juice customers, some consideration must be given to the estimates to these suppliers that it would take between 1 and 2 years to service the entire industry. We are also persuaded that lithographing of can lids will not be a long term solution for most companies. Therefore, we recognize that the lead time must take into account the fact that most companies, if not all, must develop, at a substantial cost,

new labels for all of their products. Most commenters indicated that this could be accomplished within a year. However, inasmuch as lithography of can tops is a short term marking solution for some smaller companies that may not be serviced immediately by the major label suppliers, it is not necessary to postpone implementation until the label manufacturers can provide every company with new labels.

Based on the data submitted by the commenters, we are also satisfied that orange juice processors as well as labels suppliers maintain a large inventory of packaging, and that it would be to everyone's benefit to substantially diminish those stockplies. The result of forcing the industry to discard this inventory would undoubtedly result in higher consumer prices. It appears that nearly all such inventory will be depleted within a year. In view of the lithography option, it is similarly unnecessary to postpone implementation until *all* non-complying inventory is depleted.

Finally, we are persuaded that the complexity and cost of labeling changes, and impracticability of adhesive labels, precluded the industry from taking final action to comply with C.S.D. 85-47 until the Court of International Trade rendered its opinion on the legality of the ruling. We do not agree that it was necessary to wait until every possible issue concerning compliance was resolved.

DETERMINATION

Based on the prevsiouly stated considerations, Customs has determined that C.S.D. 85-47 will become effective on February 1, 1987, approximately 1 year from the date the Court of International Trade rendered its decision. If the final repacked product or orange juice contains any foreign concentrate entered for consumption or withdrawn from warehouse on or after this date, the certification requirements of §134.25, Customs Regulations (19 CFR 134.25), apply. Therefore, effective February 1, 1987, importers or orange juice concentrate must certify to Customs at the time of entry either that the retail package of orange juice will be properly marked with the country or origin, or that he will notify the repacker of the marking requirements.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 12, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 25, 1986 (51 FR 23045)]

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19 CFR Part 178

(T.D. 86-121)

Customs Regulations Amendment to Listing of OMB Control Numbers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include the clearance number issued by the Office of Management and Budget (OMB), necessary for certain information collection requirements included in a recent interim amendment to the Customs Regulations. The interim amendment stated that an application for clearance was submitted to OMB. That office has since approved the regulation and issued the clearance number which appears in this document.

EFFECTIVE DATE: July 7, 1986.

FOR FURTHER INFORMATION CONTACT: Larry L. Burton (202-566-8237).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Parts 4, 6, 24, 111, 123, and 145, Customs Regulations (19 CFR Parts 4, 6, 24, 111, 123, and 145), were amended on an interim basis by T.D. 86-109, published in the Federal Register on June 11, 1986 (51 FR 21152). The amendments implement § 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (the Act, Pub. L. 99-272), which establishes a schedule of fees chargeable to users of various services provided by the Customs Service in connection with the processing of persons, aircraft, vehicles, vessels, and merchandise arriving in the U.S., as well as for the payment of an annual fee by customs brokers. The Act also sets forth certain limitations or conditions concerning the collection of fees, and authorizes the promulgation of such regulations as necessary to carry out the provisions of the new law. Certain aspects of the interim regulations impose burdens upon segments of the public to make periodic reports and payments to Customs, as well as to maintain records for possible examination.

The Paperwork Reduction Act of 1980 (Pub. L. 96-511, 94 Stat. 2812, 44 U.S.C. 3501 *et seq.*) established polices and procedures for

controlling paperwork burdens imposed on the public by federal agencies. Pursuant to this Act, by a document published in the Federal Register on March 31, 1983 (48 FR 13666), the Office of Management and Budget (OMB) promulgated rules implementing the Act. The OMB rules are codified at 5 CFR Part 1320 *et seq.*

One aspect of OMB's oversight function is the review and approval of information collections. Generally, information collections include any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. OMB analyzes such requests for three basic requirements. First, the collection of information must be necessary for proper performance of the agency functions. Second, the request for information or records must not duplicate information otherwise accessible to the agency. Third, the information must have practical utility.

When an information collection is approved by OMB, it is issued a control number. The control number provides a simple and effective way to inform the public that a particular information collection has been approved by OMB pursuant to the Paperwork Reduction Act.

In the June 11, 1986, interim regulations, Customs stated that the amendments were subject to the Paperwork Reduction Act, and that an application for approval was submitted to OMB. OMB was able to quickly review the information collection requirements included in T.D. 86-109, and has issued a control number. This document amends Part 178, Customs Regulations (19 CFR Part 178), by including that control number in the list of previously issued OMB numbers.

E.O. 12291, Regulatory Flexibility Act, Inapplicability of Public Notice Requirement

This document merely amends a listing of the status of previously published regulations. Therefore, the requirements of E.O. 12291, the Regulatory Flexibility Act, and the notice and public comment requirements of the Administrative Procedure Act (5 U.S.C. 552) are not applicable.

List of Subjects in 19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collection of information.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

157-868 O - 86 - 2

AMENDMENT TO THE REGULATIONS

Part 178, Customs Regulations (19 CFR Part 178), is amended as set forth below:

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting, in proper numerical order, the following entries:

§ 178.2 Listing of OMB Control Numbers.

* * * * * * *

19 CFR Section	Description	OMB Control No.
§ 4.98(i)	Users fees for Customs services	1515-0154
§ 6.1a	Users fees for Customs services	1515-0154
§ 24.22	Users fees for Customs services	1515-0154
§ 111.96	Users fees for Customs services	1515-0154
§ 123.1a	Users fees for Customs services	1515-0154
§ 145.1a	Users fees for Customs services	1515-0154

Dated: June 18, 1986.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, June 25, 1986 (51 FR 23050)]

(T.D. 86-122)

Notice of Revised Customs Form 3461, Entry/Immediate Delivery

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document advises the public that Customs has revised Customs Form 3461, now called, Entry/Immediate Delivery, so that it will contain sufficient information to be used in the automated cargo selectivity system. This system allows approximately 80 percent of imported merchandise to be released from Customs custody without actual examination. The revised form is also capable of integration into the Automated Commercial System which

will allow brokers and importers to file an entry and secure release of merchandise by computerized electronic data transfer. The revised Customs Form 3461 is reprinted as an attachment to this document.

EFFECTIVE DATE: The revised version of Customs Form 3461 may be used immediately. Previous versions can be used until September 2, 1986, after which only the revised form may be used.

FOR FURTHER INFORMATION CONTACT: Jerrald Worley or Shirley Rosen, Office of Cargo Enforcement and Facilitation (202-566-8151), or Dale Snell, Program Planning Staff (202-566-5865); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

All merchandise imported into the U.S., unless specifically exempted, must be presented to Customs for examination before it can be released from Customs custody and entered into the commerce of the U.S. Most merchandise is released upon presentation to Customs of an "entry" which contains sufficient information to identify the importer of record, make a written record of entry, and verify the existence of a bond to guarantee production of a follow-up entry summary together with the deposit of estimated duties, if applicable. Within 10 working days after release of the merchandise, entry summary documentation, together with the deposit of estimated duties, if applicable, must be furnished to Customs. This documentation enables Customs to properly classify and appraise the merchandise, as well as to collect necessary statistical information. Entry and release of merchandise are provided for in § 448, Tariff Act of 1930, as amended (19 U.S.C. 1448). The procedures relating to the entry process are set forth in Parts 141 and 142, Customs Regulations (19 CFR Parts 141, 142).

Customs Form 3461, entitled Immediate Delivery Application, is the source document now presented to Customs when making an entry. The form is filled out for each shipment of merchandise and presented to a Customs officer along with invoices and a right to make entry supported by a bond to obtain release of the merchandise. The information on this form allows Customs to verify that the correct shipment is released to the correct person, that it matches the carrier's manifest, and that an acceptable bond is on file.

As part of a continuing program to make the entry process more efficient, Customs developed an automated cargo selectivity system. This system currently allows approximately 80 percent of imported merchandise to be released without actual examination. This system stores information in our computers about certain categories of merchandise and about importers which are known, or sus-

pected to be involved in high risk, prohibited, or restricted importations. The current Customs Form 3461 does not contain sufficient information to be used in the selectivity program. Therefore, importers have been providing supplemental documents to Customs with the necessary information in order to expedite release of their shipments.

In an effort to reduce the paperwork burden on the public, and provide better service to carriers, brokers, and importers, after extensive negotiations with the National Customs Brokers and Freight Forwarders Association of America, Customs has revised the Customs Form 3461. The new version of the form, now called Entry/Immediate Delivery, provides for the numeric or alphabetic coding of information such as entry type, tariff classification, port of entry, carrier, and country of origin of the merchandise. This allows full integration into the automated cargo selectivity system and rapid processing and release of merchandise. The form is also aligned with the requirements of Customs Automated Commercial System which allows brokers and importers to file an entry and secure a release of merchandise through electronic data transfer. The revised form is also compatible with Optical Character Reader (OCR) equipment which, if introduced at a later date, will further speed processing.

The revised version of Customs Form 3461 may be used immediately. Previous versions can be used until September 2, 1986, after which ony the revised form may be used. The Customs Form 3461 Alternate has not been revised. The revised Customs Form 3461 is reprinted as an attachment to this document. Copies of the form and the instructions are also available from district directors of Customs pursuant to the provisions of § 24.14, Customs Regulations (19 CFR 24.14). For those wishing to print their own copies of the form, a specification sheet is included. The revised Customs Form 3461 has been approved by the OMB and assigned control number 1515-0069.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: June 18, 1986.

Michael H. Lane,
Acting Assistant Secretary of the Treasury.

TABS:

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

Form Approved
OMB No. 1515-0069

ENTRY/IMMEDIATE DELIVERY

19 CFR 142.3, 142.16, 142.22, 142.24

1. ARRIVAL DATE	2. ELECTED ENTRY DATE	3. ENTRY TYPE CODE/NAME	4. ENTRY NUMBER
5. PORT	6. SINGLE TRANS. BOND	7. BROKER/IMPORTER FILE NUMBER	
	8. CONSIGNEE NUMBER		9. IMPORTER NUMBER
10. ULTIMATE CONSIGNEE NAME		11. IMPORTER OF RECORD NAME	
12. CARRIER CODE	13. VOYAGE/FLIGHT/TRIP	14. LOCATION OF GOODS—CODE(S)/NAME(S)	
15. VESSEL CODE/NAME			
16. U.S. PORT OF UNLADING	17. MANIFEST NUMBER	18. G.O. NUMBER	19. TOTAL VALUE
20. DESCRIPTION OF MERCHANDISE			

21.	22. IT/BL/AWB NO.	23. MANIFEST QUANTITY	24. TSUSA NUMBER	25. COUNTRY OF ORIGIN	26. MANUFACTURER NO.

27. CERTIFICATION

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

SIGNATURE OF APPLICANT

X

PHONE NO. | DATE

28. BROKER OR OTHER GOVT. AGENCY USE

28. CUSTOMS USE ONLY

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CUSTOMS EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

DELIVERY AUTHORIZED: SIGNATURE DATE

Paperwork Reduction Act Notice: This information is needed to determine the admissibility of imports into the United States and to provide the necessary information for the examination of the cargo and to establish the liability for payment of duties and taxes. Your response is necessary.

Customs Form 3461 (112088)

SUMMARY SPECIFICATIONS FOR CUSTOMS FORM 3461

General Description—5-part marginally punched continuous form compatible with IBM 370/155 and typewriter. Part 1 to be compatible with Dest model 213 OCR reader.

Size—overall: Width 9½ inches, depth 11 inches.

PAPER, DESCRIPTION, COLOR OF INK

Part No.	Paper—Basis 500 sheets 17 x 22"			Ink
	Color	Kind	Sub. No. (latitude)	
1	White.....	CW Bond...	20	Sinclair Valentine Red J25083.
2	White.....	CW Bond...	9-10	Standard Black.
3	White.....	CW Bond...	9-10	Standard Black.
4	White.....	CW Bond...	9-10	Standard Black.
5	Yellow.....	CW Bond...	15	Standard Black.

(Note: Specifications for parts 2-4 same as previous edition of form.)

Joining—Crimp and firm glue left margin and crimp right margin.

Interleaving Carbons—Black narrow unpunched ⅜" short on left and ¾" short on right.

Perforations:

Marginal—½" from left and right side, parts only.

Tearline—Horizontal tearline perforations, parts and carbons, to be provided every 11" between forms.

Punching—5/32 inch diameter round holes spaced vertically ½ inch center to ¼ inch from left and right edges.

Revised February 1986.

[Published in the Federal Register, June 30, 1986 (51 FR 23617)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-62)

LUCIANO PISONI FABRBICA ACCESSORI INSTRUMENT MUSICIALI AND ENZO PIZZI, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Before DiCARLO, *Judge.*

Court No. 84-10-01435

Plaintiffs challenge final affirmative determinations by the Department of Commerce, International Trade Administration (Commerce) and the International Trade Commission (Commission) that resulted in an antidumping duty order concerning woodwind instrument pads from Italy. Plaintiffs argue that Commerce erred in initiating the investigation and in continuing the investigation when it knew the petition failed to satisfy legal requirements, that Commerce did not compare the same merchandise in the Italian and United States markets, and that Commerce imposed margins resulting solely from currency fluctuations.

The Court holds that Commerce did not compare the same merchandise, and that a dumping margin may not result solely from currency changes. Since the margin may be eliminated on remand, the Court will not address plaintiffs' contention that the Commission improperly disregarded the size of the margin in finding material injury to a domestic industry.

[Plaintiffs' motion for judgment on the agency record is granted in part and denied in part. The action is remanded.]

(Decided June 12, 1986)

Klayman & Gurley, P.C. (*Larry Klayman,* and *John Gurley*) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Elizabeth Seastrum; Edward Mcdaj,* International Trade Commission, or counsel) for defendant.

Mudge, Rose, Guthrie, Alexander & Ferdon (*N. David Palmeter* and *Jeffrey Neeley*) for *amicus curiae* Hyundai Steel Ind. Co., Ltd.

Dewey, Ballentine, Bushby, Palmer & Wood, (*Alan Wm. Wolff, Jane Albrecht*) and *Akin, Gump, Strauss, Hauer & Feld,* (*Richard R. Rivers*) for *amicus curiae* Lone Star Steel Co.

MEMORANDUM OPINION AND ORDER

DiCARLO, *Judge:* Plaintiffs, an Italian producer of woodwind instrument pads and its United States importer, challenge final affirmative determinations of the United States Department of Commerce, International Trade Administration (Commerce), *Pads for Woodwind Instrument Keys From Italy; Final Determination of*

Sales at Less Than Fair Value, 49 Fed. Reg. 28295 (1984), and the International Trade Commission (Commission), *Pads for Woodwind Instrument Keys from Italy,* Inv. No. 731-TA-152 (Final), USITC Pub. 1566 (1984), 49 Fed. Reg. 34313 (1984), that resulted in an order assessing an antidumping duty of 1.16% *ad valorem* on woodwind instrument pads from Italy. 49 Fed. Reg. 37137 (1984).

Plaintiffs make four arguments challenging Commerce's determination that woodwind instrument pads are being sold in the United States at less than fair value. Since the Court holds that Commerce unreasonably failed to make a merchandise adjustment under 19 C.F.R. §353.16, and that a dumping margin may not be found to exist as a result of currency changes, the dumping margin may be eliminated following remand. Therefore the Court does not address plaintiffs' contention that the Commission improperly disregarded the size of the margin in its material injury determination.

I. Judicial Review

In reviewing an antidumping duty determination by Commerce, the standard of review is not *de novo.* Rather, the Court must hold unlawful any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B) (1982). Under the substantial evidence standard for review of agency determinations, the Court must accept Commerce's findings if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Federal Trade Commission* v. *Indiana Federation of Dentists,* 54 U.S.L.W. 4531, 4533 (U.S. June 2, 1986). Substantial deference is granted to the agency in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law. *See American Lamb Co.* v. *United States,* 785 F.2d 994 (Fed. Cir. 1986); *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT ——, 622 F. Supp. 1070 (1985).

II. Commerce's Determination of Sales at Less Than Fair Value

A. *Commerce's Initiation of the Investigation*

Plaintiffs allege that the antidumping petition did not contain required price information and therefore should have been rejected by Commerce.

A petition must contain "information reasonably available to the petitioner supporting the allegations" of the "elements necessary for the imposition" of antidumping duties. 19 U.S.C. §1673a(b)(1), (c)(1). A Commerce regulation, 19 C.F.R. §353.36(a)(7), says that petitions "shall contain":

> All pertinent facts as to the price at which the foreign merchandise is sold or offered for sale in the United States and in the home market in which produced or from which

> exported * * * and if appropriate, information regarding sales in third countries or the cost of producing the merchandise. Petitioners unable to furnish information on foreign sales or costs may present information concerning U.S. domestic producers' costs adjusted for differences in the foreign country in question from information publicly available.

The petition contained: (1) home market (Italian) price lists for plaintiffs' pads, in dollars, dated January 1, 1982; (2) export price lists for petitioner's pads, in lira, dated December 1, 1982; (3) estimated home market cost of production data based on petitioner's actual 1976 costs when it manufactured in Italy; and (4) petitioner's cost of production data, current to September, 1983.

Plaintiffs say the price lists were not a sufficient basis to initiate the investigation because they were "out-of-date, not in effect, and clearly inapplicable to the U.S. and Italian markets as alleged." Plaintiffs' Reply Brief at 6. Plaintiffs contend that the fact that the Italian prices were listed in dollars and the United States prices were listed in lira particularly rendered the price lists an insufficient basis to initiate the investigation.

Commerce says that although the price lists submitted by the petitioner were suspect (Commerce later determined the price lists were mislabeled), they provided an adequate basis to proceed since prices on both lists were less than petitioner's cost of production. Commerce also argues it was reasonable to initiate an investigation on the basis of a comparison of price lists allegedly from 1982 with petitioner's 1983 cost of production data.

Commerce interprets the statutory requirement that the petition contain only information "reasonably available to the petitioner" as permitting Commerce to accept petitions from small businesses with less information that would be acceptable in petitions from large businesses. The Court finds this interpretation consistent with the intent of Congress. *See* S. Rep. No. 96-249, 96th Cong., 1st Sess. 47, *reprinted in* 1979 U.S. Code Cong. & Ad. News 433.

Also, Commerce has some discretion in deciding whether to initiate an investigation; Commerce is permitted to assess the sufficiency of the petition "in light of its own knowledge and expertise" and facts capable of judicial notice. *United States* v. *Roses, Inc.*, 1 Fed. Cir. 39, 46, 706 F.2d 1563, 1568-69 (1983). However, Commerce may not, as plaintiffs argue, accept a letter from plaintiffs' counsel arguing against initiating the investigation. *Roses* prohibits Commerce from considering such communications during the 20-day period Commerce has to decide whether to begin an investigation after the filing of the petition under 19 U.S.C. § 1673a(c). Plaintiffs' suggestion that *Gilmore Steel Corp.* v. *United States*, 9 CIT ——, 585 F. Supp. 670 (1984), "limits" *Roses* is in error, since *Gilmore* does not address preinitiation communications.

The Court holds that Commerce's decision to initiate the investigation was a "sufficiently reasonable" interpretation of the statute,

American Lamb Co. v. *United States*, 4 Fed. Cir. ——, 785 F.2d 995 (1986), and was in accordance with law.

B. *Commerce's Continuation of the Investigation*

Plaintiffs argue that Commerce should have rescinded the notice initiating the investigation when it learned that the petitioner failed to provide accurate price information. During the investigation, Commerce determined that one of the price lists furnished by petitioner was effective from 1976 to early 1980 instead of 1982, as alleged. Plaintiffs argue that once this information was discovered there was no longer any basis to conduct the investigation, and the notice of initiation should have been rescinded.

The statutory scheme offers no basis for plaintiffs' position that Commerce is required to rescind a notice of initiation of an investigation upon discovering inaccuracies in a petition. Once Commerce has commenced an investigation, it is obligated to "make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold at less than fair value," 19 U.S.C. § 1673(b)(1) (1982). If the best information available, including the petition, affords no such reasonable basis, Commerce must make a negative preliminary determination of sales at less than fair value.

In making a final determination in an investigation, Commerce must verify all information on which it relies. 19 U.S.C. § 1677e (1982 § Supp. II 1984). Corrections to petitioners' data are the very point of verification procedures. It is therefore proper for Commerce to complete an investigation commenced after a petition is filed by an interested party even when a petition is found to contain inaccuracies. Since Commerce is authorized to commence an antidumping duty investigation *sua sponte* whenever it determines that an investigation is warranted based upon available information, 19 U.S.C. § 1673a(a) (1982), it would be unreasonable to require that Commerce terminate an investigation commenced after the filing of a petition by an interested party when, despite inaccuracies contained in the petition, it finds evidence of sales at less than fair value.

Plaintiffs' reliance on *Gilmore Steel Corp.* v. *United States*, 9 CIT ——, 585 F. Supp. 670 (1984) is misplaced. In that case the domestic plaintiff challenged Commerce's authority to terminate an investigation after initiation. Two months after issuing an affirmative preliminary determination, Commerce said that it believed plaintiff did not have standing to file a petition on behalf of a United States industry, and that the investigation should not have been initiated. The Court affirmed the power of Commerce to terminate investigations where such a fundamental defect in the petition comes to its attention after expiration of the 20-day review period. The Court did not hold, as plaintiffs claim, that Commerce has an obligation to terminate investigations if it finds inaccuracies in a

petition. The Court holds that Commerce's decision not to rescind the notice of initiation was in accordance with law.

C. *Commerce's Comparison of the Merchandise*

Plaintiffs also claim that Commerce compared different merchandise without making necessary adjustments for the differences of the merchandise.

In both Italy and the United States the price of different size pads is determined by the average size of pads in particular size ranges. A Commerce investigator explained the situation as follows:

> For example, the price for a 19mm saxophone pad when sold in Italy is based on the average size pad in the 14.5–20mm range, about 17.5mm. This same pad when sold in the U.S. falls in the 17.5–22mm range and thus its price is based on the average for that range, about 20mm. On the other hand, the price for a 21mm saxophone pad in Italy is based on the average size for the 20.5–30mm range, about 26mm, while the price in the U.S. for this pad, based on the 20mm average for its size range, would be the same as for the 19mm pad.
>
> The problem posed by this situation is that in comparing saxophone pads of the same size in these two markets, the facts that were the basis for the pricing decisions were different. In the above examples, a comparison of 19mm pads between Italy and the U.S. is in effect a comparison of the pricing decisions based on the costs of 17.5mm pads in Italy and 20mm pads in the U.S. A comparison of 21mm pads is a comparison of the pricing decisions based on the costs of 26mm pads in Italy and 20mm pads in the U.S.

R. Doc. 44, at 2-3.

Although Commerce said they compared the sales price of a particular pad size in the United States market with the sales price of the identical pad size in the home market, their comparison did not result, according to the investigator's report, in a comparison of identical pads sold in Italy and the United States. In its determination, Commerce said

> We did not consider an attempt to restructure the home market pricing to be appropriate, since it resulted in an adjustment for what appeared to be [plaintiffs'] deliberate pricing strategy in each of the markets under review.

49 Fed. Reg. 28,295; 28,298.

Plaintiffs say that Commerce was required to make either a circumstances of sale or a merchandise adjustment to allow for the comparison of different size pads. A circumstances of sale adjustment is not warranted, since the differences in the ranges of pad sizes in the two markets is not a "selling cost" similar to "credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising * * *." 19

C.F.R. § 353.15(b). However, the Court holds that a merchandise adjustment was required.

The Commerce regulation providing for adjustments for differences in physical characteristics in the merchandise, 19 C.F.R. § 353.16, provides in part:

> In comparing the United States price with the selling price in the home market, or for exportation to countries other than the United States in the case of similar merchandise, due allowance shall be made for differences in the physical characteristics of the merchandise in the markets being compared. In this regard, the Secretary will be guided primarily by the differences in cost of production, to the extent that it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences, but, when appropriate, the effect of such difference upon the market value of the merchandise may also be considered.

Defendant does not argue that the ranges of pad sizes compared by Commerce were the same, but claims that Commerce has unlimited discretion to grant or deny merchandise adjustments under 19 C.F.R. § 353.13, which provides that any "person who alleges entitlement to any adjustment pursuant to sections 353.14 through 353.19 must establish entitlement thereto to the satisfaction of the Secretary." Defendant contends that plaintiffs failed to "establish a methodology which would permit that ITA to quantify the amount of such an adjustment." Defendant's Brief, at 39.

Commerce's discretion in making adjustments under 19 C.F.R. § 353.16 is not unlimited. Our appellate court has required that Commerce's decision whether to grant or deny an adjustment under section 353.16 must be "reasonable." *Smith-Corona Group, Consumer Products Division, SCM Corp.* v. *United States*, 1 Fed. Cir. 130, 144-45, 713 F.2d 1568, 1582 (1983). Moreover, Commerce performed a verification of plaintiffs' cost of production, which could have provided a basis for a merchandise adjustment under section 353.16.

The Court will not instruct Commerce how to compensate for the physical differences in the compared merchandise. However, the Court holds that Commerce's comparision of pads without allowing for differences in the physical characteristics of the different ranges of pad sizes was unreasonable and not in accordance with law.

D. *Commerce's Currency Conversion Methodology*

Finally, plaintiffs argues that Commerce is required to adopt a reasonable method of currency conversion for its ten home market sales during the period of investigation which does not create a dumping margin.

Plaintiffs say Commerce is obligated to do this for two reasons: (1) the purpose of the antidumping laws is to remedy unfair trade,

not to punish foreign producers selling for less than United States producers, and (2) a Commerce regulation requires that differences between prices caused by currency fluctuations be disregarded. The regulation provides:

> (b) *Special rules for fair value investigations.* For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. *Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.* [Emphasis added.]

19 C.F.R. § 353.56(b). *See Melamine Chemicals, Inc.* v. *United States*, 2 Fed. Cir. ——, 732 F.2d 924 (1984).

Defendant argues that Commerce properly applied the general rule for currency conversions under § 353.56(a), basing exchange rates on quarterly rates published by the Secretary of the Treasury as provided by 31 U.S.C. § 5151 (1982). But in *Melamine*, the government argued, and the Court held, that 31 U.S.C. § 5151 applies only to the assessment and collection of duties, not to less than fair value investigations. 31 U.S.C. § 5151 does not compel Commerce to use quarterly rates.

Defendant says use of some other currency conversion method was not required under section 353.56(b) since the value of the lira compared to the dollar did not "fluctuate" during the period under investigation, but rather declined steadily, which should have served to reduce rather than create a margin. Plaintiffs agree that the depreciation of the lira would effectively decrease any margin, but argue that they were not permitted to reap the benefit of the lira's decline since Commerce based its conversion calculations on the exchange rate that prevailed on the first day of each quarter rather than on the lower rates which existed on the dates of each transaction.

In *Melamine*, our appellate court held that it was in accordance with the intent of Congress and within the authority of Commerce to adopt rules which would take into account exchange rate variables rather than rely on a mechanical conversion formula in determining dumping margins in less than fair value investigations:

> The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at LTFV by the imposition of appropriately increased duties. That purpose would be ill-served by application of a mechinical formula to find LTFV sales, and thus a violation of the antidumping laws, where none existed. A finding of LTFV sales based on a margin resulting *solely* from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair.

732 F.2d at 933 (emphasis in original).

It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's use of quarterly exchange rates. In this case the purpose of the antidumping laws would be violated if Commerce found a dumping margin based on the use of quarterly rates, while no margin would result if Commerce were to use the rates prevailing at the time of transactions.

At oral argument, the Court asked defendant whether the dumping margin of 1.16% would be reduced or eliminated if the exchange rates prevailing on the dates of the transactions had been used. Defendant filed with the Court a recalculation of the margin indicating that the margin would be .698%. Plaintiffs filed a motion to strike these calculations, objecting to the form and to alleged errors in the calculations. In response, defendant corrected one of the alleged errors, lowering the margin to .697. Since the Court orders the case remanded to Commerce on the merchandise adjustment issue, plaintiffs' motion to strike the calculation is denied as moot. Plaintiffs will be afforded an opportunity to comment on the result of the remand. *See Carlisle Tire & Rubber Co.* v. *United States*, 5 CIT 229, 564 F.Supp. 834 (1983).

III. Conclusion

The case is remanded to Commerce for action consistent with this opinion. Commerce will supplement the record and file in the Court its redetermination within 45 days from the issuance of this memorandum opinion and order. Plaintiffs will file any comments on the results of the remand within 15 days of the filing of Commerce's redetermination, and defendant will respond within 10 days of the filing of plaintiffs' comments.

So ordered.

(Slip Op. 86-63)

BOMONT INDUSTRIES, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASAHI CHEMICAL INDUSTRY CO., LTD., INTERVENOR-DEFENDANT

Court No. 86-05-00557

OPINION AND ORDER

[Plaintiff's application for a preliminary injunction denied.]

(Dated June 17, 1986)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart* and *Mary Tuck Staley*) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sheila N. Ziff*) for the defendant.

Barnes, Richardson & Colburn (James S. O'Kelly and *Gerard P. Burke, Jr.)* for the intervenor-defendant.

AQUILINO, *Judge:* Two producers of impression fabric from man-made fiber in Japan, namely, Asahi Chemical Industry Co., Ltd. and Shirasaki Tape Co., Ltd., were excepted from an affirmative dumping determination in 1978. *See* 43 Fed. Reg. 22,344 (May 25, 1978). The plaintiff domestic producer of nylon impression fabric and another company eventually filed a dumping petition with the Department of Commerce limited to sales from Asahi and Shirasaki. Thereafter, the International Trade Administration ("ITA") issued a final determination that "nylon impression fabric from Japan is not being, nor is likely to be, sold in the United States at less than fair value, as provided in section 731 of the Tariff Act of 1930, as amended". 51 Fed. Reg. 15,816 (April 28, 1986).

This action seeks judicial review of that determination pursuant to subsections (A)(i)(I) and (B)(ii) of 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c).

Plaintiff's application for a temporary restraining order was denied after all parties were heard in open court. Thereafter, a hearing was held on plaintiff's application for a preliminary injunction. The proposed order submitted in conjunction with that application would enjoin liquidation of any nylon impression fabric produced by Asahi and Shirasaki and entered during the period April 28, 1986 through final resolution of this action by the court.

I

At both hearings, counsel for the defendant argued that any suspension of liquidation of entries during the pendency of this action would be "meaningless." [1] This position is articulated further in defendant's memorandum of law as follows:

> The suggestion that a favorable outcome for plaintiff in this action could possibly affect entries covered by a preliminary injunction suspending liquidation and could result in the retroactive assessment of antidumping duties on those entries betrays plaintiff's misunderstanding of the antidumping law. It is patent from the statutory scheme that the merchandise covered by the involved entries *will* enter the commerce of this of antidumping duties and beyond the reach of this country free Court, regardless of the outcome of this action or the issuance of a preliminary injunction. The reach of the antidumping law is *prospective only, not* retroactive, except in the limited situations where *provisional* measures (suspension of liquidation and imposition of provisional antidumping duties or a security deposit equal to the amount of the provisionally estimated antidumping duties) are allowed. Under the statutory scheme, these provisional measures may be imposed only after the pub-

[1] Transcript of proceedings on May 9, 1986 [hereinafter cited as "May 9 Tr."], p. 3; transcript of proceedings on May 23, 1986 [hereinafter cited as "May 23 Tr."], pp. 11, 12.

> lication of a preliminary affirmative determination by Commerce in an antidumping or countervailing duty proceeding.[2]
>
> * * * * * * *
>
> * * * [E]njoining liquidation of the involved entries upon plaintiff's application would be a futile exercise as those entries are beyond the reach of this antidumping litigation and of this Court and must ultimately be liquidated free of antidumping duties. Under these circumstances, issuance of a preliminary injunction would be contrary to the statutory scheme, the legislative intent, and an abuse of discretion.[3]

This position, which concentrates in the roles and responsibilities of the ITA and International Trade Commission ("ITC") for the imposition of antidumping duties under Subtitle B of Title I of the Trade Agreements Act of 1979, 93 Stat. 162–75, is clearly erroneous. Title X of that same statute provides for judicial review of the exercise of those roles and responsibilities. Section 1001(c)(2) thereof, now 19 U.S.C. § 1516a(c)(2), as amended, states that this Court of International Trade

> may enjoin the liquidation of some or all entries of merchandise covered by a determination of the * * * administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.[4]

Unless such liquidation is enjoined, subsection (c)(1) mandates that all entries be liquidated in accordance with the administrative determination. On the other hand, 19 U.S.C. § 1516a(e) provides:

> Liquidation in accordance with final decision—If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> (2) *entries, the liquidation of which was enjoined under subsection (c)(2) of this section,*

---

[2] Defendant's Memorandum in Opposition to Plaintiff's Application for Preliminary Injunction, p. 2 (emphasis in original).

[3] *Id.* at 10. *See also* Intervenor's Memorandum of Law in Opposition to Plaintiff's Application for a Preliminary Injunction, p. 4 ("no purpose would be served by suspending the liquidation of entries") and pp. 6–7 ("[t]he equitable relief sought by plaintiff can have no legal effect on current or future entries of Asahi's merchandise").

[4] Intervenor-defendant's contention at page 5 of its memorandum that "determination" means only an "affirmative" one is also clearly erroneous. Subsection (c)(2) is predicated upon "a determination described in paragraph (2) of subsection (a)". One such determination is a "final *negative* determination by the administering authority * * * under section * * * 1673d". 19 U.S.C. 1516a(a)(2)(B)(ii) (emphasis added).

> *shall be liquidated in accordance with the final court decision in the action.* Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision. [emphasis added]

The Court for Appeals for the Federal Circuit reaffirmed this clear-cut statutory rule in *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 934 (Fed. Cir. 1984).[5] *See also Smith-Corona Group, Consumer Products Division, SCM Corporation* v. *United States*, 1 CIT 89, 96-99, 507 F.Supp. 1015, 1021-23 (1980).

II

The Report of the Committee on Ways and Means of the House of Representatives recognized that subsection (c)(2) made a "major change" in the law. H.R. Rep. 317, 96th Cong., 1st Sess. 182 (1979). But that report also stated that the change is not to be construed as granting the court authority to exercise the power in all situations, only "where appropriate". *Id.* Indeed, subsection (c)(2) codified the traditional judicial criteria for ruling on an application for a preliminary injunction as follows:

> * * * In ruling on a request for * * * injunctive relief, the court shall consider, among other factors, whether—
>
> (A) the party filing the action is likely to prevail on the merits,
>
> (B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,
>
> (C) the public interest would best be served if liquidation is enjoined, and
>
> (D) The harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.[6]

In other words, while Congress clearly understood that, in the absence of a preliminary injunction of the kind sought herein, entries "will escape assessment of dumping duties,"[7] it was unwilling to change the law other than where "extraordinary circumstances"[8] exist which still require analysis of the foregoing criteria for injunctive relief.

---

[5] Intervenor-defendant's memorandum of law cites (at page 11) this decision for another, appropriate proposition. Despite references to that case in the complaint itself (para. 46) and in plaintiff's reply brief (at pages 17-18), again for other reasons, intervenor-defendant's citation has been taken as an excuse by plaintiff's counsel to present a "Motion for Leave to File a Supplemental Statement to Plaintiff's Reply Brief". This motion is hereby denied, and no part of that statement is either referred to or relied on hereinafter.

The court received on June 16, 1986 a memorandum from defendant's counsel attempting to discuss *Melamine* for the first time. The absence of any prior reference to this case or the underlying statute, even after this court's mention thereof during colloquy on the application for a temporary restraining order [*see* May 9 Tr. at 7], constrains the court to now question whether defendant's counsel have intentionally disregarded the dictates of CIT Rule 11 as well as Canon 7 of the Lawyer's Code of Professional Responsibility in general and Ethical Consideration 7-23 and Disciplinary Rule 7-102(A) (2) and (5) in particular. Any such disregard will not be countenanced by this court in this or any other action brought before it.

[6] 19 U.S.C. § 1516a(c)(2) (1979) (sentence deleted by Customs Courts Act of 1980, Pub.L. 96-417, § 609(c), 94 Stat. 1746).

[7] H.R. ep. 317, 96th Cong., 1st Sess. 182 (1979).

[8] S. 249, 96th Cong., 1st Sess. 248 (1979).

Whether the analysis follows the order of those criteria as set forth in the statute, or as articulated in the Federal Circuit or formulated in other jurisdictions,[9] a crucial requirement is irreparable harm to the applicant. In *Zenith Radio Corporation* v. *United States,* 710 F.2d 806, 810, (Fed. Cir. 1983), the court concluded

> that liquidation would * * * eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin on entries in the '79–'80 review period. The result of liquidating the '79–'80 entries would not be economic only. In this case, Zenith's statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination. In the context of Congressional intent in passing the Trade Agreements Act of 1979 and the existing finding of injury to the industry underlying T.D. 71–76, we conclude that the consequences of liquidation do constitute irreparable injury.

As indicated, that case arose out of a review of a fixed period pursuant to settion 751 of the 1979 act, 19 U.S.C. § 1675.

In an action such as the one at bar, liquidation of past entries at the proper rate of duty is not the "only remedy available". Rather, this proceeding can affect future entries. Thus, the court in *American Spring Wire Corp.* v. *United States,* 7 CIT 2, 578 F.Supp. 1405 (1984), concluded that the *Zenith* decision did not create an irrebutable presumption of irreparable harm. This is, an applicant for an injunction supending liquidations during judicial review of a negative administrative dumping determination must prove irreparable injury along with the other requirements for such extraordinary relief. *See, e.g., Timken Company* v. *United States,* 6 CIT 75, 569 F.Supp. 65, 69 (1983).[10]

At the hearings herein, plaintiff's attorneys, who were also counsel of record in both *American Spring Wire* and *Timken,* attempted to persuade the court that failure to suspend liquidation of Asahi and Shirasaki entries during the term of this action will cause their client irreparable harm. Despite an able presentation, they failed to bear their burden in this regard.

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[9] *Compare S.J. Stile Associates Ltd.* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981) *with* (1) *Ceramica Regiomontana, S.A.* v. *United States,* 7 CIT 390, 590 F.Supp. 1260 (1984):

> * * *Although the extraordinary remedy of a preliminary injunction is not available unless the moving party's burden of persuasion is met as to all four factors, the showing of likelihood of success on the merits is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief, *i.e.*, the greater the hardship the lesser the showing.

7 CIT at ——, 590 F.Supp. at 1264 (quoting from *American Air Parcel Forwarding Company* v. *United States,* 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981)); *and* (2) *Texaco Inc.* v. *Pennzoil Company,* 784 F.2d 1133, 1152 (2d Cir. 1986):

> In this circuit the standard for issuance of preliminary injuctive relief is well-settled. The plaintiff has the burden of showing irreparable harm *and* (1) either probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *plus* a balance of hardships tipping decidedly in the plaintiff's favor. * * * The effect of the grant or withholding of such relief upon the public interest must also be considered. [emphasis in original; citations omitted]

[10] That case also involved an annual review pursuant to section 751 of the 1979 act, but the complaint challenged the resultant administrative revocation of the antidumping duty order in contrast to *Zenith,* where the issue simply was the appropriate margin for such duty. *See Timken Company* v. *United States,* 4 CIT 263, 264, 553 F.Supp. 1060, 1061 (1982).

The evidence indicates that the plaintiff is having difficulty competing in the marketplace. It sustained a net loss in 1984, then achieved an operating profit for 1985; for the first four months of this year, the company experienced a drop in sales and a net loss.[11] At the May 23 hearing, the testimony focused on one particular customer of the plaintiff [12] which apparently has purchased competing merchandise from Shirasaki, but that testimony also indicated sales to the customer from domestic competitors. *See* May 23 Tr. at 55. In any event, the plaintiff was able to negotiate a substantial sale to that customer in March 1986, albeit at a price lower than a quotation for the same product at the end of 1985. *See* Hearing Exhibit 2.

In July 1985, the ITC reached a preliminary determination pursuant to 19 U.S.C. § 1673b(a) that there was a reasonable indication that the domestic industry is materially injured, or is threatened with material injury, by reason of imports from Japan of nylon impression fabric alleged to be sold at less than fair value. USITC Publication 1726 at 1 (July 1985). The determination is stated to have been based on findings, among others, of significant growth in demand for such fabric and of underselling by imports in a very price sensitive market. *See id.* at 3. The Commission concluded its report on the following note, however:

> There was a significant increase in the capacity of the domestic industry during the period of investigation. The entry of Milliken into the market as a fully integrated producer may accentuate this trend. This may have an impact on the analysis of the causal link between Japanese imports and the condition of the domestic industry.[13]

Of course, the question posed by the instant application is not whether the plaintiff is being injured by Asahi and Shirasaki imports, or whether those imports are being sold at less than fair value, but rather, to quote from the affidavit of plaintiff's president, whether

> admission of Japanese fabric into commerce in the United States without the possibility of offsetting dumping duties will prevent Bomont from recovering profitability, prolong its period of losses, deprive it of working capital, and threaten its very existence.[14]

If this is the gravamen of plaintiff's application, it prays for too much. And plaintiff's proof shows too little. That is, the evidence fails to support the thesis that lack of suspension of liquidation during the pendency of this action, in the hope of ultimate admin-

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[11] *See* Affidavit of Joseph A. Sullivan, para. 6, p. 4 (May 5, 1986) and Hearing Exhibit 1.

[12] The Sullivan affidavit outlines (in paragraph 8) recent sales experiences with some six other "major accounts".

[13] USITC Publication 1726 at 10, n. 37 (July 1985). The court notes in passing that the other domestic petitioner before the ITA has not joined in this action for judicial review.

[14] Sullivan Affidavit, para. 7.

istrative imposition of any antidumping duty, will cause the plaintiff irreparable injury. While the court recognizes that Asahi and Shirasaki merchandise may enter the United States during this period, there has been no attempt by the plaintiff to quantify the number of such entries which have occurred (or which will occur).

The plaintiff did attempt to compare its prices with those of the Japanese competitors, but the best evidence of the latter, a Shirasaki price list, is apparently two years out of date.[15] As for Asahi, the testimony at the May 23 hearing did not show sales to the one customer singled out for analysis. *See, e.g.,* May 23 Tr. at 56. Moreover, an affidavit of plaintiff's vice president for sales submitted originally to the ITA admits that he had no "specific price quote information on Asahi unslit fabric during the second half of 1985 or through the early part of 1986." Exhibit 9, para. 9 to Complaint.

That same affidavit specifies a Shirasaki price for the last quarter of 1985 *below* the price at which the plaintiff successfully negotiated the March 1986 sale referred to above. *Compare id.,* paras. 6-8 *with* Hearing Exhibit 2. On the other hand, another affidavit originally submitted to the ITA (and now Exhibit 10 to the complaint) describes in paragraph 4 a reduction in price in an attempt to compete with Shirasaki on another account. While this court does not yet have the administrative record before it, the magnitude of that reduction may well exceed the repair any appropriate antidumping duty could effectuate.[16]

As *Ceramica Regiomontana* and other cases show, *supra* page 7, note 9, there is an inter-relationship between the requisite showings of likelihood of success on the merits and irreparable harm for preliminary injunctive relief. Paragraph 28(b) of the complaint herein alleges that the petition to the ITA claimed dumping margins of 19.7 percent or less for the period investigated, but that allegation concedes price increases to the United States of 18.1 percent for the same time frame.[17] While these figures have been juxtaposed in support of the first count of the complaint claiming an unlawful failure by the ITA to investigate initially a period of time longer than the first six months of 1985, they barely support any claim of irreparable injury.

Time, of course, is an element of irreparability. Indeed, the plaintiff has also presented the court with a motion for expedition of this action. However, the Customs Courts Act of 1980, 28 U.S.C. § 2647, provided that actions such as this shall have precedence. While this statutory provision was repealed by Congress in Public

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[15] This document [Hearing Exhibit 7] was not offered for the contents thereof in any event, but only to indicate the type of information available to the witness in testifying within the meaning of Federal Rule of Evidence 701.

[16] The court notes that the ITA in its original determination (in 1977) found weighted-average margins of 0.15 percent for Asahi and 0.34 percent for Shirasaki, with the margins for the latter ranging from 0.3 to 4.3 percent. Asahi's weighted-average margin was considered to be *de minimis*, that of Shirasaki "minimal". 42 Fed. Reg. 65,345 (Dec. 30, 1977).

[17] *See also* Plaintiff's Memorandum of Points and Authorities in Support of its Application for a Temporary Restraining Order and a Preliminary Injunction, p. 15.

Law 98-620, effective November 8, 1984, pursuant to 28 U.S.C. § 1657 this Court of International Trade continues to grant such actions precedence. Furthermore, both 28 U.S.C. § 2635(d)(1) and CIT Rule 72(a) mandate that the defendant file the administrative record within forty days. When these requirements are compared with the year's time the Customs Service has at a minimum under 19 U.S.C. § 1504 to liquidate entries, any irreparable harm to the plaintiff due to lack of suspension of liquidation becomes even less discernible.

Failure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction, and the court need not conclusively determine the other criteria. *See, e.g., National Corn Growers Association* v. *Banker,* 9 CIT ——, 623 F.Supp. 1262, 1275 (1985); *American Air Parcel Forwarding Company* v. *United States,* 6 CIT 146, 573 F.Supp. 117, 122 (1983). However, in view of the inter-relationship of this criterion with the merits, the court is not persuaded now that the plaintiff is so likely to succeed on the merits as to make the showing of irreparable harm a conceptual formality.

In view of the foregoing, plaintiff's application for a preliminary injunction must be denied.

So ordered.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/96	Restani, J. June 6, 1986	FAG Bearings Corp.	83-6-00793	Item 680.39 12.2%, 11.4%, 10.6%	Item 680.33 5.8%, 5.6%, 5.3%	FAG Bearings, Ltd. v. U.S., Slip Op. 85-52	Buffalo Combination ball/roller bearings with integral shafts
C86/97	Restani, J June 6, 1986	FAG Bearings Corp.	83-12-01781	Item 680.39 10.6%, 9.8%	Item 680.33 5.3% or 5.1%	FAG Bearings, Ltd. v. U.S., Slip Op. 85-52	Buffalo Combination ball/roller bearings with integral shafts
C86/98	Restani, J. June 6, 1986	FAG Bearings Corp.	84-11-01665	Item 680.39 9.8% or 8.9%	Item 680.33 5.1% or 4.9%	FAG Bearings, Ltd. v. U.S., Slip Op. 85-52	Buffalo Combination ball/roller bearings with integral shafts
C86/99	Newman, S.J. June 6, 1986	Intergram	83-7-01080, etc.	Item 648.82 17%	Item 648.97 10.3%	Agreed statement of facts	Los Angeles 5-piece plier sets
C86/100	Newman, S.J. June 6, 1986	North American Foreign Trading Corp.	85-4-00519	Item A684.62 Free of duty for telephone Item 688.36 4.7% for clock portion	Item A684.62 Free of duty for telephone and clock portion	Agreed statement of facts	New York Modular Desk/Wall Telephone
C86/101	Restani, J. June 9, 1986	FAG Bearings, Ltd.	83-1-00106	Item 680.39 11.4%	Item 680.33 5.6%	FAG Bearings Ltd. v. U.S., Slip Op. 85-52	Detroit Combination ball/roller bearings with integral shafts
C86/102	Newman, S.J. June 9, 1986	C.J. Tower & Sons of Buffalo, Inc.	82-3-00275	Item 682.25 11.8%	Item 682.30 5.8%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/103	Aquilino, J. June 13, 1986	S. Betesh & Co.	82-2-00197	Item 706.24 20%	Item 706.23 6.5%	Agreed statement of facts	New York Linen handbags
C86/104	Newman, S.J. June 16, 1986	Terumo Corp.	84-8-01168, etc.	Item 709.27 13% or 14.2%	Item 709.09 5.1% or 5.3%	Agreed statement of facts	Los Angeles Surflo I.V. and Coaxial Dual Flow Catheters

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/171	Watson, J. June 6, 1986	Boghosian Bros.	274869, etc.	Export value	F.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed, or appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Rugs
V86/172	Watson, J. June 11, 1986	American Custom Brokerage Co.	R63/11835	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Honolulu Transistor radios together with their accessories and parts; an entirety
V86/173	Watson, J. June 11, 1986	Kowa American Corp.	R63/7708, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/174	Watson, J. June 12, 1986	Harben Co.	R63/3593, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/175	Newman, S.J. June 12, 1986	Mitsubishi International Corp.	81-9-01285, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Los Angeles Footwear
V86/176	Newman, S.J. June 12, 1986	Mitsubishi International Corp.	82-4-00489	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	New York Footwear
V86/177	Newman, S.J. June 12, 1986	Mitsubishi International	82-9-01345, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Seattle Footwear
V86/178	Newman, S.J. June 12, 1986	NSI, Inc.	84-12-01783	Transaction value	Equal to invoice value	Agreed statement of facts	Savannah Needle equipment

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T17.6/3-4:

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 86-123)

Customs Regulations Amendment Adding Austria to List of Countries Whose Pleasure Vessels Are Entitled To Be Issued U.S. Cruising Licenses

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Austria to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any resident of the U.S. are allowed to arrive at and depart from Austrian ports and cruise in the waters of Austria without being subjected to formal entry and clearance procedures. Therefore, Customs is extending reciprocal privileges to Austrian-flag pleasure vessels.

EFFECTIVE DATE: These privileges became effective for Austria on April 21, 1986.

FOR FURTHER INFORMATION CONTACT: Donald H. Reusch, Carriers, Drawback and Bonds Division (202-566-5706), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. vessels documented with a pleasure license endorsement, used exclusively for pleasure, not engaged in any trade, and not violating the customs or navigation laws of the U.S. may proceed from port to port in the U.S. or to foreign ports without entering and clearing, as long as they have not visited hovering vessels. When returning from a foreign port or place, such licensed U.S.

pleasure vessels are required to report their arrival pursuant to § 4.2, Customs Regulations (19 CFR 4.2).

Generally, foreign-flag yachts entering the U.S. are required to comply with the laws applicable for foreign vessels arriving at, departing from, and proceeding between ports of the U.S. However, as provided in § 4.94(b), Customs Regulations (19 CFR 4.94(b)), pleasure vessels from certain countries may be issued cruising licenses which exempt them from formal entry and clearance procedures (e.g., filing manifests, obtaining permits to proceed and paying entry and clearance fees). Upon arrival at each port of entry in the U.S., the master shall report the fact of arrival to the appropriate Customs officer. Yachts or pleasure vessels not carrying passengers or merchandise in trade are exempt from paying tonnage tax and light money in any case pursuant to §4.21(b)(5), Customs Regulations (19 CFR 4.21(b)(5)). Cruising licenses are available to pleasure vessels of countries which extend reciprocal privileges to U.S. pleasure vessels. A list of these countries is set forth in § 4.94(b).

By diplomatic note dated April 14, 1986, the Austrian Embassy in Washington, D.C., informed the Department of State that the Government of Austria permits yachts used and employed exclusively as pleasure vessels and belonging to any resident of the U.S., to arrive at and depart from ports of Austria and cruise the waters of Austria without entering and clearing Austrian Customs, and without the payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes, or charges for cruising licenses.

The Department of State informed Customs Headquarters by a letter dated May 13, 1986. The Carriers, Drawback and Bonds Division of Customs is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.94(b). Therefore, on May 21, 1986, the Director of that division determined that, effective retroactively to April 21, 1986, Austria should be added to the list of countries set forth in § 4.94(b).

By virtue of the authority vested in the President by § 5 of the Act of May 28, 1908, 35 Stat. 425, as amended (46 U.S.C. 104), the President has delegated the authority to issue these cruising licenses to the Secretary of the Treasury by E.O. 10289, September 17, 1951. By Treasury Department Order 165-25, the Secretary of the Treasury delegated authority to the Commissioner of Customs to prescribe regulations relating to § 4.94(b) and other sections of the Customs Regulations relating to lists of countries entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82-201), dated October 13, 1982, the Commissioner delegated authority to amend this section to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations

and Rulings, who then redelegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Government of Austria and the Department of State, as described above, it has been determined that the U.S. is in possession of satisfactory evidence regarding the passage of U.S. pleasure vessels through the ports and waters of Austria without their being subjected to formal entry and clearance procedures. Therefore, Austria is added to the list of countries whose pleasure vessels may be issued U.S. cruising licenses.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely implements a statutory requirement and involves a matter in which the majority of the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

THE REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a major impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs inspection and duties, Imports, Vessels, Yachts.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103.

§4.94 also issued under 19 U.S.C. 1433, 1434, 1435, 1441; 46 U.S.C. 91, 104, 313, 314.

§4.94 [Amended]

2. Section 4.94(b), Customs Regulations (19 CFR 4.94(b)), is amended by inserting, in appropriate alphabetical order, the word, "Austria", to the list of countries whose yachts or pleasure vessels may be issued U.S. cruising licenses.

Dated: June 25, 1986.

B. JAMES FRITZ,
Director, Regulations Control
and Disclosure Law Division.

[Published in the Federal Register, July 3, 1986 (51 FR 24322)]

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19 CFR Part 12

(T.D. 86-124)

Entries of Textiles and Apparel Exported From Japan

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Policy statement

SUMMARY: This document advises that a mandatory "live" entry will be required by Customs for certain shipments of textiles and apparel exported from Japan and entered or withdrawn from warehouse for consumption in the U.S. A "live" entry consists of, among other things, the filing of sufficient documentation to enable Customs to appraise, classify, and determine the admissibility of the merchandise. It also requires the payment of estimated duty prior to release of the merchandise. This action is necessary to prevent circumvention of quota and visa requirements by transshipping merchandise through Japan and entering it as a product of Japan.

EFFECTIVE DATE: July 7, 1986.

FOR FURTHER INFORMATION CONTACT: William Marchi, Commercial Compliance Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2957).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to several bilateral and multilateral international trade agreements to control the importation of textiles and apparel, the U.S. has taken certain actions towards restraining trade in these articles. These actions have included the setting of import limitations (quotas) on disruptive imports and the establishment of visa or export license requirements with foreign countries.

Notwithstanding vigorous enforcement measures taken by Customs to enforce quota and visa requirements, large-scale abuses in Japan still exist with respect to shipments from Japan. This is in larger part due to various schemes currently used by importers and exporters to circumvent the quota and visa restrictions. One such scheme, the transshipping of textiles and apparel through Japan, and entering it into the U.S. as a product of Japan, has resulted in the fraudulent entry of an estimated 50 to 80 million yards of fabric. Under this scheme, goods are imported into a free trade zone and invoiced by the buyer as a product of Japan. They are then exported to the U.S. with a false country of origin marking. Thus, the exporter and importer have successfully circumvented the quota and visa requirements on the merchandise from the actual country of origin.

Customs has identified the textiles and apparel most often involved in this transshipment scheme as woven fabric of man-made fibers classifiable under textile category number 612 (items 338.4004, 338.4005, 338.5003, 338.5005, 338.5008 through 338.5022, and 338.5024 through 338.5036, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202)).

ACTION

With respect to merchandise in textile category 612 which was exported from Japan and is being entered or withdrawn from warehouse for consumption in the U.S. on or after July 7, 1986, the following procedures will apply:

(1) The merchandise must be entered under the entry/entry summary procedures ("live formal entry") set forth in § 142.11 *et seq.*, Customs Regulations (19 CFR 142.11 *et seq.*), before its release under the provisions of § 142.13(c)(2), Customs Regulations (19 CFR 142.13(c)(2)). This entails, among other things, the filing of sufficient documentation to enable Customs to appraise, classify, and determine the admissibility of the merchandise. It also requires the payment of estimated duty prior to release of the merchandise;

(2) All documentation relating to textile category 612 merchandise must be reviewed by a Customs import specialist before release of the merchandise; and

(3) The merchandise will be subject to intensive physical examination.

In conjunction with these procedures, Customs field officers have been alerted to the possibility that efforts may be made to pass off fabrics consisting of blends of man-made fibers and cotton as cotton goods (*e.g.*, under item 326.00, TSUS), when, in fact, the merchandise is in chief value of man-made fibers and therefore subject to the restraints placed upon textile category 612 merchandise.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 13, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 1, 1986 (51 FR 23736)]

(T.D. 86-125)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued December 20, 1985, to March 19, 1986, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and an approval under T.D. 84-49.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: June 25, 1986.

File: 218916.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Andrew Crowe & Sons, Inc.
Articles: Rope, cordage, and twine
Merchandise: Nylon yarn; polyester yarn
Factories: Warren (2), Belfast, Unity, and Liberty, ME
Statement signed: November 30, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston, February 11, 1986

(B) Company: Appleton Papers, Inc.
Articles: NCR Paper® band of carbonless copy paper
Merchandise: Uncoated base stock paper
Factories: Appleton, Portage and Combined Locks, WI; Camp Hill and Roaring Spring, PA; West Carrollton, OH
Statement signed: November 15, 1985
Basis of Claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston, (Baltimore Liquidation), February 11, 1986

(C) Company: AT&T Nassau Metals Corporation
Articles: Continuous cast copper wire
Merchandise: Electrolytically refined cathode copper
Factory: Gaston, SC
Statement signed: September 11, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami, February 25, 1986

(D) Company: Bessonet Bee Company, Inc.
Articles: Finished honey
Merchandise: Raw honey
Factory: Donaldsonville, LA
Statement signed: September 16, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New Orleans, February 11, 1986

(E) Company: Borden Industrial Food Products, Inc.
Articles: Frozen concentrated lemon juice and reconstituted lemon juice
Merchandise: Concentrated lemon juice for manufacturing
Factories: Indio, CA; Waterloo, NY; Chicago, IL
Statement signed: June 3, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Los Angeles and Los Angeles (San Francisco Liquidation), March 12, 1986

(F) Company: Boundary Fish Company
Articles: Finished dogfish products
Merchandise: Whole shark
Factory: Blaine, WA
Statement signed: November 22, 1985
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), March 14, 1986

(G) Company: Celanese Chemical Company, Inc.
Articles: Acetic acid; vinyl acetate; methyl acrylate; formaldehyde (crude and finished and merchant grades); paraformaldehyde; formcel® methyl alcohol solution; formcel® normal butyl alcohol solution; methyl formate; methylal (dimethoxymethane); ethyl acetate; propyl acetate; butyl acetate; isobutyl acetate; acetic anhydride; trimethylolpropane (TMP); pentaerythritol (PE); pentaerythritol triacrylate (PETA); trimethylolpropane triacrylate (TMPTA); trimethylolpropane trimethacrylate (TMPTMA); cellulose acetate flake; cellulose acetate cigarette tow; cellulose acetate filament yarn; cellulose acetate staple fiber; cellulose acetate

fiber batting; cellulose acetate molding material; cellulose acetate extruded sheeting; cellulose acetate cast products; cellulose triacetate flake, yarn and staple fiber; acetal copolymer, sold under the trademark CELCON® et al.
Merchandise: Methanol
Factories: BAy City, Bishop, Houston, and Pampa, TX; Newark, NJ; Rock Hill, SC; Cumberland, MD; Narrows, VA
Statement signed: September 27, 1985
Basis of claim: Used in; appearing in, when valuable wastes exist
Rate forwarded to Regional Commissioners of Customs: New York and Houston, February 18, 1986
Revokes: T.D. 85-1-F

(H) Company: Chevron Chemical Company
Articles: Lubricating oil additives
Merchandise: Neutral calcium sulfonate (Surpass S-301A and OLOA 246A)
Factory: Belle Chasse, LA
Statement signed: October 24, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioners of Customs: Los Angeles (San Francisco Liquidation) and New Orleans, January 21, 1986

(I) Company: Chevron Research Company
Articles: Catalysts
Merchandise: Molybdic oxide
Factory: Elyria, OH
Statement signed: June 28, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), March 12, 1986

(J) Company: Collins & Aikman Corporation
Articles: Spun yarn of various compositions
Merchandise: Dyed and undyed nylon, acrylic, rayon, polyester and polypropylene staple fiber
Factories: Norwood and Troy, NC
Statement signed: August 19, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, December 20, 1985

(K) Company: Dri-Print Foils, Inc.
Articles: Hot stamping foils—printing decoration for plastic, wood and paper and other products produced in a similar manner
Merchandise: Polyester film
Factory: Rahway, NJ
Statement signed: January 16, 1986

Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, March 19, 1986
Revokes: T.D. 82-225-A, to cover successorship from Beatrice Companies, Inc.

(L) Company: Ferguson Perforating and Wire Co.
Articles: Brass sheets, perforated; copper sheets, perforated; brass wire cloth; and sugar mill machinery repair parts
Merchandise: Brass strip, brass wire, copper strip, and copper sheet
Factory: Providence, RI
Statement signed: August 13, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commission of Customs: Boston, February 6, 1986

(M) Company: GAF Corporation
Articles: Polybutylene terephthalate compounds
Merchandise: Polybutylene terephthalate
Factories: Lenden, NJ; Texas City, TX; Calvert City, KY; and factories of agents under T.D.s 55207(1) and 55027(2)
Statement signed: December 16, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, February 7, 1986

(N) Company: GNB Incorporated
Articles: Lead oxide; antimonial lead; calcium lead; pig lead
Merchandise: Pig lead; metallic antimony
Factories: Los Angeles, CA: Frisco, TX; St. Paul, MN
Statement signed: January 22, 1986
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, March 18, 1986
Revokes: T.D. 85-106-A, to cover name change from GNB Batteries, Inc.

(O) Company: Harsco Corporation, Astro Metallurgical Division
Articles: Alloyed and unalloyed titanium mill products and fabrications
Merchandise: Commercially pure titanium and titanium 6AL/4V materials
Factory: Wooster, OH
Statement signed: October 2, 1985
Basis of claim: Used in and used in less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, February 18, 1986
Revokes: T.D. 78-254-B and T.D. 85-41-M

(P) Company: Harvey Titanium, Ltd.
Articles: Titanium alloy rough forgings
Merchandise: Titanium alloy billet and bar
Factory: Santa Monica, CA
Statement signed: May 7, 1985
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, March 17, 1986

(Q) Company: Hercules Incorporated
Articles: Kymene resins
Merchandise: Bis-hexamethylene triamine
Factories: Savannah, GA; Milwaukee, WI; Portland, OR
Statement signed: November 9, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), January 15, 1986

(R) Company: Hoffmann-LaRoche, Inc.
Articles: Ascorbic acid ultra fine and fine powder; ascorbic acid type S; ascorbic acid granular and fine granular; sodium ascorbate fine powder, fine granular and type AG
Merchandise: Ascorbic acid crystalline
Factory: Belvidere, NJ
Statement signed: January 22, 1986
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, March 17, 1986.

(S) Company: Morton Thiokol, Inc.
Articles: Epoxy molding compounds
Merchandise: Epoxy cresol novolac resins; tetra acid dianhydride; fused silica
Factory: Ringwood, IL
Statement signed: June 28, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Los Angeles, February 25, 1986
Revokes: T.D. 83-259-R

(T) Company: Ohio Pure Foods, Inc.
Articles: Grapefruit juice from concentrate and frozen concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Akron, OH
Statement signed: August 29, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, March 17, 1986

(U) Company: Olin Corporation
Articles: Copper alloy sheet in coil or strip, tubing, blanks, cups, and ammunition
Merchandise: Copper ingot and zinc bars
Factories: E. Alton (2), and Marion, IL; Waterbury, CT
Statement signed: November 27, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, January 22, 1986

(V) Company: Riverbend Products, Inc.
Articles: Finished concentrated lemon juice for manufacturing
Merchandise: Concentrated lemon juice for manufacturing
Factories: Visalia, CA; Yuma, AZ
Statement signed: December 20, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), March 14, 1986

(W) Company: Syntex Laboratories, Inc.
Articles: Granulated naproxen, tableted naproxen, and packaged tableted naproxen
Merchandise: Naproxen, pharmaceutical grade (d-2-(6'-methoxy-2-naphthyl), propionic acid)
Factory: Palo Alto, CA
Statement signed: November 7, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioners of Customs: Miami, Los Angeles, and Chicago, February 11, 1986

(X) Company: Syntex Chemicals, Inc.
Articles: [(±)-1 alpha-tetrahydropyranyloxy-2 alpha-(2-hydroxy-3-butenyl)-3 beta-(3 alpha-tetrahydroxypyranyl-oxy-4-phenoxy-1-trans-butenyl)-4 alpha-t-butyldimethylsiloxycyclopentane] in toluene, or Fen-18
Merchandise: (±)-3-hydroxy-1-iodo-4-phenoxy-cis-but-1-ene; or IPG 7A
Factory: Boulder, CO
Statement signed: October 28, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioners of Customs: Miami, Los Angeles, and Chicago, January 15, 1986

(Y) Company: U.S. Reduction Company
Articles: Aluminum alloy ingots
Merchandise: Silicon metal and silicon metal alloy
Factory: Marietta, PA
Statement signed: October 28, 1985

Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, March 17, 1986
Revokes: T.D. 79-213-X

(Z) Company: Vista Chemical Company
Articles: Alcohol and alumina
Merchandise: Aluminum powder
Factory: Westlake, LA
Statement signed: November 26, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Houston, February 6, 1986

Approval Under T.D. 84-49

(1) Company: TransAmerican Natural Gas Corporation
Articles: Middle distillate fuel oil and high sulfur residual fuel oil
Merchandise: Crude oil, classes I, II, and III
Factory: Good Hope, LA
Statement signed: October 28, 1985
Basis of claim: As provided in the drawback rate contained in T.D. 84-49
Rate forwarded to Regional Commissioner of Customs: New Orleans, February 11, 1986

(T.D. 86-126)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued March 27, 1986, to May 29, 1986, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: June 25, 1986.

File: 218915.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Abbott Laboratories
Articles: Intravenous amino acid injections (aminosyn)
Merchandise: Alanine; arginine; histidine; leucine; isoleucine; lysine acetate; methionine; phenylalanine; proline; serine; threonine; tryptophan; tyrosine; valine
Factory: North Chicago, IL
Statement signed: July 29, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, April 3, 1986

(B) Company: American Chrome and Chemicals, Inc.
Articles: Chromium oxide
Merchandise: Sodium dichromate (anhydrous)
Factory: Corpus Christi, TX
Statement signed: January 28, 1986
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, May 27, 1986

(C) Company: American Standard, Inc.
Articles: Air conditioners and manufactured parts
Merchandise: Steel sheet, strip, blanks, plate by ASTM specification; galvanized steel sheet, strip, and blanks by ASTM specification; aluminized steel sheet by ASTM specification; copper tubing by ASME specification; aluminum sheet by ASME specification; air conditioner parts by unique part number
Factories: Charlotte, NC; Clarksville, TN; Fort Smith, AR; La-Crosse, WI; Lexington, KY; Minneapolis, MN; Montgomery, AL; Rushville, IN; Dunmore, PA; Trenton, NJ; Tyler, TX
Statement signed: October 31, 1985
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, April 14, 1986

(D) Company: AT&T Technologies, Inc.
Articles: Fiberoptic cable/strands
Merchandise: Germanium tetrachloride and pure quartz (fused silica) tubes
Factory: Norcross, GA
Statement signed: January 16, 1986
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, May 29, 1986

(E) Company: BF Goodrich Company
Articles: Polyvinyl chloride, resins and compounds, polyblends and latexes
Merchandise: Vinyl chloride monomer
Factories: Various
Statement signed: April 9, 1986
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: Boston (Baltimore Liquidation), May 8, 1986
Revokes: T.D. 80-280-G, to cover additional factories

(F) Company: Borden Industrial Food Products, Inc.
Articles: Filtered and refined lemon oil (finished lemon oil)
Merchandise: Raw lemon oil
Factory: Indio, CA
Statement signed: June 3, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Los Angeles and Los Angeles (San Francisco Liquidation), April 15, 1986

(G) Company: Borg-Warner Chemicals, Inc.
Articles: Plastic resin in pellet or powder form
Merchandise: Styrene monomer
Factories: Oxnard, CA; Ottawa, IL; Washington, WV
Statement signed: March 3, 1986
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, April 29, 1986
Revokes: Unpublished authorization letter of February 11, 1986 (file DRA-1-09-CO:R:CD:D 218398)

(H) Company: General Electric Company
Articles: Transformers; concrete reactors; regulators; precipitators; rectifiers; bushings and arresters
Merchandise: Cable; paper; steel plate; steel sheet; steel sheet (electrical); porcelain insulators
Factories: Pittsfield, MA; Schenectady, NY; Rome, GA; Hickory, NC; and Shreveport, LA
Statement signed: March 17, 1986
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, April 4, 1986
Revokes: T.D. 85-1-R, to cover additional factory

(I) Company: Indol Color Co., Inc.
Articles: Color pigments, wet and dry
Merchandise: Dye intermediates, per T.D. 72-108(3)
Factories: Carteret and Newark, NJ
Statement signed: January 15, 1986
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, May 16, 1986
Revokes: T.D. 78-397-N

(J) Company: Juice Bowl Products, Inc.
Articles: Finished concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Lakeland, FL
Statement signed: April 24, 1986
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami, May 20, 1986

(K) Company: Kaiser Aluminum and Chemical Corporation
Articles: Extruded magnesium products to customer specifications
Merchandise: Magnesium billets
Factory: Tulsa, OK
Statement signed: July 22, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, April 21, 1986

(L) Company: Lederle Parenterals, Inc.
Articles: Pharmaceuticals such as calcium leucovorin injections
Merchandise: Calcium leucovorin
Factory: Carolina, PR
Statement signed: November 8, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, April 3, 1986

(M) Company: Lykes Pasco Packing Co.
Articles: Orange juice from concentrate, frozen concentrated orange juice, bulk concentrated orange juice, concentrated and single strength punch
Merchandise: concentrated orange juice for manufacturing
Factory: Dade City, FL
Statement signed: January, 17, 1986
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami, March 27, 1986
Revokes: T.D. 83-15-M and T.D. 85-139-J

157-869 0 - 86 - 2

(N) Company: Metal Container Corporation
Articles: Containers, can bodies, and parts thereof
Merchandise: Aluminum alloy sheets, coils, or strips
Factories: Jacksonville and Gainesville, FL; Columbus, OH; Arnold, MO
Statement signed: December 11, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioners of Customs: Chicago, and Los Angeles (San Francisco Liquidation), March 27, 1986

(O) Company: M.G.F. Industries, Corporation
Articles: Hot and cold heading wire—alloy steel and titanium
Merchandise: Alloy steel wire rod and titanium wire rod
Factory: Commerce, CA
Statement signed: May 2, 1986
Basis of claim: Used in less valuable waste
Rate forwarded to Regional Commissioner of Customs: Los Angeles, May 29, 1986

(P) Company: Permuthane Incorporated
Articles: Liquid resin solutions
Merchandise: Isophorone diisocyanate, tris (2-ethylhexyl) phosphate, isophorone diamine, hexanediol, ethylene carbonate, n-butyl acrylate and methyl methacrylate
Factory: Peabody, MA
Statement signed: February 10, 1986
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, March 31, 1986
Revokes: T.D. 85-190-T, to cover successorship from Polyvinyl/Permuthane Co.

(Q) Company: Permuthane Incorporated
Articles: Liquid resin solutions
Merchandise: Polyurax polyol PPG-1025 and N-methyl-2-pyrrolidone
Factory: Peabody, MA
Statement signed: December 26, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, March 25, 1986

(R) Company: Pfizer, Inc.
Articles: Ground calcium metal, calcium wire, and calcium metal alloys
Merchandise: Calcium metal turnings
Factories: Canaan and Wallingford, CT

Statement signed: March 19, 1986
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, May 27, 1986
Revokes: T.D. 81-281-T

(S) Company: Standard Chlorine of Delaware, Inc.
Articles: 1,2,4-trichlorobenzene and 1,2,3-trichlorobenzene
Merchandise: Trichlorobenzene technical
Factory: Delaware City, DE
Statement signed: September 20, 1985
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: New York, April 10, 1986

(T) Company: Uniroyal Chemical Company, Inc.
Articles: Naugawhite
Merchandise: Paracresol
Factory: Naugatuck, CT
Statement signed: February 26, 1986
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, April 25, 1986
Revokes: T.D. 85-190-X

(U) Company: Uniroyal Tire Company, Inc.
Articles: Yarns; synthetic industrial fabrics
Merchandise: Modacrylic staple fiber
Factories: Ardmore, OK; Opelika, AL; Scottsville, VA; Eau Claire, WI; Hogansville, GA; Winnsboro, SC
Statement signed: March 3, 1986
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, April 25, 1986
Revokes: T.D. 84-169-X

(V) Company: Uniroyal Tire Company, Inc.
Articles: Tires; tread rubber
Merchandise: Various chemicals, polyester fabric and cord, synthetic rubber, polyethylene wrap, fiberglass tire cord, bronze-plated bead wire, nylon tire cord, brass-plated steel tire cord
Factories: Ardmore, OK; Opelika, AL; Scottsville, VA; Eau Claire, WI; Hogansville, GA; Winnsboro, SC
Statement signed: March 3, 1986

Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, May 27, 1986
Revokes: T.D. 83-254-X

(T.D. 86-127)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued May 14, 1985, to April 25, 1986, inclusive, pursuant to subparts A through C, inclusive, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313 (a) and (b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded, and the date on which it was forwarded.

(DRA-1-09)

Dated: June 25, 1986.

File: 218914.

EDWARD B. GABLE, JR.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Agrigold, Inc. d/b/a Agrigold Juice Products
Section 1313(a) articles: Orange juice from concentrate
Section 1313(a) merchandise: Concentrated orange juice
Section 1313(b) articles: Canned fruit juice blends, canned fruit juice drinks, and finished orange juice products
Section 1313(b) merchandise: Orange juice from concentrate
Factory: Anaheim, CA
Statement signed: April 15, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Los Angeles, May 14, 1985

(B) Company: Armstrong World Industries, Inc.
Section 1313(a) articles: Resilient vinyl sheet flooring
Section 1313(a) Merchandise: Di-2-ethylhexyl phthalate
Section 1313(b) articles: Resilient vinyl sheet flooring
Section 1313(b) merchandise: Di-2-ethylhexyl phthalate
Factory: Lancaster, PA
Statement signed: May 16, 1985

Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), September 26, 1985

(C) Company: Commodore Business Machines, Inc.
Section 1313(a) articles: Personal computers
Section 1313(a) merchandise: Keyboards; printed circuit boards; power supplies
Section 1313(b) articles: Personal computers
Section 1313(b) merchandise: Keyboards; printed circuit boards; power supplies
Factory: West Chester, PA
Statement signed: January 20, 1986
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston, April 25, 1986

(D) Company: Glen Raven Mills, Inc.
Section 1313(a) articles: Yarn
Section 1313(a) merchandise: Rayon staple fiber
Section 1313(b) articles: Yarn
Section 1313(b) merchandise: Rayon staple fiber
Factories: Kings Mountain, NC; Macon, GA
Statement signed: August 27, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Miami, September 25, 1985

(E) Company: Glen Raven Mills, Inc.
Section 1313(a) articles: Yarn
Section 1313(a) merchandise: Polyester staple filber
Section 1313(b) articles: Yarn
Section 1313(b) merchandise: Polyester staple fiber
Factories: Kings Mountain, NC; Macon, GA
Statement signed: August 27, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Miami, September 25, 1985

(F) Company: The Lubrizol Corporation
Section 1313(a) articles: Same as in 1313(b)
Section 1313(a) merchandise: Polyalkylbenzene
Section 1313(b) articles: Sulfonic acid, basic calcium sulfonate and finished lubricant additives
Section 1313(b) merchandise: Polyalkylbenzene and basic calcium sulfonate
Factories: Painesville, OH; Deer Park, and Pasadena, TX
Statement signed: September 25, 1985
Basis of claim: Used in

Rate forwarded to Regional Commissioner of Customs: Chicago, January 21, 1986
Revokes: T.D. 85-75-G

(T.D. 86-128)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued July 30, 1985, to March 24, 1986, inclusive, pursuant to subparts A and B, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(a), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner who issued the rate, and the date on which it was signed.

(DRA-109)

Dated: June 25, 1986.

File: 218913.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Byron Jackson Pump
Articles: Centrifugal pump systems
Merchandise: Imported electrical motors and finished component parts
Factory: Charlottte, NC
Statement signed: August 2, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs: Miami, September 19, 1985

(B) Company: Seaside Paint and Lacquer Co., Inc.
Articles: Various lacquers and wood preservative
Merchandise: Imported nitro-cellulose wet with 30% IPA
Factory: Long Beach, CA
Statement signed: June 10, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs: Los Angeles, August 19, 1985

(C) Company: Southwest Electric Company
Articles: Electrical transformers
Merchandise: Imported component parts
Factory: Oklahoma City, OK
Statement signed: July 3, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs: Houston, July 30, 1985

(D) Company: U.S. Ilis Powder Manufacturing, Inc.
Articles: Ilis powder, Ilis jelly and yam noodle
Merchandise: Imported dried taro (Ilis)
Factories: Los Angeles and Gardena, CA
Statement signed: March 18, 1986
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs: Los Angeles, March 24, 1986
Revokes: T.D. 85-140-H

(E) Company: WICAT Systems
Articles: Computer systems, peripherals and spare parts
Merchandise: Imported computer sub-assemblies and component parts
Factory: Provo, UT
Statement signed: April 7, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs: Houston, October 25, 1985

(F) Company: Zoecon Corporation
Articles: Sugar bait
Merchandise: Imported sugar
Factory: Dallas, TX
Statement signed: December 13, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs: Houston, January 6, 1986

U.S. Customs Service

General Notices

19 CFR Part 24

Current IRS Interest Rate Used in Calculating Interest on Overdue Accounts and Refunds

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public that the adjusted rate of interest to be charged or paid by Customs on applicable overpayments or underpayments of Customs duties will decrease from 10 to 9 percent on July 1, 1986. This rate is set by the Internal Revenue Service and is subject to change twice a year. It is being published for the convenience of the importing public and Customs personnel. A schedule of rates for prior periods is also included.

EFFECTIVE DATE: July 1, 1986.

FOR FURTHER INFORMATION CONTACT: Robert Hamilton, Revenue Branch, National Finance Center, U.S. Customs Service, P.O. Box 68901, Indianapolis, IN 46268 (317) 298-1200.

SUPPLEMENTARY INFORMATION:

Background

By T.D. 85-93, published in the Federal Register on May 29, 1985 (50 FR 21832), Customs advised the public that, in order to implement §§ 621 and 210 of Pub. L. 98-573, the Trade and Tariff Act of 1984, interest on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established in 26 U.S.C. 6621 and 6622. This determination covers antidumping and countervailing duty payments, and increased or additional Customs duties determined to be due on a liquidation or reliquidation of an entry. In addition, T.D. 85-93 also stated that it has been determined that a uniform interest payment system should be established and that refunds pursuant to a court determination and payable under 28 U.S.C. 2644, and interest on overpayments and underpayments of estimated excise taxes determined at liquidation shall be assessed at the rate prescribed under 26 U.S.C. 6621 and 6622.

Although T.D. 85-93 stated that the current semiannual interest rate may be obtained from the IRS or any Regional Customs Financial Management Office at any time, Customs received a suggestion that it regularly publish the current interest rate in the CUSTOMS BULLETIN and Federal Register for the convenience of the importing public and Customs personnel. Customs agreed that this would be beneficial and has published interest rate notices previously and will continue to publish future notices.

ACTION

The rate of interest for the period of July 1, 1986–December 31, 1986, is 9 percent. This rate will remain in effect until January 1, 1987, when it is subject to change.

PREVIOUS INTEREST RATES

The following table includes the interest rates applicable to the 6-month periods since July 1, 1984. These are the rates applied to outstanding accounts from the particular periods.

Period	Rate
July 1, 1984–December 31, 1984	11 percent
January 1, 1985–June 30, 1985	13 percent
July 1, 1985–December 31, 1985	11 percent
January 1, 1986–June 30, 1986	10 percent

Dated: June 26, 1986.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

[Published in the Federal Register, July 3, 1986 (51 FR 24323)]

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19 CFR Parts 19 and 144

Notice Concerning Status of Customs Regulations Relating to Duty-Free Stores

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of status of proposed regulations.

SUMMARY: This document informs the public that Customs is taking no further action at the present time with respect to the advance notice of proposed rulemaking relating to duty-free stores, which was previously published in the Federal Register. This action is being taken because of Congressional opposition towards Customs enactment of any rules or regulations relating to duty-free stores until Congress takes some action on this issue.

DATE: July 7, 1986.

FOR FURTHER INFORMATION CONTACT: John Holl, Office of Cargo Enforcement and Facilitation, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8151).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 21, 1983, Customs published an advance notice of proposed rulemaking in the Federal Register (48 FR 33318), pertaining to the administration of duty-free stores. In that document Customs outlined the problems posed by duty-free stores relating to the smuggling of goods into other countries and the illegal reentry or diversion of goods into the U.S.; disputes over operating rights among prospective stores, existing stores, and public authorities; and complaints of purchasers of duty-free store merchandise.

Because of the administrative expense and problems associated with the operation of duty-free stores, Customs considered various options, which include proposing either the complete or partial abolition of these stores or allowing them to exist only in locations where the merchandise can be delivered to purchasers beyond the exit point from the U.S., and the incorporation of duty-free store operating procedures into Parts 19 and 144, Customs Regulations (19 CFR Parts 19 and 144). After consideration of the almost 1000 comments received in response to the advance notice, Customs prepared a notice proposing not to abolish any duty-free stores, but to require new and existing stores to meet certain requirements in order to continue in operation. It was also proposed to incorporate specific duty-free store operating procedures into Parts 19 and 144, Customs Regulations, so as to improve Customs control over the stores. However, before the second notice was approved and published, by § 114 of Pub. L. 98-473 (Continuing Appropriations for Fiscal Year 1985), dated October 4, 1984, Congress prohibited Customs use of any funds made available by that Act or any other Act, to propose or promulgate any rules or regulations relating to duty-free stores.

This action precluded Customs from enacting any regulations pertaining to duty-free stores until October 1, 1985, at the earliest. However, the House of Representatives' Committee on Appropriations, on pages 15 and 16 of House Report 99-210, accompanying H.R. 3036, dated July 18, 1985, took the view that the Congressional restriction on the use of funds for the enactment of duty-free store regulations did not lapse on September 30, 1985, but remained in effect beyond the end of Fiscal Year 1985.

DETERMINATION

In view of the Congressional opposition to the use of funds by Customs for enacting duty-free store regulations, we are taking no

further action at this time with respect to this regulatory action. However, because we are still of the opinion that the Customs Regulations should be amended to include procedures relating to the operation of duty-free stores, efforts will be made towards this goal.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 24, 1986.

MICHAEL H. LANE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 7, 1986 (51 FR 24535)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 191

Withdrawal of Proposed Customs Regulations Amendment Relating to Exemptions for Claimants Under Same Condition Drawback

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Withdrawal of proposed rule.

SUMMARY: This document withdraws the proposed amendment to the Customs Regulations which would have removed the exemption given same condition drawback claimants from the requirement of certifying whether or not the merchandise to be exported or already exported was sold to the U.S. Government. Upon further review, it has been determined advisable not be proceed with the proposal.

DATE: Withdrawal effective on July 7, 1986.

FOR FURTHER INFORMATION CONTACT: Russell A. Berger, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5856).

SUPPLEMENTARY INFORMATION:

Background

By notice published in the Federal Register on November 5, 1985 (50 FR 45919), it was proposed to amend § 191.11(b), Customs Regulations (19 CFR 191.11(b)), relating to claims for drawback of Customs duties, by removing the exemption given same condition drawback claimants from the requirement of certifying whether or not the merchandise to be reported or already exported was sold to the U.S. Government. The notice, which explained the proposal, invited comments before any final action was taken. No comments were received and, after further review, it been determined that the proposal should not be adopted. Accordingly, the notice is being withdrawn.

ACTION—WITHDRAWAL OF PROPOSAL

Based upon further consideration of the matter, Customs has determined that the proposed amendment should not be implemented. Accordingly, the notice published in the Federal Register on November 5, 1985 (50 FR 45919), is withdrawn.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 24, 1986.

MICHAEL H. LANE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 7, 1986 (51 FR 24536)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Decisions of the United States Court of International Trade

(Slip Op. 86-64)

HERAEUS-AMERSIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 81-1-00100

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Defendant's motion for the return of monies paid granted.]

(Decided June 5, 1986)

Fitch, King and Caffentzis (*Richard C. King, Peter Fitch* and *James Caffentzis*) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*John J. Mahon*) for the defendant.

CARMAN, *Judge:* In this case, on appeal before the United States Court of Appeals for the Federal Circuit, defendant applied to this Court for an order to show cause and moved for return of monies paid to plaintiff. The Court duly ordered a hearing requiring plaintiff to show cause why it should not return the sum of $18,349.27 mistakenly refunded to it by the United States Customs Service (Customs). At the hearing, plaintiff raised questions of the Court's jurisdiction because of the appeal pending in the Court of Appeals. The Court stayed the proceedings at the hearing and directed the defendant to make application for the relief sought before the Court of Appeals. Defendant made such application and subsequently the Court of Appeals ordered this Court to

> proceed with the expeditious resolution of the dispute between the parties over the refund of the payment made by the Customs Service to Heraeus-Amersil, Inc., taking such action as may appear to it to be necessary or desirable to restore the status quo prior to the error of its supporting personnel in mistakenly forwarding papers to the Customs Service.

This Court then continued the hearing on the order to show cause on June 5, 1986. At the conclusion of the presentations by the parties, the Court ordered that the monies be repaid.

FACTS

On June 6, 1985, the Court issued Slip Op. 85-60 granting judgment for plaintiff and upholding plaintiff's claimed classification of fused quartz and fused silica on the basis of an established and uniform practice. However, the Court limited its holding to Court No. 81-1-00100 covering entry number 188,596 only. Because additional entries had been severed from other cases and consolidated with Court No. 81-1-00100, confusion arose over the application of the Court's holding to the various entries involved. The Court therefore granted defendant's motion for amendment and/or rehearing in Slip Op. 85-88 and vacated the prior opinion and judgment in Slip Op. 85-60. In Slip Op. 85-88, the Court granted plaintiff's motion for summary judgment only as to six entries which had been made before December 30, 1977.

On October 24, 1985, defendant filed an appeal and on November 6, 1985, plaintiff was permitted to file an interlocutory appeal. However, on November 5, 1985, according to the affidavit of Vito Gualario, at that time Head of the Residual Liquidation Section for the New York Region, United States Customs Service, Customs received entry papers from the Clerk of the Court of International Trade for all nine entries subject of Consolidated Court No. 81-1-00100, along with copies of Slip Op. 85-60 and its accompaning Judgment Order and page 2 only of Slip Op. 85-88, which listed the nine entry numbers with their corresponding protest and court numbers. As there was no indication in the papers that the consolidated civil action was not final, Customs attempted to reliquidate all of the entries in Consolidated Court No. 81-1-00100 under the provisions claimed correct by plaintiff and mistakenly issued refunds to the importer in the amount of $13,503.77, plus $4,845.50 in interest payments.

Subsequently, in letters dated January 14, 1986, and March 6, 1986, government counsel demanded the return of the monies since the case was on appeal and no final judgment had been entered. *See* Affidavit of John J. Mahon 4. Upon refusal of plaintiff to return the monies, defendant filed its application for an order to show cause on April 22, 1986.

OPINION

At the continued hearing on the order to show cause, plaintiff again challenged the Court's jurisdiction to provide relief in this matter, this time arguing that the defendant failed to exhaust its administrative remedies. The only arguable remedy, maintained plaintiff, would have been for defendant to proceed under 19 U.S.C. § 1501 (1982),[1] the provision for voluntary reliquidations. Since sec-

[1] 19 U.S.C. § 1501 reads in part:
Voluntary reliquidations by appropriate customs officer; notice

Continued

tion 1501 requires voluntary reliquidation to occur within 90 days from notice to the importer of the *original* liquidation, plaintiff apparently concludes that there is no statutory remedy available to defendant to correct the mistaken refund to plaintiff.[2] Regardless, plaintiff contends that defendant has not pursued administrative remedies that would lead to an event upon which the Court's jurisdiction could be based under 28 U.S.C. § 1581 (1982).

The Court's jurisdiction in this case, however, arose when plaintiff brought action under 28 U.S.C. § 1581(a) challenging Customs' denials of its protests. When the Court rendered judgment on August 27, 1985, it was not divested of jurisdiction to ensure the proper implementation of its judgment or compliance with statutory procedures pending the finality of its judgment. Although Customs' refund of monies was ostensibly pursuant to the Court's order of August 27, 1985, it was not in accordance with that order since the refund was based upon attempted reliquidations of nine entries rather than upon the six entries called for by the order. Further, Customs did not carry out the refund pursuant to a final court order since the case was on appeal. *See* 28 U.S.C. § 2645(c) (1982) (pertaining to the finality of judgments unless rehearing granted or appeal taken). This Court thus has authority and responsibility to implement the Order of the Court of Appeals and take "such action as may appear * * * necessary or desirable to restore matters to the status quo prior to the error" resulting in the refund of monies. Such authority is indispensible to ensuring the Government's security as contemplated by 19 U.S.C § 1514(a) (1982), which provides for the reliquidation of entries or refund of duties only after a court judgment has become final. *American Grape Growers Alliance* v. *United States*, 9 CIT ——, 622 F. Supp. 295 (1985), further supports the proposition that the Court has inherent power to oversee the implementation of its judgment and hold supplemental proceedings necessary for the proper effectuation of its judgment. *See id.* at 297. In *American Grape Growers*, the court found that 28 U.S.C. § 2645(c) was not a bar to enforcing its judgment when an appeal in antidumping and countervailing duty proceedings has been taken. In the case now at bar, the Court's power is even more compelling, since it is merely ensuring the maintenance of the status quo pending the appeal as the statutory scheme requires. Finally this Court has authority pursuant to 28 U.S.C. § 1651(a) (1982) to issue writs necessary in aid of its jurisdiction. The Court accordingly ordered plaintiff to return the monies to Customs pending a final court decision in this case.

A liquidation made in accordance with section 1500 of this title or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by the appropriate customs officer on his own initiative, notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given to the importer, his consignee or agent * * *.

[2] The subject entries were originally liquidated in 1978 and 1981. *See Heraeus-Amersil, Inc.* v. *United States*, 9 CIT ——, 617 F. Supp.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/105	Restani, J. June 17, 1986	FAG Bearings, Ltd.	80-2-00354	Item 680.35 Various rates	Item 680.33 6%	FAG Bearings, Ltd. v. U.S., S.O. 85-52	Detroit Combination ball/roller bearings
C86/106	Restani, J. June 17, 1986	FAG Bearings, Ltd.	81-3-00322	Item 680.35 Various rates	Item 680.33 6%	FAG Bearings, Ltd. v. U.S., S.O. 85-52	Detroit Combination ball/roller bearings
C86/107	Restani, J. June 17, 1986	FAG Bearings, Ltd.	81-6-00761	Item 680.35 Various rates	Item 680.33 5.8%	FAG Bearings, Ltd. v. U.S., S.O. 85-52	Detroit Combination ball/roller bearings
C86/108	Newman, S.J. June 17, 1986	Panasonic Co.	84-12-01786	Item 720.18 $0.95 each + 13.6%	Item 685.40 5.1%	Agreed statement of facts	Tacoma Video tape and video-cassette recorders which incorporate timer devices

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/179	Rao, J. June 17, 1986	Singer Co.	77-5-00820	Export value	Various appraised values shown on entry papers less 28.5% or appraised values on Singer Model 2020 and 2021 needles, less 28.5% for Singer Model 2045 needle	Hensel Bruckmann & Lorbacher, Inc. v. U.S., S.O. 83-57, aff'd. 735 F.2d 1340 (1984)	Boston Industrial sewing machine needles
V86/180	Rao, J. June 17, 1986	Singer Co.	81-4-00404	Export value	Various appraised values shown on entry papers less 28.5% or appraised values on Singer Model 2020 and 2021 needles, less 28.5% for Singer Model 2045 needle	Hensel Bruckmann & Lorbacher, Inc. v. U.S., S.O. 83-57, aff'd. 735 F.2d 1340 (1984)	Boston Industrial sewing machine needles
V86/181	Rao, J. June 17, 1986	Singer Co.	82-10-01372	Export value	Various appraised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., S.O. 83-57, aff'd. 735 F.2d 1340 (1984)	Boston Industrial sewing machine needles
V86/182	Rao, J. June 17, 1986	Singer Co.	83-4-00625	Export value	Various appraised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., S.O. 83-57, aff'd. 735 F.2d 1340 (1984)	Boston Industrial sewing machine needles
V86/183	Newman, S.J. June 17, 1986	Mitsubishi International Corp.	83-2-00196, etc.	American selling price	Appraised values less 22% per pair	Agreed statement of facts	Boston Footwear
V86/184	Newman, S.J. June 17, 1986	Mitsubishi International Corp.	83-8-01121, etc.	American selling price	Appraised values less 22% per pair	Agreed statement of facts	New York Footwear
V86/185	Rao, J. June 19, 1986	Singer Co.	83-3-00353	Export value	Appraised values shown on entry papers less 28.5%	Hensel Bruckmann & Lorbacher, Inc. v. U.S., S.O. 83-57, aff'd. 735 F.2d 1340 (1984)	Boston Industrial sewing machine heads

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

Procedural Handbook
Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10007.

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U.S. Customs Service

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U.S. Court of International Trade

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Customs Bulletin

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 134

(T.D. 86-129)

Country of Origin Marking Requirements for Imported Footwear

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Policy statement.

SUMMARY: This document gives notice that section 134.46, Customs Regulations (19 CFR Part 134.46), which imposes specific country of origin marking requirements in instances where the full or abbreviated name of a country or locality other than the country of origin appears on an imported article or its container, applies *whenever* the full or abbreviated name of a country or locality other than the country of origin appears anywhere on imported footwear or the footwear container (shoe box) regardless of the context in which the name or locality is used. The notice is being published to provide for uniform application of section 134.46 as it pertains to imported footwear.

DATE: This policy shall be effective as to merchandise entered or withdrawn from warehouse for consumption on or after August 1, 1986 (in the case of footwear boxes) and October 1, 1986 (in the case of footwear).

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

Background

Section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), provides that every imported article of foreign origin, or its container, shall be legibly and conspicuously marked to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Part 134, Customs Regulations (19

CFR Part 134), sets forth the regulations implementing the country of origin marking requirements of 19 U.S.C. 1304(a).

Section 134.46, Customs Regulations (19 CFR 134.46), provides that *in any case* in which the words "United States," or "American," the letters "U.S.A.," any variation of such words or letters, or the name of any city or locality in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced, appear on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning (emphasis added).

IMPORTED FOOTWEAR AND BOXES

Some questions have recently arisen concerning the applicability of section 134.46 in instances where the name of a country or locality other than the country of origin appears on imported footwear or its container (shoe box) in the context of size references and patent notices, *e.g.*, U.S. Pat. No. ———". Whether or not a potential purchaser would be misled by such references would depend in large part on the sophistication of the potential purchaser and the degree of scrutiny the purchaser performs to determine the country of origin of the article. We believe that a definitive rule is necessary to ensure that all ultimate purchasers are properly informed of the country of origin and to provide for uniformity of application of the country of origin marking requirements of 19 U.S.C. 1304, and section 134.46, Customs Regulations.

POLICY

1. On or after August 1, 1986, no shoe box will be treated as properly marked if the full or abbreviated name of a country of locality other than the country of origin appears anywhere on the shoe box *in any context* (including, but not limited to, a size reference) and the requirements of section 134.46, Customs Regulations, are not satisfied. To satisfy the close proximity requirement, the country of origin preceded by the words "Made in" or "Product of" must appear near to and on the same panel as the name of the country or locality other than the country of origin. If the name of the country or locality other than the country of origin appears on a side or top panel of the shoe box, marking the bottom of the box will not be acceptable.

2. On or after October 1, 1986, no importations of footwear will be treated as properly marked if the full or abbreviated name of a country or locality other than the country of origin appears anywhere on the shoe *in any context* (including, but not limited to, a size reference or patent notice) and the requirements of the section 134.46, Customs Regulations, are not satisfied.

3. Such country of origin marking must be legible, conspicuous, and permanent so that it can be read without strain by a purchaser.

AUTHORITY

This notice is being published in accordance with section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), and Part 134, Customs Regulations (19 CFR 134).

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 26, 1986.
FRANCIS A KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 9, 1986 (51 FR 24814)]

(T.D. 86-130)

Recent Statutory Change

Text of Section 10, Public Law 99-307, Amending Coastwise Towing Statute

Section 10, Public Law 99-307, enacted and effective May 19, 1986, amends section 4370(a), Revised Statutes (46 U.S.C. App. 316(a)), so that the towing of any vessel, other than a vessel in distress, by a vessel not documented to engage in the coastwise or Great Lakes trade between ports or places in the United States embraced within the coastwise laws, either directly or by way of a foreign port or place, or any part of such towing, or such towing between points in a harbor of the United States, is prohibited. Before this amendment a non-coastwise-qualified vessel could tow a foreign-flag vessel between points in the United States embraced within the coastwise laws.

In order to provide wider dissemination of this statutory change, section 10 of Public Law 99-307 and 46 U.S.C. App. 316(a), as amended by Public Law 99-307, are reproduced below. Amendments to the Customs Regulations (see section 4.92 and footnote 124 to part 4) to reflect the changes made by Public Law 99-307 are currently being drafted.

Dated: July 2, 1986.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

Public Law 99-307, 99th Congress

AN ACT

To make miscellaneous changes in laws affecting the United States Coast Guard, and for other purposes

By it enacted by the Senate and House of Representatives of the United States of America in Congress assembled * * *

* * * * * * *

SEC. 10. Section 4370(a) of the Revised Statutes of the United States (46 U.S.C. App. 316(a)) is amended—

(1) by striking all from "a certificate of registry," through "the Act of June 7, 1918, as amended (U.S.C., 1934 edition, Supp. IV, Title 46, sec. 288)," and substituting "a certificate of documentation issued under section 12106 or 12107 of title 46, United States Code,"; and

(2) by striking "a vessel of foreign registry, or a vessel in distress", and substituting "a vessel in distress".

* * * * * * *

Section 4370(a), Revised Statutes (46 U.S.C. App. 316(a)), as amended.

It shall be unlawful for any vessel not wholly owned by a person who is a citizen of the United States within the meaning of the laws respecting the documentation of vessels and not having in force a certificate of documentation issued under section 12106 or 12107 of title 46, United States Code, to tow any vessel other than a vessel in distress from any port or place in the United States, its territories or possessions, embraced within the coastwise laws of the United States, to any other port or place within the same, either directly or by way of a foreign port or place, or to do any part of such towing, or to tow any such vessel, from point to point within the harbors of such places. The owner and master of any vessel towing another vessel in violation of the provisions of this section shall each be liable to a fine of not less than $250 nor more than $1,000, which fines shall constitute liens upon the offending vessel enforceable through the district court of the United States for any district in which such vessel may be found, and clearance shall not be granted to such vessel until the fines have been paid. The towing vessel shall also be further liable to a penalty of $50 per ton on the measurement of every vessel towed in violation of this section, which sum may be recovered by way of libel or suit.

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 86-602/650)

HERAEUS-AMERSIL, INC., APPELLEE/CROSS-APPELLANT *v.* UNITED STATES, APPELLANT/CROSS-APPELLEE

John J. Mahon, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellant. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Richard C. King, Fitch, King and Caffentzis, of New York, New York, argued for appellee. With him on the brief was *James Caffentzis*.

Appealed from: U.S. Court of International Trade.

Judge CARMAN.

(Appeal Nos. 86-602/650)

HERAEUS-AMERSIL, INC., APPELLEE/CROSS-APPELLANT *v.* UNITED STATES, APPELLANT/CROSS-APPELLEE

(Decided July 8, 1986)

Before Rich and Davis, *Circuit Judges*, and Miller, *Senior Circuit Judge*.

DAVIS, *Circuit Judge*.

This is a consolidated appeal brought by the United States and Heraeus-Amersil, Inc. (Heraeus) from the memorandum opinion and order of the United States Court of International Trade,[1] holding that an established and uniform practice existed with respect to merchandise imported by Heraeus and also that the established and uniform practice was properly discontinued by the United States Customs Service (Customs) (notwithstanding the absence of publication in the Federal Register) because Heraeus and actual notice of the change in classification of the merchandise.[2] We affirm.

---

[1] *Heraeus-Amersil, Inc.* v. *United States*, 617 F. Supp. 89, — CIT — (1985) (Carman, J.).

[2] The relevant facts are contained in a stipulation of facts on which the trial court based its decision on cross-motions for summary judgment.

I

Heraeus imports merchandise known as fused quartz or fused silica in various shapes and sizes. From 1968 through November 1977, 300 entries were documented at the ports of Newark and John F. Kennedy International Airport (JFK). There is nothing in the record to suggest that identical or similar merchandise was imported at any port other than Newark or JFK. At least five import specialists were responsible for advisory classification of Heraeus' merchandise during that ten-year period. These import specialists uniformly classified the merchandise (depending upon shape) under item 540.11 of the Tariff Schedules of the United States (TSUS)[3] at 7.5% ad val., or item 540.41, TSUS,[4] at 7% ad val.

There is no evidence that the merchandise was ever classified differently prior to December 30, 1977. In 1977, however, a new Customs import specialist was placed at JFK. This import specialist made a new advisory classification resulting in the change in classification of Heraeus' merchandise to item 540.67, TSUS,[5] at 25% ad val.

The merchandise now at issue was imported from Germany during March through December 1976, and in April 1981, and was liquidated under item 540.67. Heraeus timely filed protests challenging the classification of the merchandise under that item, and claiming the existence of an established and uniform practice to classify such merchandise under item 540.11 or item 540.41. These protests were denied.

Heraeus then brought suit in the Court of International Trade contesting the classification of its merchandise under item 540.67, and arguing that, in the absence of a finding by the Secretary of the Treasury (Secretary), the court itself could find that an established and uniform practice existed to classify the merchandise under item 540.11 or item 540.41 within the meaning of § 315(d) of

---

[3] Item 540.11, TSUS, as modified by T.D. 68-9, provides:
Glass, in the mass; glass, crushed, powdered or flaked (frostings); and waste or scrap glass; all the foregoing except glass provided for in items 540.21 and 540.27:
Glass in the mass:
540.11 Containing over 95 percent silica by wright ..... 7.5% ad val.

[4] Item 540.41, TSUS, as modified by T.D. 68-9, provides:
Glass rods, tubes, and tubing, all the foregoing not processed:
540.41 Containing over 95 percent silica by weight ..... 7% ad val.

[5] Item 540.67 of the TSUS, as modified by T.D. 68-9, provides:
Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical glass blanks for corrective spectacle lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements;
* * * * * * *
540.67 Other optical glass and synthetic optical crystals; polarizing material ..... 25% ad val.

the Tariff Act of 1930, as amended, 19 U.S.C. § 1315(d) (1982),[6] and that this established and uniform practice precluded classification at the higher rate of duty until Customs complied with the notice provision of § 1315(d), *supra*. The United States argued that the matter should be remanded back to the Secretary to make the necessary findings because the trial court lacked the authority to determine whether such a practice in fact existed. In the alternative, the Government contended that the new classification was valid because the § 1315(d) notice requirement is predicated upon a finding (absent here) by the Secretary of an established and uniform practice.

On cross-motions for summary judgment, the court first restated its earlier holding in *Heraeus-Amersil, Inc.* v. *United States*, 600 F. Supp. 221, 8 CIT 329 (1984) (denying Heraeus' motion to dismiss in part), that an established and uniform practice could be shown, in the absence of a finding by the Secretary, by actual uniform liquidations. In that earlier opinion, the court had noted that "[e]arlier cases suggest that a section 1315(d) 'established and uniform practice' can be predicated on uniform classifications and liquidations at various ports over a period of time." *Id.* at 223. The court reasoned that the question whether an established and uniform practice existed would not have been considered in prior cases if the issue was not relevant to those courts' ultimate determinations. Also supporting the court's holding was a predecessor regulation to 19 C.F.R. § 177.10(b) (1985) which evidenced Customs' understanding at one time "that section 1315(d) envisioned an 'actual' established and uniform practice." *Id.* at 224. Hearings before the House Ways and Means Committee likewise manifested the belief that the *de facto* existence of a uniform practice was of major importance to Customs. *Id.* For these reasons, the court denied the motion to dismiss in part and concluded that, in the absence of a finding by the Secretary, it could decide whether an actual uniform practice existed.

In the decision now under review the court also held that an actual established and uniform practice classifying Heraeus' merchandise under item 540.11 and item 540.41 existed despite the fact that the Secretary had not made a finding to that effect. *Heraeus-Amersil*, 617 F. Supp. at 93. The basis of the court's holding was "the classification [by Customs] of fused quartz/fused silica under items 540.11 and 541.41 span[ning] a period of at least 10 years. Over 300 liquidations at two ports under these item numbers have been documented. The parties have been unable to find any evidence of variant liquidations during the 10-year period or earlier."

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[6] Section 1315(d) of Title 19 United States Code (1982) provides:

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties or the imposition of countervailing duties under section 1303 of this title.

Id. The court distinguished, however, a classification based on an actual practice from one based upon a finding by the Secretary, and held that the former could be extinguished by the discontinuance of such a practice if known to the importer. *Id.* at 94–95. Here, such knowledge existed as of December 30, 1977.

Both sides have appealed to this court. The Government filed its appeal (No. 86–602) under 28 U.S.C. § 1295(a)(5) (1982) from the final decision of the trial court denying the higher duties for the items imported in 1976. Heraeus cross-appeals (in No. 86–650) under 28 U.S.C. § 1292(d)(1) (1982) from Judge Carman's certification of the question whether the established and unfair practice was changed by Customs, so far as Heraeus is concerned, on December 30, 1977. This court has accepted the cross-appeal by order of November 6, 1985.

Heraeus contends before us that (1) the actual existence of an established and uniform practice under § 1315(d) does not depend upon a determination by the Secretary; (2) the trial court properly found that such a practice in fact existed here; and (3) the trial court erred in holding that the established and uniform practice could be extinguished other than by compliance with the Tariff Act's publication requirement (§ 1315(d)). The Government argues that (1) the Act requires a finding by the Secretary, and in the absence of a finding, the trial court is powerless to make the determination itself, (2) assuming the court could make an established and uniform practice determination, Heraeus failed to demonstrate that one existed in this instance, and (3) assuming the court properly found that an established and uniform practice existed, it correctly held that the practice ended when the merchandise was initially liquidated at the higher rates.

II

The first issue is whether a court can find that an established and uniform practice exists in the absence of a finding by the Secretary to that effect. The United States both in its brief and at oral argument refuses to acknowledge that an established and uniform practice recognized by § 315(d) of the Tariff Act of 1930, as amended at 19 U.S.C. § 1315(d), *supra,* can exist pursuant either to a finding by the Secretary that such a practice exists *or* (when the Secretary fails to act on a request for such a finding) upon a judicial finding of an actual practice of liquidating a significant number of entries of particular merchandise at the same rates over an extended period of time. The latter is the situation we have here.

In its protest dated August 10, 1978, Heraeus in effect requested the Secretary to make a finding that an established and uniform practice existed with respect to the then imported optical grade glass. The protest noted expressly that the change in classification of the merchandise was unwarranted because of the existence of "[a]n established and uniform practice * * * to classify such mer-

chandise under items other than item 540.67." The United States urges that this specific content of the protest did not amount to an official request upon the Secretary and was not sufficient to trigger the obligation of the Secretary to make a determination. The answer is that, in the absence of any language in the applicable regulations providing other procedures that importers should follow in requesting a finding by the Secretary, Heraeus' request constituted as specific a request and was as inherently reasonable as the law may properly demand. Under the present regulations, nothing more is required. *See Commonwealth Oil Refining Co.* v. *United States*, 332 F. Supp. 203, 209, 67 Cust. Ct. 155, 163 (1971), *aff'd on other grounds*, 480 F.2d 1352 (CCPA 1973). It is also reasonable to interpret the simple denial of that protest, not as a denial on the merits as to whether an established and uniform practice existed, but rather as the failure of the Secretary to act on the subject in any respect. If there had been a denial of the existence of such practice, it is most likely that something would have been said along that line.

When the Secretary thus fails to act upon a request to make a finding, the court can and should make that determination itself,[7] rather than remanding the matter back to the Secretary for further consideration. The underlying issue is the actual existence of an established and uniform practice. If such a practice existed, the Secretary should have found it to have existed. *Ditbro Pearl Co.* v. *United States*, 515 F.2d 1157, 1159, 62 CCPA 95, 97 (1975) (Markey, *CJ*, concurring).[8] Contrary to the United States' postulate that an established and uniform practice arises upon only a formal finding by the Secretary (or a ruling published pursuant to 19 C.F.R. § 177.10(b) (1985)),[9] the courts have consistently made such findings where the actual existence of a uniform practice was at issue.[10] *See, e.g., Siemens America, Inc.* v. *United States*, 692 F.2d 1382, 1384, 1 Fed. Cir. (T) 9, 10 (1982) ("we agree * * * that appellants have nevertheless failed to sustain their burden of proving that there existed an established and uniform practice"); *Commonwealth Oil Refining Co.* v. *United States*, 480 F.2d 1352, 1362–63, 60 CCPA 162, 176 (1973) ("Commonwealth has failed to come forth

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[7] Where the Secretary does act upon a request, deciding either that an established and uniform practice does or does not exist, that action cannot be disturbed "absent a clear abuse of discretion." *Rank Precision Indus.* v. *United States*, 660 F.2d 476, 480, 68 CCPA 78, 84 (1981).

[8] *See Ditbro Pearl*, 515 F.2d at 1159–60, 62 CCPA at 98, where J. Miller (concurring) noted that "The 'key' issue is whether appellant sustained its burden of proving that the rate of duty contended for was applicable to its merchandise 'under an existing and uniform practice'."

[9] 19 C.F.R. § 177.10(b) provides:

> (b) *Rulings regarding a rate of duty or charge.* Any ruling regarding a rate of duty or charge which is published in the Customs Bulletin will establish a uniform practice. A published ruling may result in a change of practice, it may limit the application of a court decision, it may otherwise modify an earlier ruling with respect to the classification or valuation of an article or any other action found to be in error or no longer in accordance with the current views of the Customs Service, or it may revoke a previously-published ruling or a previously-issued ruling letter. No ruling published under the provisions of this section will have the effect of changing either an earlier published ruling or a practice established by other means by imposing a higher rate of duty or charge on an article unless the earlier ruling or practice has been determined to be clearly wrong.

[10] As succinctly stated by the trial court in its first opinion in *Heraeus-Amersil*, "[o]ne must therefore conclude that the issue was meaningful to the determination. Otherwise, it would seem that the courts were engaging in useless formulations." 600 F. Supp. at 224.

with affirmative, convincing evidence of the existence of a long-established practice at Philadelphia"); *Biddle Sawyer Corp.* v. *United States*, 320 F.2d 416, 422, 50 CCPA 85, 92 (1963) ("[w]e find nothing in the testimony or in the exhibits which supports appellant's contention that there was an established and uniform practice"); *B.R. Anderson & Co.* v. *United States*, 201 F. Supp. 319, 328, 47 Cust. Ct. 215, 228 (1961) ("under such circumstances no established and uniform practice had been demonstrated to have existed"). If an established and uniform practice could exist upon only a finding by the Secretary, § 1315(d) would be rendered "a nullity in the hands of a Secretary choosing to refrain from ever making a finding." *Ditbro Pearl*, 515 F.2d at 1159, 62 CCPA at 97 (Markey, *CJ*, concurring).

In these previous cases, the judicial search for a uniform practice concentrated largely on evidence of uniform classification and liquidation of merchandise at various ports over an extended period at time. *Heraeus-Amersil, Inc.* v. *United States*, 600 F. Supp. at 223. In *Siemens America*, 692 F.2d at 1383-84, 1 Fed. Cir. (T) at 10, this court—assuming *arguendo* that a formal administrative finding was not a prerequisite to an established and uniform practice—considered and rejected Siemens America's argument that an unpublished letter ruling and "the subsequent liquidation of approximately 100 entries under [one] item" over a two-year period at one port—the port of New York—created such a practice. Siemens America failed to carry its burden of establishing the existence of an established and uniform practice, in part, because it did not establish that it was the sole importer of the merchandise or that the merchandise was imported solely at the port of New York. The court implied, however, that, with adequate proof, an established and uniform practice could be judicially found to exist. Although the appellant in *Washington Handle Co.* v. *United States*, 34 CCPA 80 (1946), introduced evidence suggesting that the merchandise was imported for a two-year period solely at two subports, the court held that an established and uniform practice did not exist. The court noted that at the beginning and throughout the two-year period, "there was considerable uncertainty as to its proper classification." *Id.* at 86. Moreover, an investigation as to the proper classification was conducted during this period. The court intimated, again, that it might have reached a different conclusion in a less chaotic setting:

> we think it proper to say that 28 shipments of the instant imported materials at two subports, *under the circumstances here recited*, cannot properly be held to constitute an 'established and uniform practice' in respects with which we are here concerned.

Id. (emphasis added). Sufficient proof did exist in *Emil Deinert*, 9 Cust. Ct. 411, 412 (1942), in which the Customs Court found that an established and uniform practice existed where the merchandise was uniformly classified for a period of eight years.

On the basis of these consistent statements, we must conclude that, where the Secretary fails to respond to a request that he find the existence of an established and uniform practice, the courts can make that finding in his stead. Nothing in the text or legislative history of § 1315(d) prohibits that course.

III

Before the Court of International Trade, Heraeus submitted, and the United States did not challenge,[11] that over a ten-year period, at the only two ports at which the merchandise was imported, more than 300 entries were classified under item 540.11 or 540.41 (depending upon shape). There is no evidence in the record of any liquidation of the merchandise under item 540.67 or any other item prior to December 31, 1977. During that ten-year period, there was never any doubt as to the proper classification. On this evidence, the court properly held that Heraeus successfully proved the existence of an established and uniform practice. There is no basis for determining otherwise.[12]

IV

In its cross-appeal, Heraeus contends that the established and uniform practice of liquidating the merchandise under items 540.11 and 540.41 cannot be changed until publication pursuant to § 1315(d). Congress provided in § 1315(d) that

> No administrative ruling resulting in the imposition of a higher rate of duty or charge *than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption * * * prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling.*

(emphasis added). In enacting this provision, Congress recognized that the importing community relies upon the existence of established and uniform practices in conducting their business.[13] If the

---

[11] The United States now argues that an established and uniform practice can only arise where there are uniform liquidations throughout the United States. Thus, since the liquidations here occurred only in the New York region, no such practice existed. This contention runs counter to common sense—not all goods are imported throughout the country—and finds no support in the statute, legislative history, or prior case law.

[12] If we were to assume, contrary to all the probabilities, that Customs' simple denial of Heraeus' protest was intended as a denial of the existence of the asserted uniform and established practice, that administrative determination would have been, on the basis of the known and proved facts, an abuse of discretion.

Because this case is so clear, we need not now consider whether a trial court's determination of the existence *vel non* of an established and uniform practice is purely a question of fact or is a "mixed" question of law and fact.

[13] Customs recognized this policy in a predecessor regulation to 19 C.F.R. § 177.10(b) which provided that "[i]f there is an established and uniform practice at the various ports," a higher duty rate could not be imposed without public notice. Customs Regulations of 1943, § 16.10(a). It was thus "Customs' understanding, originally at least, that section 1315(d) envisioned an 'actual' established and known practice." *Heraeus-Amersil*, 600 F. Supp. at 224. *See also Customs Administrative Bill: Hearings on H.R. 6738 Before the House Comm. on Ways & Means*, 75th Cong., 1st Sess. 212–13 (1937) (statement of American Tariff League):

> We recognize that this section is legislation to legalize that which has been the practice of the Department for a number of years, namely, where there has existed a uniform practice, sanctioned by the customs authorities for a number of years before a changed of rate or classification is made by the Department, the

Continued

Secretary makes a finding that an established and uniform practice has existed, the Secretary should not revoke that practice prior to publication of notice to that effect in the Federal Register. By that means, the Secretary's change in the pre-existing practice (as he has established it or found it to be) is made known to all importers throughout the country. Similarly, where an established and uniform practice has been judicially found (because Customs refused to pass on that issue) to classify particular merchandise under a specific tariff provision, the importing community should be afforded a grace period to permit it to make business decisions in light of any new agency action changing that practice. Accordingly, where the merchandise was entered before the actual discontinuance of the practice, the rate in existence at the time the merchandise was imported applies until notice of the change is given. As the trial court stated:

> Customs may dispense with the publication requirement only after the practice has been discontinued and an importer is on actual or constructive notice of the discontinuance.

Heraeus-Amersil, 617 F. Supp. at 95. However, it was not the intent of Congress when it enacted the § 1315(d) notice provision that, where the Secretary (though requested) failed to decide whether an established and uniform practice existed and that determination had to be made by the court, the lack of a published notice in the Federal Register would bar the application of an administrative change in rates even though the affected importer was specifically informed that Customs had changed its practice. The words of § 1315(d)—which relate solely to a change in duties found by the Secretary to have been imposed under an established and uniform practice—do not so provide, and we know of no sufficient reason why Congress would have desired substantially to prolong use of a formerly-employed rate known by the particular importer to have already been abandoned by Customs (which has not itself acknowledged the existence of that practice).[14]

In this case, Heraeus had actual notice of the change in classification as of December 1977. The next group of importations involved here was entered in April 1981. If we accepted Heraeus' point that it is entitled to the application of the lower rates until Customs complies with the § 1315(d) notice provision of publication in the Federal Register, Heraeus could receive a windfall because the lower (putatively incorrect) rate would apply to the April 1981

Department will allow before placing the same in effect 30 days' notice after publication of such change. While we recognize the existence of this practice, it has been carried on, we may say, as a matter of executive leniency, but there has been no sanction of law.

See also id. at 132 (analysis submitted by Treasury Department):

The last sentence of the proposed amendment is a paraphrase of the present customs regulation which grant 30 days notice to importers and others before adverse administrative rulings resulting in a change in a uniform and established practice becomes effective. The fairness of such regulations is evident * * *.

[14] We leave open the case of importers who are unaware of Customs' change, through individual action, in a previous uniform and established practice know to those importers as such but not acknowledged as such by Customs under § 1315(d).

merchandise even though Heraeus knew of Customs' change in classification three years earlier.[15] For these reasons, the Court of International Trade correctly determined that the entries entered before December 30, 1977 must be reliquidated under items 540.11 or 540.41 but not those entries entered after December 30, 1977.[16]

AFFIRMED

[15] Heraeus relies on a number of internal Customs' procedures for the argument that no deliberate change in a uniform and established classification practice could be made until certain internal steps were taken. One flaw in that proposition is that there is no *finding* that the agent who reclassified the merchandise was cognizant of the existence of the established and uniform practice.

[16] As to those later entries, Heraeus remains free to challenge the correctness of item 540.67 on its own merits, if proper protests have been filed.

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

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One Federal Plaza
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Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 20 | JULY 30, 1986 | No. 30

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U.S. Customs Service

Treasury Decisions

(T.D. 86-131)

Approval of Atlantic Petroleum Services, Inc., To Gauge Imported Petroleum and Petroleum Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Atlantic Petroleum Services, Inc., 3165 Richmond Terrace, Staten Island, New York, has applied to Customs for approval to gauge imported petroleum and petroleum products. It has been determined that Atlantic Petroleum Services meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of Atlantic Petroleum Services, Inc., to gauge imported petroleum and petroleum products in the Customs Districts of New York (including the New York Seaport, JFK Airport, and Newark, New Jersey, Areas), Philadelphia, Boston and Baltimore is approved.

EFFECTIVE DATE: July 11, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-2446).

Dated: July 14, 1986.

ROGER J. CRAIN,
Chief, Technical Section, Technical Services Division.

[Published in the Federal Register, July 18, 1986 (51 FR 26094)]

(T.D. 86-132)

Quarterly Rates of Exchange

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 USC 372(c)), for the information and use of Customs

officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarterly beginning: July 1, 1986 through September 30, 1986.

Country	Name of currency	U.S. dollars
Australia	Dollar	.65490
Austria	Schilling	.065306
Belgium	Franc	.022472
Brazil	Cruziero	.072254
Canada	Dollar	.724533
China, P.R.	Renminbi Yuan	.312198
Denmark	Krone	.123640
Finland	Markka	.196792
France	Franc	.143906
Germany	Deutsche Mark	.459559
Hong Kong	Dollar	.128041
India	Rupee	.080645
Iran	Rial	N/A
Ireland	Pound	1.3883
Italy	Lira	.000669
Japan	Yen	.006146
Malaysia	Dollar	.381388
Mexico	Peso	N/A
Netherlands	Guilder	.407997
New Zealand	Dollar	.53900
Norway	Krone	.134165
Philippines	Peso	N/A
Portugal	Escudo	.006723
Republic of So. Africa	Rand	.39600
Singapore	Dollar	.456621
Spain	Peseta	.007192
Sri-Lanka	Rupee	.035702
Sweden	Krona	.141193
Switzerland	Franc	.564016
Thailand	Baht (Tical)	.038023
United Kingdom	Pound	1.5495
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-133)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 2, 1986	$0.006906
June 3, 1986	.006875
June 4, 1986	.007027
June 5, 1986	.007095
June 6, 1986	.007123
Israel shekel:	
June 2-6, 1986	N/A
South Korea won:	
June 2, 1986	.001121
June 3, 1986	.001120
June 4, 1986	.001121
June 5-6, 1986	.001122
Taiwan N.T. dollar:	
June 2, 1986	.026171
June 3, 1986	.026178
June 4, 1986	.026185
June 5, 1986	.026192
June 6, 1986	.026199

(LIQ-03-01 S:COM CIE)

Dated: June 6, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-134)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below.

The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 9, 1986	$0.007133
June 10, 1986	.007161
June 11, 1986	.007189
June 12, 1986	.007181
June 13, 1986	.007194
Israel shekel:	
June 9–13, 1986	N/A
South Korea won:	
June 9–11, 1986	001122
June 12–13, 1986	001123
Taiwan N.T. dollar:	
June 9, 1986	.026205
June 10, 1986	.026205
June 11, 1986	N/A
June 12, 1986	.026205
June 13, 1986	.026205

(LIQ–03–01 S:COM CIE)
Dated: June 13, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–135)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 16, 1986	$0.007194
June 17, 1986	.007128
June 18, 1986	.007067

June 19, 1986	.007077
June 20, 1986	.007055
Israel shekel:	
June 16–20, 1986	N/A
South Korea won:	
June 16–20, 1986	.001123
Taiwan N.T. dollar:	
June 16–19, 1986	.026212
June 20, 1986	.026281

(LIQ–03–01 S:COM CIE)

Dated: June 20, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–136)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 23, 1986	$0.006995
June 24, 1986	.007117
June 25, 1986	.007123
June 26, 1986	.007100
June 27, 1986	.007123
Israel shekel:	
June 23–27, 1986..	N/A
South Korea won:	
June 23, 1986	.001122
June 24, 1986	.001123
June 25–27, 1986	.001124
Taiwan N.T. dollar:	
June 23–27, 1986	.026212

(LIQ–03–01 S:COM CIE)

Dated: June 27, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-137)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
June 30, 1986	$0.007112
Israel shekel:	
June 30, 1986	N/A
South Korea won:	
June 30, 1986	.001125
Taiwan N.T. dollar:	
June 30, 1986	.026212

(LIQ-03-01 S:COM CIE)

Dated: June 30, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-138)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
June 4, 1986	$0.066644
June 6, 1986	.063888
Belgium franc:	
June 6, 1986	.021978
Germany deutsche mark:	
June 6, 1986	.448430
Japan yen:	
June 5, 1986	.005921
June 6, 1986	.005963
Netherlands guilder:	
June 6, 1986	.398565
Norway krone:	
June 2, 1986	.127649
June 3, 1986	.129660
June 4, 1986	.129534
Republic of South Africa rand:	
June 2, 1986	.41650
June 3, 1986	.41100
June 4–5, 1986	.40000
June 6, 1986	.39600
Switzerland franc:	
June 5, 1986	.542446
June 6, 1986	.543183

(LIQ–03–01 S:COM CIE)

Dated: June 6, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–139)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
June 11, 1986	$0.68450
Austria schilling:	
June 10, 1986	.064185
June 11, 1986	.064267
June 12, 1986	.064360
June 13, 1986	.064381
Belgium franc:	
June 10, 1986	.022065
June 11, 1986	.022109
June 12, 1986	.022158
June 13, 1986	.022153
Denmark krone:	
June 10, 1986	.121877
June 11, 1986	.121929
June 12, 1986	.122003
June 13, 1986	.122011
Germany deutsche mark:	
June 10, 1986	.450450
June 11, 1986	.451773
June 12, 1986	.452489
June 13, 1986	.452796
Ireland pound:	
June 11, 1986	1.3698
June 12, 1986	1.3690
June 13, 1986	1.3718
Italy lira:	
June 12-13, 1986	.000659
Japan yen:	
June 09, 1986	.005957
June 10, 1986	.005992
June 11, 1986	.006011
June 12, 1986	.006030
June 13, 1986	.006051
Netherlands guilder:	
June 10, 1986	.399920
June 11, 1986	.400962
June 12, 1986	.401768
June 13, 1986	.402010
Republic of South Africa rand:	
June 09, 1986	.38600
June 10, 1986	.38400
June 11, 1986	.37050
June 12, 1986	.36420
June 13, 1986	.36900
Switzerland franc:	
June 09, 1986	.542299
June 10, 1986	.546747

June 11, 1986	.547196
June 12, 1986	.547046
June 13, 1986	.548847

(LIQ-03-01 S:COM CIE)
Dated: June 13, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-140)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
June 16, 1986	$0.064599
Belgium franc:	
June 16, 1986	.022217
Denmark krone:	
June 16, 1986	.122324
Germany deutsche mark:	
June 16, 1986	.454339
Ireland pound:	
June 16, 1986	1.3768
Italy lira:	
June 16, 1986	.000661
Japan yen:	
June 16, 1986	.006042
June 17, 1986	.005959
June 18, 1986	.005965
June 19, 1986	.005992
June 20, 1986	.005963
Netherlands guilder:	
June 16, 1986	.403145
Republic of South Africa rand:	
June 16, 1986	.38500

June 17, 1986	.40550
June 18, 1986	.42500
June 19–20, 1986	.40500
Switzerland franc:	
June 16, 1986	.550661
June 17, 1986	.539665
June 18, 1986	.540541
June 19, 1986	.543478
June 20, 1986	.541272

(LIQ-03-01 S:COM CIE)

Dated: June 20, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-141)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
June 23, 1986	$0.68250
June 24, 1986	.67900
June 25, 1986	.66800
June 26, 1986	.66730
June 27, 1986	.67030
Austria schilling:	
June 24, 1986	.064020
June 25, 1986	.064185
June 26, 1986	.063980
June 27, 1986	.064558
Belgium franc:	
June 24, 1986	.022026
June 25, 1986	.022080
June 26, 1986	.022017
June 27, 1986	.022193

Denmark krone:	
June 25, 1986	.121581
June 27, 1986	.122220
Germany deutsche mark:	
June 24, 1986	.450045
June 25, 1986	.451264
June 26, 1986	.450248
June 27, 1986	.453721
Ireland pound:	
June 27, 1986	1.3708
Italy lira:	
June 25, 1986	.000658
June 27, 1986	.000660
Japan yen:	
June 23, 1986	.005956
June 24, 1986	.006001
June 25–26, 1986	.006020
June 27, 1986	.006044
Netherlands guilder:	
June 24, 1986	.399521
June 25, 1986	.400721
June 26, 1986	.399521
June 27, 1986	.402414
Republic of South Africa rand:	
June 23, 1986	.38900
June 24, 1986	.38700
June 25, 1986	.39400
June 26, 1986	.39550
June 27, 1986	.40000
Switzerland franc:	
June 23, 1986	.540833
June 24, 1986	.548246
June 25, 1986	.550055
June 26, 1986	.549602
June 27, 1986	.553097

(LIQ–03–01 S:COM CIE)

Dated: June 27, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-142)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
June 30, 1986	$0.67350
Austria schilling:	
June 30, 1986	.064767
Belgium franc:	
June 30, 1986	.022252
Denmark krone:	
June 30, 1986	.122624
Germany deutsche mark:	
June 30, 1986	.454339
Ireland pound:	
June 30, 1986	1.3740
Italy lira:	
June 30, 1986	.000663
Japan yen:	
June 30, 1986	.006105
Netherlands guilder:	
June 30, 1986	.403307
Republic of South Africa rand:	
June 30, 1986	.40400
Switzerland franc:	
June 30, 1986	.556638

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 134

Country of Origin Marking of Imported Native American-Style Jewelry

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed interpretive rule; solicitation of comments.

SUMMARY: Customs is reviewing its position regarding the country of origin marking of imported Native American-style jewelry. Currently, such jewelry may be marked for country of origin purposes with a string tag or adhesive label. However, it has come to Customs attention that some jewelry dealers and wholesalers remove the country of origin labels and tags and sell the imported goods as authentic Native American. Consideration is being given to requiring more permanent marking on such items and comments are invited on the substance of such new marking requirements, an appropriate effective date if new requirements are promulgated, and an appropriate definition of the term "Native American-style jewelry".

DATE: Comments (preferably in triplicate) must be received on or before September 15, 1986.

ADDRESS: Written comments may be addressed to, and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry Procedures and Penalties Divison, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

Background

Section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), generally requires that every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit in a

manner as to indicate to an ultimate purchaser in the U.S. the English name of the country of origin of the article, unless specifically exempted. Part 134, Customs Regulations (19 CFR Part 134), sets forth the country of origin marking requirements of 19 U.S.C. 1304.

Customs normally permits any reasonable method of marking that will remain on the article during handling until it reaches the ultimate purchaser. (§§ 134.41, 134.44, Customs Regulations (19 CFR 134.41, 134.44)). This includes the use of paper sticker labels and string tags (§ 134.44, Customs Regulations (19 CFR 134.44)). However, where it is shown that a particular method of marking is not sufficiently permanent to inform the ultimate purchaser of the country of origin of the article, Customs may require another type of marking which will insure that in all foreseeable circumstances, the article will reach the ultimate purchaser with its country of origin marking intact.

At the request of Congress, the Department of Commerce initiated a study last year on the importation of Native American-style jewelry and handicrafts. Allegations had been made by representatives of the Native American handicrafts industry that some jewelry and craft dealers and wholesalers remove the country of origin labels from imported goods and sell the products as authentic Native American.

In a report dated July 1985, entitled "Study of Problems and Possible Remedies Concerning Imported Native American-Style Handicrafts", the Department of Commerce confirmed these allegations. According to the study, imports are estimated to account for 10 to 20 percent of the Native American-style arts and crafts sold and a high percentage of these are believed to be sold at the retail level without country of origin markings. Some of the imported goods are reexported to other countries, and some of these are sold in the U.S. as authentic. The biggest problem is reportedly in the area of jewelry.

The study describes several remedies that can be used to curb the problem of the removal of country-of-origin markings from imported Native American-style jewelry and handicrafts prior to final sale. One of the suggested remedies is that Customs require permanent indelible marking of these items.

In response to the above study, the American Indian Craftsmen and Dealers Coalition, with Congressional support, filed a ruling request with Customs asking that permanent marking be required on imported Native American-style jewelry and handicrafts. The ruling request reiterated that the adhesive labels and hang tags which are currently allowed are usually removed before the article is offered for sale to the consumer. It is claimed that such practice hurts both the consumer and the domestic producers of authentic American Indian arts and crafts.

We believe that the problem raised by the Commerce study and the ruling request must be addressed. Increased enforcement by Customs is not enough to solve the problem since the allegations are that much of the merchandise in question is entering the country with proper marking and that such marking is being removed after importation. Therefore, consideration is being given to requiring a more permanent marking than a hang tag or paper label on Native American-style jewelry. By limiting the proposal to jewelry, we believe that the major marking problem will be eliminated with the least amount of confusion on the part of both Customs and the importing public. We are not satisfied that the extent of the problem in the handicrafts area is great enough to warrant new mandatory methods of marking on the myriad of products encompassed by that term.

Proposed Change of Marking Requirement

To ensure that the ultimate purchaser is advised of the country of origin, Customs is proposing that imported Native American-style jewelry (i.e., jewelry which incorporates traditional Native American design motifs, materials and construction) shall be marked as follows:

The article must be indelibly marked with the country of origin by cutting, die-sinking, engraving or stamping. The country of origin marking may appear on the clasp, or in some other conspicuous location. Alternatively, a metal or plastic tag indelibly marked with the country of origin may be permanently attached to the article.

In those cases where due to the size or nature of the article the indelible marking is too small to read without a magnifying glass, the country of origin should also be indicated on a string tag or adhesive label securely affixed to the article. A string tag or adhesive label will be permitted as the only means of marking in the case of those few articles which are too small to be indelibly marked and do not permit the permanent attachment of a metal or plastic tag (*e.g.* a small earring). The materials generally used in Native American-style jewelry include sterling silver or other metal which appears like sterling silver. The jewelry is either all metal or set with one or more of the following stones: turquoise, lapis lazuli, shells, onyx, carnelian, sugilite, or coral.

Comments

Customs invites comments from the public on both the substance of the proposed change of marking, and if a change is made, when it should be effective. Customs would also welcome comments concerning an appropriate definition of the term "Native American-style jewelry" to be included in any change of the marking requirement.

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Consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

Because any change in country of origin marking is important to domestic producers as well as importers, Customs is giving the public notice and an opportunity to comment in accordance with § 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)).

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 27, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 15, 1986 (51 FR 25574)]

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19 CFR Parts 151, 178

Proposed Customs Regulations Amendments Relating to Approval of Commercial Gaugers and Accreditation of Commercial Laboratories

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide procedures for Customs to approve commercial gaugers (including public gaugers) to weigh, gauge, or measure certain commodities, and for Customs to accredit commercial laboratories to perform certain laboratory analyses on certain commodities. The results of these activities may be used by Customs to determine the proper duty for the commodities.

DATE: Comments must be received on or before September 16, 1986.

ADDRESS: Written comments may be addressed to the Regulations Control Branch, U.s. Customs Service, 1301 Constitution Avenue NW., Room 2426, Washington, D.C. 20229. Comments relating to the information collection aspects of the proposal should be addressed to the Office of Information and Regulatory Affairs, Attention: Desk Officer for U.S. Customs, Office of Management and Budget, Washington D.C. 20503, as well as to Customs, as noted above.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, Room 7113, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229, (202-566-2446).

SUPPLEMENTARY INFORMATION:

BACKGROUND

By notice published in the Federal Register of October 18, 1984 (49 FR 40882), Customs proposed to amend Part 151, Customs Regulations, relating to public gaugers. As a result of public response, a notice was published in the Federal Register of December 24, 1984 (49 FR 49853), extending the comment period. After reviewing comments received on various aspects of the proposal, it was determined advisable to revise the amendments so as to accommodate the public's concerns over paperwork burdens while allowing Customs to carry out its mission to collect the revenue and protect the commerce. The discussion of comments received in response to the original proposal follows with an analysis reflecting the proposed revisions.

DISCUSSION OF COMMENTS ON THE ORIGINAL PROPOSAL

Ten comments were received in response to the original proposal. Five had various concerns over the impact of the proposal; three supported it in principle but suggested minor changes; and two asked for provisions to expand the proposal to cover additional commodities. Most of the concerns focused on three aspects of the proposal: (1) procedure, such as whether the Regulatory Flexibility Act applies; (2) lack of specific language; and (3) the specific requirements described in certain provisions.

Comment: The proposed rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). For this reason, an initial regulatory flexibility analysis should have been prepared and the comment period should be extended.

Analysis: The approximately 35 currently-approved "public gaugers" and the one currently-approved independent commercial laboratory will not have to reapply. This rule's application procedures would only affect new applicants, of which there are approximately 10 each year. In addition, this rule provides for Customs recognition that a gauger or laboratory meets performance standards that

are valued by Customs and industry alike. Thus the rule should benefit not only gaugers and laboratories but also importers needing gauging or laboratory services.

Customs agreed to extend the comment period for 30 days and published a notice to that effect in the Federal Register on December 24, 1984 (49 FR 49853).

Comment: The application and operational requirements for commercial gaugers and commercial laboratories are different. This could cause internal problems for gaugers which operate laboratories.

Analysis: Customs agrees, and has combined the regulations for commercial gaugers and commercial laboratories.

Comment: Since Customs and the buyers and sellers of the merchandise may not require the same data, Customs should specify acceptable procedures and equipment, and should publish methods for review and comment.

Analysis: The information Customs needs to classify merchandise in accordance with the Tariff Schedules of the United States (19 U.S.C. 1202) may not be identical to that needed by buyers or sellers, but is probably very similar. Therefore, Customs has revised the proposal to have commercial gaugers and laboratories specify both the services and commodities for which they seek approval or accreditation [see § 151.13(a), Acceptance of Reports] and the procedures they intend to use [see § 151.13(b)(2), Approval of Commercial Gaugers and Commercial Laboratories]. Since these procedures are published by well-known standards-writing organizations and are used throughout the industry, there is no need for Customs to publish them for comment.

Comment: The Director, Technical Services Division, should not be authorized to require procedures that may differ from one location to another or from those required by clients (importers) since this may result in additional costs.

Analysis: Customs does not agree. The district director now has the authority to require specific procedures, and we are not aware of any problems this has caused in the past. Since gauging and laboratory analysis are technical functions, this authority should be transferred to the Director, Technical Services Division. However, to allay concern, Customs has revised this provision in two ways: (1) the Director, Technical Services Division, may require specific procedures if warranted by local conditions, and (2) the commercial gauger or laboratory may ask the Director to review these procedures or delay their implementation.

Comment: The proposal requires commercial gaugers and each other person authorized to sign gauging reports to have a minimum of 6 months training and experience in performing the same services with the same commodities. Laboratory staff also must have certain specified experience. These requirements are vague, excessive, and unreasonable.

Analysis: The same requirement is in the current regulations and has caused no problems. However, the current regulations do not provide for performance checks after approval. Although adequate training and experience are still essential for approval, Customs believes that it can best carry out its mission with an initial determination of an applicant's competence and periodic verifications that this competence has been maintained. Therefore, Customs proposes to eliminate structured personnel qualification requirements (such as chemists needing bachelor's degrees) in favor of performance-based criteria.

Comment: The experience requirement for an outside laboratory's staff is beyond the control of the gauger contracting for the work.

Analysis: An approved gauger or laboratory may not use an unapproved laboratory for analyzing samples for Customs purposes, and may not report the analysis results from an unapproved laboratory as its own. The only laboratories whose tests may be used for Customs purposes are Customs-accredited laboratories; i.e., those operated by a Customs-approved commercial gauger or those which have been accredited by Customs on an independent basis. Although this is not a new prohibition, the proposal has been modified to emphasize this restriction.

Comment: Certain information required in the proposed recordkeeping sections are not normally available to the commercial gauger or laboratory. Furthermore, the recordkeeping requirements are complicated and excessive.

Analysis: Customs agrees, and has modified the recordkeeping requirements to accommodate these concerns. We have identified the records we need to evaluate and verify Customs-related work, and have eliminated all others, including all criteria on how records are to be kept (e.g., bound notebooks). The proposal includes only the usual business records and those which would be needed to evaluate a gauger's or laboratory's work and to verify its continued competence.

Comment: The terms "repeatedly inaccurate" and "significant degree" in proposed §§ 151.13(i)(3) and 151.14(b)(2) are vague. A specific number of occasions in a given time period should be stated, and "reproducibility" should be used instead of "significant degree."

Analysis: Customs does not agree. The same language appears in the current regulations and has not caused problems. Customs needs this flexibility so that it can refrain from imposing automatic penalties for minor errors but act on serious problems without waiting for a certain number of offenses. Customs will consider reproducibility when evaluating results.

Comment: The term "S&W" (sediment and water) should be used instead of "BS&W" (bottom sediment and water) as the latter term is obsolete.

Analysis: Customs agrees, and has changed the proposal accordingly.

Comment: Customs should provide a way to expand the proposal to cover additional commodities.

Analysis: Customs agrees, and has provided appropriate procedures in § 151.13(k), Additional Services and Commodities.

Comment: Public gaugers which already have Customs approval should be "grandfathered" in; they snould not have to reapply.

Analysis: Customs agrees. Public gaugers and independent commercial laboratories having Customs approval at the time these proposals take effect will not have to reapply. They may continue to gauge and analyze petroleum and petroleum products as described in the current regulations. These organizations will become subject to these regulations 6 months from the date they take effect.

Executive Order 12291

Because this document will not result in a "major rule" as defined by § 1(b) of E.O. 12291, a regulatory impact analysis and review as prescribed by § 3 of the E.O. is not required.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that these amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of the Act.

Paperwork Reduction Act

This document is subject to § 3504(h) of the Paperwork Reduction Act of 1980, Pub. L. 96-511. Comments relating to the information collection aspects of the proposal should be sent to the Office of Management and Budget and to Customs at the addresses given in the ADDRESS portion of this document.

Authority

These amendments are proposed under the authority of R.S. 251, as amended, 77A Stat. 14, sec. 499, 46 Stat. 728, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1202 (Gen. Hdnotes 1-6, 11, 12, Tariff Schedules of the United States) 1499, 1624).

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.6, Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regula-

tions (19 CFR 103.11(b)), on regular business days between 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal authors of this document were Glen E. Vereb and Roger J. Crain, Office of Commercial Operations, Customs Headquarters. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 151 AND 178

PART 151

Customs duties and inspection, Imports, Chemicals, Flammable materials, Petroleum, Sugar.

PART 178

Reporting and recordkeeping requirements, Paperwork requirements, Collection of information.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Parts 151 and 178, Customs Regulations (19 CFR Parts 151 and 178), as set forth below.

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. It is proposed to revise the authority citation for Part 151 to read as follows:

Authority: 19 U.S.C. 66, 1202 (Gen. Hdnotes. 11 and 12, Tariff Schedules of the United States (TSUS)), 1624. Subpart A also issued under 19 U.S.C. 1499. Subpart D also issued under sch. 6, pt. 1, hdnotes. 1-6, TSUS. Subpart E also issued under sch. 3, pt. 1C, hdnote. 6, TSUS. Subpart F also issued under sch. 3, pt. 1A, hdnote. 3, TSUS. Subpart H also issued under sch. 5, part 3B, TSUS.

§ 151.21 also issued under sch. 1, part 10, TSUS;
§ 151.42 also issued under 19 U.S.C. 1460, 1584, 1592;
§ 151.43 also issued under 19 U.S.C. 1592;
§ 151.46 also issued under 19 U.S.C. 1507;
§ 151.62 also issued under 19 U.S.C. 1481;
§ 151.63 also issued under 19 U.S.C. 1484;
§ 151.66 also issued under 19 U.S.C. 1562;
§ 151.68 also issued under 19 U.S.C. 1311, 1562;
§ 151.69 also issued under 19 U.S.C. 1557, 1562;
§ 151.82 also issued under 19 U.S.C. 1481;
§ 151.91 also issued under sch. 1, part 12A, hdnote. 3, TSUS.

2. All other statutory authority cited at the end of various sections in Part 151 will be removed.

3. It is proposed to revise § 151.10 to read as follows:

§ 151.10 Sampling.

When necessary, the district director may obtain samples of merchandise for appraisement, classification, or other official purposes. Samples shall be taken by a Customs officer or a commercial gauger approved in accordance with § 151.13. Samples shall be marked to ensure identification and retained according to established policies.

4. It is proposed to amend Part 151 by adding new § 151.13 to Subpart A to read as follows:

§ 151.13 Commercial Gaugers and Commercial Laboratories.

Commercial gaugers are commercial organizations and individuals who measure, gauge, or sample merchandise. (The term "public gauger" has been used to denote a type of commercial gauger dealing mainly with petroleum and petroleum products. "Public gaugers" are commercial gaugers and are subject to the regulations in Part 151.) Commercial laboratories are commercial organizations and individuals who analyze merchandise, i.e., determine its composition and/or characteristics through laboratory analysis. Commercial gaugers may own and operate commercial laboratories and vice versa. They may be approved or accredited, respectively, as a single organization, but each part of the organization is subject to the appropriate requirements of Part 151.

(a) *Acceptance of reports.* Provided that the commercial gauger or laboratory has complied with the appropriate provisions of this section, the district director may accept, for Customs purposes, the following quantity and laboratory analysis reports from Customs-approved commercial gaugers and Customs-accredited commercial laboratories, respectively:

(1) From Customs-approved commercial gaugers:

Petroleum and Petroleum Products:
gross or net landed quantity [see § 151.47(a)];

(2) From Customs-accredited commercial laboratories:

(i) Petroleum and Petroleum Products:
(A) API gravity,
(B) amount of sediment and water (S&W),
(C) antiknock index, and
(D) distillation characteristics;

(ii) Sugar, Sirups, and Molasses:
(A) sugar degrees determined by the polariscopic test,
(B) percent soluble nonsugar solids,
(C) percent total sugars, and
(D) weight per gallon in air at 60 °F.

Any difference between the quantities or characteristics found by the commercial gauger or laboratory and those found by Customs, if exceeding those published in these regulations, shall be resolved

in favor of Customs unless the commercial gauger or laboratory can establish that Customs is in error.

Quantity or analysis reports issued by or based on work performed by subcontractors, i.e., non-Customs-approved commercial gaugers or non-Customs-accredited commercial laboratories, will not be accepted.

Additional services and commodities may be added to the list according to the procedures given in § 151.13(k).

(b) *Approval of commercial gaugers and commercial laboratories.* Commercial gaugers seeking approval and commercial laboratories seeking accreditation shall send a letter of application to the U.S. Customs Service, Attention: Director, Technical Services Division (hereafter, the "Director"), Washington, D.C. 20229. Applications shall include:

(1) The applicant's legal name and the addresses of the principal place of business and any other offices;

(2) A statement of:

(i) the services to be provided (e.g., gauging, laboratory analysis, etc.);

(ii) the commodities to be gauged, sampled, or analyzed (e.g., petroleum and petroleum products);

(iii) the characteristics to be determined (e.g., distillation characteristics, the amount of sediment and water, etc.); and

(iv) references to the procedures to be used (e.g., ASTM D 1085: Ga(u)ging Petroleum and Petroleum Products, ASTM D 86: Distillation of Petroleum Products, etc.);

(3) Detailed statements of ownership and any partnerships, parent-subsidiary relationships, or affiliations with other domestic or foreign organizations such as importers; other commercial gaugers, laboratories, or samplers; producers; refiners; etc.;

(4) A statement of financial condition;

(5) If a corporation, a copy of the articles of incorporation and the names of all officers and directors;

(6) The names (or titles) and qualifications of each person who will be authorized to sign or approve gauging or analysis reports on behalf of the commercial gauger or laboratory;

(7) A complete description of the applicant's facilities, instruments, and equipment;

(8) A bond executed in accordance with Part 113, Customs Regulations (19 CFR Part 113); and

(9) A written agreement in the following form to avoid conflict-of-interest situations and to comply with requirements prescribed by Customs:

COMMERCIAL GAUGER (LABORATORY) AGREEMENT

As conditions for approval (accreditation), I agree:

—To have no financial interest in or other connection with any business or other activity which might affect the unbiased performance of my duties as a Customs-approved (-accredited) commercial gauger (laboratory). I understand that this does not prohibit my accepting the usual fees for professional services.

—To comply with the requirements of Part 151, Customs Regulations (19 CFR Part 151), and to conduct my professional services in conformance with approved standards and procedures, including procedures which may be required by the Commissioner of Customs or the Director, Technical Services Division.

—To maintain the ability, i.e., the instruments, equipment, qualified staff, facilities, etc., to perform the services for which I am approved (accredited) and to allow my performance to be evaluated by the Director, Technical Services Division, on a periodic basis by such means as on-site inspections, demonstrations of gauging (analysis) procedures, reviews of submitted records, and proficiency testing through check-samples.

—To notify both the district director and the Director, Technical Services Division, of any attempt to impede, influence, or coerce me in the performance of my duties immediately.

—To investigate any circumstances which might affect the accuracy of my work promptly; to correct the situation immediately; and to notify both the district director and the Director, Technical Services Division, of such matters, their consequences, and any actions taken immediately.

—To notify the Director, Technical Services Division, by certified mail within 5 days of any major changes involving legal name; address; ownership; parent-subsidiary relationships; bond; other offices; managerial, professional, or executive staff; approved signatories; facilities, instruments, or equipment; etc.

(c) *Combined approval and accreditation.* An organization having both gauging offices and laboratories may apply for approval and accreditation, respectively, in a single submission. Each part of the organization must meet and maintain the appropriate qualifications and technical and operational requirements, but any requirement imposed on the organization as a whole (e.g., the bond) may be met with one document.

(d) *Determination of competence.* The Director shall determine the applicant's competence, independence, and reputation by use of appropriate techniques, including background investigations by the Office of Investigations.

(e) *Notice of approval, disapproval, suspension, or revocation.* The Director shall notify the applicant that his application has been approved or give the reasons for disapproval. Approvals or accreditations may be suspended or revoked at any time for failure to comply with any provision in Part 151, and liquidated damages may be assessed under the commercial gauger's or laboratory's

bond. Notices of approval, suspension, and revocation shall be published in the Customs Bulletin.

(f) *Technical and operational requirements.* To be approved and to maintain approval, a commercial gauger or laboratory shall conform to the following:

(1) *Equipment.* The commercial gauger or laboratory shall be equipped with all instruments and equipment needed to conduct approved services and analyses according to appropriate standards published by recognized standards-writing organizations such as the American Society for Testing and Materials (ASTM), the American Petroleum Institute (API), the International Commission for Uniform Methods of Sugar Analysis (ICUMSA), or the American National Standards Institute (ANSI). The commercial gauger or laboratory shall ensure that all instruments and equipment are properly calibrated, checked, and maintained.

(2) *Procedures.* The commercial gauger or laboratory shall comply in all respects with appropriate procedures published by ASTM, API, etc., and with specific procedures required by the Director under paragraph (h) of this section.

(3) *Facilities.* The commercial gauger or laboratory shall conduct his services in facilities which have adequate space, lighting, and environmental controls to ensure compliance with the conditions prescribed in the appropriate procedures.

(4) *Personnel.* The commercial gauger or laboratory shall be staffed with persons having the necessary education, training, knowledge, and experience for their assigned functions (e.g., maintaining equipment, calibrating instruments, performing gauging services or laboratory analyses, evaluating gauging or analytical results, signing gauging or analysis reports on behalf of the commercial gauger or laboratory, etc.).

(g) *Specific procedures.* The Director may require the commercial gauger or laboratory to follow specific procedures if warranted by local circumstances. The commercial gauger or laboratory may request that such procedures be imposed, and may request the Director to review the imposition of any specific procedures or delay their implementation.

(h) *Recordkeeping requirement.* The commercial gauger or laboratory shall maintain records of the type normally kept in the ordinary course of business. In addition, the commercial gauger or laboratory shall maintain all records necessary to permit the evaluation and verification of all Customs-related work, including, as appropriate, those described below. All records shall be maintained for five (5) years in accordance with §§ 162.1a and 162.1c of this chapter.

(1) *Transaction records.* Records for each Customs-related transaction, including samples, must have the following:

(i) a unique identifying number;

(ii) the date and location where the transaction occurred or the sample was received or taken;
(iii) the identity of the product (e.g., crude oil);
(iv) the name of the client;
(v) the source of the sample (e.g., name of vessel, flight number of airline, name of individual taking the sample, etc.).

If available, records for each Customs-related transaction, including samples, should have the Customs entry date, entry number, and port of entry and the names of the importer, exporter, manufacturer, and country-of-origin.

(2) *Major instrument records.* Records for each major piece of equipment or instrument (including analytical balances) used in Customs-related work must have the name and type of the instrument, the manufacturer's name, the instrument's model and serial numbers, and the details (names, dates, etc.) of all major servicing, recalibration, etc.

(3) *Records of gauging and analytical procedures.* The commercial gauger or laboratory must maintain complete and up-to-date copies of all approved gauging and analytical procedures, calibration methods, etc., and must document the procedures each staff member is authorized to perform.

(4) *Gauging and laboratory analysis records.* The commercial gauger or laboratory must identify by number [see subparagraph (h)(1)(i) of this section] and must maintain all information or data (such as sample weights, temperatures, references to filed spectra, etc.) associated with each Customs-related gauging transaction or laboratory analysis. Each gauging and analysis record (i.e., the complete file of all data for each separate transaction) must be dated and initialed or signed by the staff member(s) who did the work.

(5) *Gauging and laboratory analysis reports.* Each gauging or laboratory analysis report submitted to Customs must include:

(i) the name and address of the commercial gauger or laboratory;
(ii) a description and identification of the sample, including its unique identifying number;
(iii) the designations of each gauging or analysis procedure used;
(iv) the gauging or analysis report itself (i.e, the quantity and/or the characteristics of the sample);
(v) the date of the report; and
(vi) the initials or signature of the person accepting technical responsibility for the gauging or analysis report (i.e., an approved signatory).

(i) *Verification requirement.* To ensure compliance with Part 151 and the accuracy of the information submitted to Customs by commercial gaugers and laboratories, the Director may conduct on-site inspections, record reviews, periodic check samples, etc.

(j) *Suspension or revocation of Customs approval or accreditation.*

(1) *Grounds.* If a commercial gauger's or laboratory's reports are repeatedly inaccurate to a significant degree, or if the gauger or laboratory fails to comply with any applicable provision of the Customs Regulations (19 CFR Chapter I), the Director may suspend or revoke the commercial gauger's approval or the commercial laboratory's accreditation.

(2) *Notice.* The Director shall give the commercial gauger or laboratory a notice containing specific written grounds for the proposed suspension or revocation and all procedures and timelines for appeal and review.

(3) *Appeal.* The commercial gauger or laboratory has 30 days from the date of the notice to file a written appeal to the Director. This appeal may contain an acceptance of responsibility and may also provide extenuating circumstances and rebuttal evidence. In addition, this appeal may ask for a meeting with the Director or his designee to discuss the proposed action. Failure to file an appeal within 30 days may result in the suspension or revocation of the commercial gauger's approval or the commercial laboratory's accreditation.

(4) *Response.* If the Director accepts the commercial gauger's or laboratory's appeal, he shall notify the gauger or laboratory immediately and close the case. If not, he shall notify the gauger or laboratory within 30 days of receipt of the appeal and advise him of his right to file a written petition to the Commissioner to review the proposed action.

(5) *Commissioner's Review.* The commercial gauger or laboratory has 30 days from the date of the Director's response to file (with the Director) a written petition for the Commissioner to review the proposed action. The Commissioner or his designee shall review the petition and shall forward the written decision to the Director for implementation.

(6) *Publication.* The Director shall publish notice of suspensions or revocations of a commercial gauger's approval or a commercial laboratory's accreditation in the CUSTOMS BULLETIN, giving the effective date and duration of each such action.

(k) *Additional Services and Commodities.* (1) Customs will consider adding additional services or commodities to those given in § 151.13(a) upon the submission of a request setting out the scope of the services or commodities being proposed, the identification of the specific standards and procedures that would be used, and technical and economic reasons why Customs should add the services or commodities.

(2) Customs-approved commercial gaugers and Customs-accredited commercial laboratories may extend their approval or accreditation to gauge or analyze additional commodities by sending the Director a letter with the information set out in paragraphs (b) (1), (2), (6), and (7) of this section.

(l) *Costs of Using Customs-approved commercial gaugers.* No expense incurred by the use of a Customs-approved commercial gauger or a Customs-accredited commercial laboratory shall be borne by the Government.

5. It is proposed to revise § 151.31 to read as follows:

§ 151.31 Use of laboratory tests in liquidation.

The characteristics of sugar, sirup, and molasses as set out in § 151.13(a)(2)(ii) and as determined by a Customs-accredited commercial laboratory shall be used for Customs purposes if the difference between these characteristics and those found by the Customs laboratory does not exceed the differences in the following table:

Characteristic	Difference between Customs value and commercial laboratory's value
Degrees polarization	0.4 sugar degree.
Total sugars	2.0 percent total sugars.

If the difference exceeds these values and the Customs-accredited commercial laboratory cannot establish that Customs is in error, then the Customs results shall be used.

6. It is proposed to amend § 151.42 by revising paragraph (a)(1)(i); removing paragraph (a)(1)(ii) and renumbering paragraphs (a)(1)(iii) and (a)(1)(iv) as (a)(1)(ii) and (a)(1)(iii), respectively; adding a new paragraph (a)(3); and removing the word "shall" and inserting the word "may" in paragraph (b). The amended and revised portions would read as follows:

§ 151.42 Controls on unlading and gauging.

(a) * * *

(1) * * *

(i) Customs-approved metering installations provided by the importer;

(ii) Shore tank gauging; or

(iii) Weighing for trucks and railroad cars.

(2) * * *

(3) The metering installations described in paragraph (a)(1)(i) are approved by Customs on a case-by-case basis. Importers seeking approval shall send a complete description of the installation to the district director who, with the concurrence of the Director, Technical Services Division, or his designee, shall give tentative or final approval.

(b) *Duties of Customs officers.* Customs officers may perform or witness ullaging and gauging as follows:

* * * * * * *

7. It is proposed to amend Part 151 by removing § 151.43 and reserving it.

8. It is proposed to amend § 151.45(a) by removing the reference "§ 151.43" and inserting in its place "§ 151.44."

9. It is proposed to revise the heading and text of § 151.47 to read as follows:

§ 151.47 Entered quantities of petroleum or petroleum products.

(a) *Optional entry of net quantity.* Instead of stating the gross quantity of petroleum or petroleum products on the entry summary, the importer may state the net quantity, which shall be determined in accordance with §§ 158.13 and 151.46 of this chapter. The analytical report from the Customs-accredited commercial laboratory shall be filed with the entry summary.

(b) *Use of laboratory tests in liquidation.* The quantity of sediment and water as determined by a Customs-accredited commercial laboratory shall be used for Customs purposes if the difference between these quantities and those found by the Customs laboratory does not exceed the differences in the following table:

Percentage of sediment and water found by Customs	Maximum percentage difference allowable
0.05 to 0.50	0.1
0.51 to 1.50	0.2
More than 1.50	0.3

If the difference exceeds the amount in the table and the Customs-accredited commercial laboratory cannot establish that Customs is in error, then the Customs results shall be used.

10. It is proposed to amend § 151.54 by removing the terms "chief chemist of the Customs laboratory" and "chief chemist" and inserting in their place the term "Customs laboratory director."

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 8, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 18, 1986 (51 FR 26021)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 86-65)

PISTACHIO GROUP OF THE ASSOCIATION OF FOOD INDUSTRIES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, CALIFORNIA PISTACHIO COMMISSION, ET AL., DEFENDANT-INTERVENORS

Court No. 86-03-00369

Before DICARLO, *Judge.*

Plaintiffs bring an action under 28 U.S.C. § 1581(i) (1982) challenging a final determination of sales at less than fair value by the United States Department of Commerce (Commerce), and move for a preliminary injunction to restrain the United States Customs Service from requiring the posting of a cash deposit or bond on all entries of pistachios from Iran that are subject to Commerce's suspension order. Defendant and defendant-intervenors move to dismiss the action for lack of jurisdiction.

Held: Plaintiffs may bring an action challenging Commerce's final determination under 19 U.S.C. § 1516a (1982 & Supp II 1984) and 28 U.S.C. § 1581(c) if and when the International Trade Commission issues a final affirmative injury determination and a final antidumping order is published. Plaintiffs have not shown the potential for immediate injury and irreparable harm which would render relief under those provisions manifestly inadequate and justify the Court's exercise of jurisdiction under 28 U.S.C. § 1581(i)(2).

[The action is dismissed.]

(Decided June 26, 1986)

Harris & Berg (Herbert E. Harris II and *Cheryl Ellsworth)* for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Commercial Litigation Branch *(Platte B. Moring, III)* for defendant.

Fried, Frank, Harris, Shriver & Jacobson (David E. Birenbaum) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

Plaintiffs, importers of Iranian pistachios, challenge the determination of the United States Department of Commerce, International Trade Administration (Commerce) in *Certain In-Shell Pistachios*

From Iran: Final Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 18919 (May 23, 1986) and move for a preliminary injunction restraining the United States Customs Service (Customs) from requiring a cash deposit or bond equal to the estimated antidumping duty for all unliquidated entries filed for consumption on or after December 11, 1985.

No antidumping duty order has yet been issued, and plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1581(i)(2) (1982). Since plaintiffs may challenge Commerce's determination under the provisions of Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (1982 & Supp. II 1984) and 28 U.S.C. § 1581(c) (1982) after the issuance of an antidumping duty order, and plaintiffs have not shown that avenue of relief to be manifestly inadequate, the action is dismissed.

BACKGROUND

In October, 1985 Commerce commenced an investigation of sales at less than fair value in the United States of pistachios imported from Iran. 50 Fed. Reg. 42978 (1985). On March 11, 1986, Commerce published its *Preliminary Determination of Sales at Less Than Fair Value; Certain In-Shell Pistachios From Iran,* 51 Fed. Reg. 8342 (1986), directing Customs to suspend liquidation of all entries of the merchandise. Commerce found that imports of the merchandise present "critical circumstances" under 19 U.S.C. § 1671b(e) (1982), and accordingly liquidation was also suspended for all unliquidated entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after December 11, 1985. 51 Fed. Reg. at 8343. Commerce found the estimated dumping margin to be 192.54%, and directed Customs to require a cash deposit or bond equal to that amount for all entries subject to the suspension order.

On March 25, 1986 plaintiffs brought an action challenging Commerce's preliminary determination, and simultaneously moved for a preliminary injunction.

On April 16, 1986 defendant moved to dismiss the action for lack of jurisdiction. On May 5, 1986 the California Pistachio Commission and seven domestic producers and processors of pistachios were granted leave to intervene as defendants. Intervenors also move to dismiss the action.

Commerce published its final determination on May 23, 1986, finding a weighted-average dumping margin of 241.14%. *Certain In-Shell Pistachios From Iran; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 18919 (1986). At oral argument on May 30, 1986, the Court denied defendant's motion to dismiss the action challenging the preliminary determination as moot, and granted plaintiffs' oral motion to amend the complaint to challenge Commerce's final determination.

The parties agree and the Court finds that the Court lacks jurisdiction over the action under 28 U.S.C. § 1581(c) since Commerce

has not published a final antidumping duty order. The question presented is whether the Court properly may exercise jurisdiction under 28 U.S.C. § 1581(i) in an action challenging a final affirmative determination of sales at less than fair value before the publication of a final antidumping duty order where plaintiffs allege that (1) the posting of a cash deposit or bond equal to the estimated dumping margin will cause them irreparable injury and (2) the determination is "fundamentally flawed" since the dumping margin is solely attributable to an error in the exchange rate used in converting Iranian rials to United States dollars.

DISCUSSION

An action challenging a final affirmative determination of sales at less than fair value may be brought under 19 U.S.C. § 1516a(a)(2) (1982 & Supp. II 1984) and 28 U.S.C. § 1581(c) within 30 days after the publication in the Federal Register of a final antidumping duty order. Under the Trade and Tariff Act of 1984 [1984 Trade Act], Pub. L. No. 98-573, § 623(a), 98 Stat. 2948, 3040 (1984), parties may challenge less than fair value determinations only as provided under 19 U.S.C. § 1516a (1982 & Supp. II 1984).

A final antidumping duty order is published by Commerce only after the International Trade Commission (Commission) makes a final affirmative determination under section 1673d(b). *See* 19 U.S.C. 1673d(c)(2) (1982). In this case the Commission's final determination will be issued shortly, in accordance with 19 U.S.C. § 1673d(b)(2).

In addition to its jurisdiction under 28 U.S.C. § 1581(a)-(h), this Court has jurisdiction over all civil actions brought against the United States arising out of any law of the United States providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2). Section 1581(i) jurisdiction may not be exercised in circumvention of the jurisdictional scheme established by section 1581(a)-(h). *See United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 183-84, 687 F.2d 467, 472 (1982); *Wear Me Apparel Co.* v. *United States*, 10 CIT ——, Slip. Op. 86-52 at 3 (1986).

In *United States Cane Sugar Refiners' Ass'n* v. *Block*, 3 CIT 196, 544 F. Supp. 883, *aff'd*, 69 CCPA 172, 683 F.2d 399 (1982), this Court held that an action challenging a presidential proclamation imposing import quotas on sugar was properly brought under section 1581(i). The Court said that it would be unreasonable to require plaintiff to attempt to import over-quota sugar in order to obtain a protestable exclusion of the merchandise before seeking judicial review of the validity of the proclamation under section 1581(a). 3 CIT at 201, 544 F. Supp. at 886. On appeal, the Court of Appeals for the Federal Circuit upheld the Court's finding of jurisdiction under section 1581(i):

> Respecting jurisdiction under § 1581(i), we note the provision of injunctive powers to the Court of International Trade in the Customs Courts Act of 1980 and the special circumstances of this case which, absent that provision, would have required [plaintiff] to present its case to the District Court. We are persuaded that in this case, involving the potential for immediate injury and irreparable harm to an industry and a substantial impact on the national economy, the delay inherent in proceeding under § 1581(a) makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under § 1581(i).

683 F.2d at 402 n.5.

In light of the opinion in *United States Cane Sugar Refiners' Ass'n*, the Court holds that in this case, where judicial review might be available under section 1581(c), the question presented is whether the remedy available to plaintiff under section 1581(c) would "involv[e] the potential for immediate injury and irreparable harm," making relief under that provision manifestly inadequate, and exercise of jurisdiction under section 1581(i) appropriate.

Plaintiffs contend that the cash or bond requirement imposed by Commerce's final determination constitutes the irreparable injury prerequisite to jurisdiction under section 1581(i) and to injunctive relief. Plaintiffs claim that if they cannot challenge Commerce's determination until after the International Trade Commission has made an affirmative injury determination and a final antidumping duty order is published, the prospective bond or deposit requirement will halt the importation of pistachios from Iran, which will cause them to suffer loss of market share and customers. Plaintiffs argue that judicial intervention into the ongoing administrative proceedings is particularly appropriate since the deposit or bond requirement is to be applied retroactively to entries made for consumption on or after December 11, 1985.

Plaintiffs did not seek a temporary restraining order, nor did they move for an expedited hearing or briefing schedule in this case. Only a short time remains before a final injury determination will be issued, which, if affirmative, will result in the publication of an antidumping duty order reviewable under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c). The claim of irreparable injury is supported by the affidavit of only one importer stating that one bonding company will not post a bond covering entries made between December 11, 1985 and March 11, 1986 unless the importer obtains a letter of credit. The importer states it cannot obtain the letter of credit and that without the cash or bond it will be compelled to reexport the entered merchandise at substantial cost and to cease its regular business of importing pistachios from Iran.

Plaintiffs' argument that the Court has jurisdiction in this situation under *Zenith Radio Corp.* v. *United States*, 710 F.2d 806 (Fed. Cir. 1983), is misplaced. In *Zenith*, the Federal Circuit held that a domestic manufacturer was entitled to an injunction restraining

the liquidation of entries which were the subject of a challenged review under section 751 of the Trade Agreements Act of 1979, current version at 19 U.S.C. § 1675 (1982 & Supp. II 1984). In its analysis of the criteria required for injunctive relief, the *Zenith* Court found plaintiff's injury was irreparable since the immediate liquidation of all of the entries occurring during the review period would "eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess [correct] dumping duties," thereby abrogating effective judicial review. 710 F.2d at 810.

In this case liquidation has been suspended and plaintiffs' challenge to Commerce's determination may be properly addressed in an action brought under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

Plaintiffs in this case seek to avoid the normal consequences of the antidumping laws. Once Commerce has published a preliminary affirmative determination of sales at less than fair value, 19 U.S.C. § 1673b(b) (1982), Commerce is required to order the suspension of liquidation of all subject entries and to order the posting of a cash deposit, bond, or other security equal to the estimated dumping margin. 19 U.S.C. § 1673b(d) (1982).

In *Krupp Stahl AG* v. *United States*, 553 F. Supp. 394 (1982), the Court refused to issue a preliminary injunction requiring Commerce to review information supplied by the plaintiff in an antidumping investigation before issuing its preliminary determination, which would set the amount of dumping duties on subsequent entries of the plaintiff's products. Plaintiffs rely on *Krupp Stahl* since the Court did "not rule out the possibility that administrative actions taken in the course of the administration of the antidumping and countervailing duty laws may cause such hardships as would justify judicial review." *Id.* at 396.

The Court is persuaded that *Krupp Stahl* supports a finding in this case that plaintiffs have shown neither manifest inadequacy nor irreparable harm:

> So far as can be seen in the present circumstances, the deposit of estimated duties will not cause a hardship of the type which justifies judicial intrusion into an ongoing administrative investigation (*Bethlehem Steel Corp.* v. *E.P.A.*, 669 F.2d 903 (3d Cir. 1982)). The effect on plaintiff is closer to the normal consequences of involvement in these investigations. Cf. *F.T.C.. v. Standard Oil Co. of California*, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980).

553 F. Supp. at 396.

The injury alleged by plaintiffs does not persuade the Court that the action must be entertained prior to the issuance of a final antidumping order. The Court holds that section 1581(i) jurisdiction is not available where the hardship alleged is that which is imposed by statute and an avenue for effective judicial relief is available under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

Plaintiffs' argument regarding the merits of their claim is not germane to the jurisdictional inquiry. Plaintiffs claim that the dumping margin estimated by Commerce resulted solely from the Federal Reserve Bank's certification to Commerce of official Iranian exchange rates which do not represent the actual value of the Iranian currency. They argue that the rate used by the Federal Reserve Bank in converting Iranian rials to U.S. dollars is erroneous as a matter of law, and that the margin would have been zero if the actual value of the rial had been properly ascertained under the provisions of 31 U.S.C. § 5151(e).

A Commerce regulation states that "any necessary conversion of a foreign currency into its equivalent in United States currency shall be made in accordance with the provisions of section 522 of the Tariff Act of 1930, as amended [31 U.S.C. § 5151]." 19 C.F.R. § 356.56 (1985). Section 5151 sets forth the manner in which rates of exchange are ascertained and certified by the Federal Reserve Bank of New York.

If and when, in an action brought under section 1581(c), the Court is called upon to review Commerce's finding of sales at less than fair value, the Court will examine the record to determine whether the exchange rate used by Commerce is supported by substantial evidence and in accordance with law. *See* 19 U.S.C § 1516a(b)(1)(B) (1982). The Court's review will not be limited, as claimed by defendant, to determining whether Commerce followed its regulation. *See* 19 C.F.R. § 353.56 (1985). Although Commerce may reasonably publish a rule under which currencies are converted in accordance with the provisions of 31 U.S.C. § 5151 (1982), see *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924 (Fed. Cir. 1984), a reasonable delegation of agency responsibility does not divest the Court of its own statutorily mandated responsibilities.

CONCLUSION

For the reasons stated above, the Court finds that plaintiffs have not shown the potential for immediate injury and irreparable harm which would render relief under section 1581(c) manifestly inadequate and justify the Court's exercise of jurisdiction under 28 U.S.C. § 1581(i)(2). Accordingly, the action is dismissed. So ordered.

(Slip Op. 86-66)

DONNA KELLEY, ET AL., PLAINTIFFS *v.* SECRETARY, U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 85-03-00437

OPINION

[Secretary's opinion on remand affirmed.]

(Dated June 27, 1986)

Donna Kelley, pro se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Platte B. Moring, III,* Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* On December 30, 1985, in the above-captioned matter, 9 CIT ___, 626 F. Supp. 398 (1985), this court remanded for further consideration the Secretary of Labor's (Secretary's) denial of a petition for Trade Adjustment Assistance filed pursuant to section 221(a) of the Trade Act of 1974, as amended (Act).[1] 19 U.S.C. § 2271(a) (1982). In a clarification of that opinion, 10 CIT ___, Slip Op. 86-39 (Apr. 2, 1986), this court pointed out the three deficiencies in the administrative record that prevented the court from finding that the Secretary's determination was supported by substantial evidence. This matter is now before the court for review of the Secretary's reaffirmance on remand denying certification of the petition.

The three defects in the administrative record noted in Slip Op. 86-39 are as follows: First, it appeared that data sheets included in the administrative record listed plant specific sales figures of industrial thread [2] and not company-wide sales of that article. If the data sheets were in fact plant specific, the court directed that the Secretary should supplement the record with data from other plants owned by American Thread that produce the article in question. 10 CIT at ___, Slip Op. 86-39 at 3 & n.3. Second, from the record it appeared that sales had decreased by approximately twelve percent between 1982 and 1983, but the customer survey relied on by the Secretary in making his determination accounted for only six and eight percent of sales, respectively, for those years and for only three percent of the sales decline during that period.[3] The court stated that these samplings were insufficient to provide substantial evidence to support the Secretary's determination. *Id.* at ___, Slip Op. 86-39 at 4-5. Third, it was unclear from the record

---

[1] The petition alleged that increased imports of articles like or directly competitive with the cotton and synthetic sewing thread produced at the American Thread Company's (American Thread's) plant in Tallapoosa, Georgia (Tallapoosa plant), contributed importantly to the worker separations or threat of worker separations at the Tallapoosa plant.

The requirements for eligibility to apply for trade adjustment assistance are set forth in § 222 of the Act which provides:

> The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part if he determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.
>
> For purposes of paragraph (3), the term "contributed importantly" means a cause which is important, but not necessarily more important than any other cause.

19 U.S.C. § 2272 (1982 & Supp. II 1984).

[2] Defendant uses the term "industrial thread" as a synonym for the term "cotton and synthetic sewing thread." As noted in Slip Op. 86-39, in the absence of information to the contrary, the court will equate the two. 10 CIT at ___, Slip Op. 86-39 at 3 n.2.

[3] The Secretary considered the period from 1982 through the first eight months of 1984 as relevant in reviewing plaintiff's petition. Id. at ___, Slip Op. 86-39 at 4.

why the customer survey failed to include the company that had decreased its purchases of industrial thread by a larger amount, during the first eight months of 1984 as compared with the first eight months of 1983, than did any other customer of American Thread for which data was compiled. Although this customer's address was listed as in Canada, it was unclear whether its purchases were for the United States' or Canada's market. *Id.* at ____, Slip Op. 86-39 at 6.

As to the first deficiency, the administrative record has been supplemented to indicate that the data sheets on the record represent company-wide, rather than plant specific, sales of the subject merchandise. Although this is contrary to the heading on the data sheets themselves, the court accepts as true the statement in the supplemental record, from an executive of the American Thread Company, verifying that sales are not made from American Thread's individual plants and thus that the data sheets do in fact represent company-wide sales.

The second defect was also corrected on remand. The court's reference to a sales decline of twelve percent from 1982 to 1983, *id.* at ____, Slip Op. 86-39 at 4, was based on annual sales totals contained in the administrative record. On remand, however, the Department of Labor corrected an addition error contained in the record. From the corrected annual sales total for 1982, it is evident that the sales decline from 1982 to 1983 was roughly two percent rather than twelve percent. Further, the record was also supplemented to include survey data from another company that had decreased purchases during this period. Based on these new figures, survey data on the record now accounts for roughly nineteen percent of the sales decline during this period rather than only three percent of the decline. It now appears that even if the portion of the two percent sales decline of industrial thread from 1982 to 1983 that is not accounted for in the survey data was lost entirely to imports of articles like or directly competitive with the subject merchandise, a decline in sales of only 1.6% (approximately) would be due to such imports. Under these circumstances, the failure to get an expanded sampling to account for a larger percentage of 1982-1983 sales or sales decline does not render the Secretary's finding, that imports did not contribute importantly to separations for the 1982-1983 period, unsupported by substantial evidence.

Finally, as to the third defect, the administrative record has been supplemented to explain the omission, from the customer survey, of the company that accounted for the greatest documented decrease in purchases during the 1983-1984 period. The record now indicates that over ninety-nine percent of this company's purchases from American Thread were processed in Canadian plants for the Canadian market. It was unnecessary, therefore, to include this company in the customer survey. *See id.* at ____, Slip Op. 86-39 at 6.

Based on the foregoing, the court concludes that there is substantial evidence on the administrative record, as supplemented, to support the Secretary of Labor's remand determination denying plaintiffs' petition for trade adjustment assistance.

Judgment will be entered accordingly. SO ORDERED.

(Slip Op. 86-67)

PHILIPP BROTHERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-4-00528

OPINION AND ORDER

[Defendant's motion for stay pending appeal denied.]

(Decided June 27, 1986)

Donohue and Donohue (James A. Geraghty), for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, and *Elizabeth C. Seastrum,* Civil Division, United States Department of Justice, for defendant.

Restani, *Judge:* On February 14, 1986, this court remanded to the International Trade Administration (ITA) a final determination in a section 751 annual review of a countervailing duty (CVD) order, Tariff Act of 1930, §751, as amended, 19 U.S.C. §1675 (1982 & Supp. II 1984), as not supported by substantial evidence. *Philipp Brothers, Inc.* v. *United States,* 10 CIT ___, 630 F. Supp. 1317 (1986), *appeal docketed,* No. 86-1122 (Apr. 14, 1986). The court ordered ITA to further consider and explain certain aspects of its determination. ITA has appealed that decision on the ground that plaintiff allegedly failed to exhaust its administrative remedies and requests that the court stay its remand order pending disposition of the appeal. The grant of a stay pending appeal of a remand order is discretionary. *American Grape Growers Alliance for Fair Trade* v. *United States,* 9 CIT ___, Slip Op. 85-104 at 4 (Oct. 7, 1985). As noted by the parties, the factors to be considered in the exercise of this discretion, like those considered in determining whether to grant a preliminary injunction, are as follows:

> (1) whether the petitioner is likely to prevail on the merits of his appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceeding, and (4) wherein lies the public interest.

McSurely v. *McClellan,* 697 F.2d 309, 317 (D.C. Cir. 1982), *cert. denied,* 106 S. Ct. 525 (1985); *see American Grape Growers,* 9 CIT at ___, Slip Op. 85-104 at 4 (citing *Timken Co.* v. *United States,* 4 CIT 263, 264 n.2, 553 F. Supp. 1060, 1062 n.2 (1982)).

Not listed among these standard factors, but of importance nonetheless, is whether the movant's appeal is subject to dismissal on

procedural grounds. There is no justification for a stay pending appeal if the appeal itself cannot be heard. In opposition to the motion for a stay, plaintiff raises a legitimate challenge to defendant's ability to be heard on the merits at this time by the appellate court. The court deems it appropriate to consider this issue before an analysis of movant's four-part burden.

Appeals may be taken from final decisions of this court, 28 U.S.C. § 1295(a)(5) (1982), and from decisions, which although not final, have been certified by this court for interlocutory appeal. 28 U.S.C. § 1292(a)(1) (1982). Defendant did not seek to have the exhaustion issue certified for interlocutory appeal. Instead, defendant appealed directly to the Court of Appeals for the Federal Circuit, where it apparently intends to argue that this court's decision on the exhaustion issue is appealable as of right under the collateral order exception.

As recently noted by the Federal Circuit,

> [t]he "collateral order" exception covers orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* [v. *Beneficial Industrial Loan Corp.*], 337 U.S. [541,] 546. To come within the exception, *an order must at a minimum "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468 (1978).

Cabot Corp. v. *United States,* 788 F.2d 1539, 1543 (emphasis added), *reh'g denied,* No. 86-729 (Fed. Cir. May 22, 1986). It is very difficult to view a decision failing to preclude review, based on lack of exhaustion of administrative remedies, as "finally determining" anything. Certainly, the issue of exhaustion of administrative remedies arises often enough, and neither party has cited a case finding resolution of such an issue to be the type of separable claim which may give rise to a "collateral order." Even if we assume that the exhaustion issue has been "conclusively" determined and is "completely separate from the merits of the action," the court seriously questions whether this issue would be "effectively unreviewable on appeal from a final judgment."

Defendant argues that if this court affirms ITA's remand determination and plaintiff fails to appeal that decision, the exhaustion issue would escape appellate review.[1] The mere possibility that an issue may not be subject to review, however, does not necessarily satisfy the Supreme Court's mandate that a decision be "effectively unreviewable" as a prerequisite to application of the collateral

[1] It is not clear to the court that under every permutation of this scenario the exhaustion issue would be unreviewable.

order doctrine. To the contrary, the Supreme Court has interpreted the exception narrowly and has held it inapplicable in instances where there is only the possibility that a decision will be unreviewable. For example, in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the trial court's refusal to disqualify an attorney from the case was held *not* to be appealable as a final collateral order. In deciding whether the trial court's decision would be rendered "effectively unreviewable" absent an immediate appeal, the court stated that to meet this condition requires that " 'denial of immediate review *would render impossible* any review whatsoever.' " *Id.* at 376 (emphasis added) (quoting *United States* v. *Ryan*, 402 U.S. 530, 533 (1971)). Obviously, if the party that had unsuccessfully argued for disqualification subsequently won on the merits, the disqualification decision would not be subject to review. Yet, the Supreme Court held that there had been "no showing that [the] opportunity for meaningful review [would] perish unless immediate appeal [were] permitted." *Firestone*, 449 U.S. at 377–78. *Compare with Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 8–12 (1983) (failure to allow immediate review of district court's stay pending state court resolution of arbitrability of claim would render the stay "entirely unreviewable" because once state court decided arbitrability issue, federal court would be bound by res judicata); *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) (unless appeal of district court's failure to hold amount of bail excessive is heard before sentencing, district court's decision "never can be reviewed at all"); *Cohen*, 337 U.S. at 545–47 (failure to resolve through appeal before trial the right to have bond posted as security in stockholder derivative action would result in loss of the right, "probably irreparably").

During the course of any litigation in which the court decides against a party on issues separable from the merits, that party could generally argue that there is the possibility that it will prevail on the merits and thus that the separable issues *may* become "effectively unreviewable." That the Supreme Court did not intend such a broad interpretation of the "effectively unreviewable" requirement is reflected in the Court's finding in *Firestone* that the collateral order doctrine was inapplicable in that case. *See also Richardson-Merrell, Inc.* v. *Koller*, 105 S. Ct. 2757, 2765 (1985) (trial court's disqualification of an attorney is not "effectively unreviewable" if denial of right to counsel of choice can be established without show of prejudice); *Coopers & Lybrand*, 437 U.S. at 469 (denial of certification to file class action is reviewable after final judgment); *United States* v. *MacDonald*, 435 U.S. 850, 861 (1978) (right to speedy trial need not "be upheld prior to trial if it is to be enjoyed at all").

At oral argument, defendant cited two cases that arguably support a somewhat flexible interpretation of the "effectively unreviewable" requirement. In *Huie* v. *Bowen*, No. 85-7067 (11th Cir.

May 5, 1986) and *Cohen* v. *Perales*, 412 F.2d 44 (5th Cir. 1969), *rev'd sub nom. on other grounds, Richardson* v. *Perales*, 402 U.S. 389 (1971), the collateral order exception was applied following court ordered remand to an administrative agency where each appellate court concluded that the respective issues brought up on appeal might otherwise escape review. To the extent that these decisions stand for the proposition that the collateral order exception is applicable where there is only a theoretical possibility that the issue in question will be unreviewable, this court believes they exceed the narrow exception intended by the Supreme Court. If, on the other hand, these cases stand for the proposition that the "effectively unreviewable" requirement can be satisfied where subsequent review of the issue in question is unlikely due to special circumstances, then this interpretation may be consistent with the Supreme Court's intent. That is, when remand to an administrative agency occurs, additional factors may intervene to decrease the likelihood of review on appeal of particular types of issues.[2] Although this court does not necessarily adopt the approach to the "effectively unreviewable" requirement employed in *Bowen* and *Perales*, defendant's argument that the exhaustion issue is reviewable under the collateral order exception has enough merit that the court must consider whether plaintiff can meet its four-part burden for grant of a stay pending appeal.

The applicability of the first factor, that of likelihood of success on the merits, has been questioned where the trial court is asked to second-guess the validity of its original holding. *American Grape Growers*, 9 CIT at ___, Slip Op. 85–104 at 5. The court has already ruled against defendant on the merits, and strict adherence by the

---

[2] The likelihood of review through a subsequent appeal has been found to be sufficiently small to warrant use of the collateral order exception where the appellant is a non-party to the underlying action. *See Frazier* v. *Cast*, 771 F.2d 259, 262 (7th Cir. 1985) (non-party attorney afforded immediate review of imposition of sanctions); *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (non-party witness afforded immediate review of denial of sanctions).

A third case cited at oral argument by defendant is clearly distinguishable from the case at bar. In *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), the Supreme Court held the collateral order exception applicable to the district court's denial of a claim of absolute presidential immunity. Central to a grant of absolute immunity is not only protection from the consequences of a judgment against the individual, but also protection from the burden of litigation itself. *See Helstoski* v. *Meanor*, 442 U.S. 500, 507–08 (1979) (discussing absolute immunity under Constitution's speech or debate clause); *Abney* v. *United States*, 431 U.S. 651, 661–62 (1977) (discussing absolute immunity under double jeopardy clause). Thus, effective relief from a court's denial of absolute immunity can be afforded only if an immediate appeal is allowed. *See Helstoski*, 442 U.S. at 507–08; *Abney*, 431 U.S. at 662. Immediate appeal is not necessary to give effect to the doctrine of administrative exhaustion. After all, the purpose of the exhaustion rule is not to assist the agency in avoiding burdensome decision making, it is to foster consideration of issues at the administrative level in the first instance. K. Davis, *Administrative Law*, § 26:1 at 415.

The fourth and final case cited by defendant is also distinguishable from the case at bar. In *Marine Petroleum Co.* v. *Champlin Petroleum Co.*, 657 F.2d 1231, 1239–42 (Temp. Emer. Ct. Appl. 1980), an immediate appeal was allowed of a district court's denial of a motion for dismissal of the Secretary of Energy as a party to a private action and continuing orders for the Department of Energy's (DOE's) participation in compulsory discovery. Dismissal had been sought on the ground that there was no claim for relief either by or against DOE and, as such, there was no case or controversy between DOE and the private parties to the litigation. In holding the collateral order exception applicable, the appellate court emphasized that the degree of independence of DOE's claimed right to dismissal from the underlying cause of action and the "heavy" burden of complying with the "massive" compelled discovery would "likely * * * make it impossible legally and practically to provide any ultimate relief to DOE [through a subsequent appeal.]" *Id.* at 1241–42. This statement simply does not hold true in the case at bar. The exhaustion claim of ITA and plaintiff's claim on the merits here are not nearly as independent of one another as those in *Marine Petroleum*. Moreover, the court's remand order here can hardly be said to require a "massive" undertaking by ITA that "risks paralyzing the national operations" of ITA. *Id.* at 1241. See *infra* discussion of irreparable harm.

trial court to the requirement of likelihood of success on the merits would, therefore, almost inevitably deprive a party of a stay pending appeal. Nonetheless, at the very least, the movant's appeal must present a serious question on the merits.[3] In view of the discussion *infra*, the court need not reach the issue of whether defendant's appeal raises a serious question.

The irreparable harm factor is the key element in deciding whether to grant a stay. The only irreparable harm that defendant alleges it will suffer if the stay is denied is that of having to exert effort to comply with the remand order, despite the possibility that the Federal Circuit may ultimately hold that this court erroneously issued that order. The court cannot agree, however, that the use of ITA's resources here to conduct investigations mandated by statute, or to provide explanations sufficient to support its actions by substantial evidence, will injure the government to a degree warranting a stay. *See American Grape Growers*, 9 CIT at ___, Slip Op. 85-104 at 7. *Compare McSurely* v. *McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) (litigation costs alone do not constitute irreparable injury), *cert. denied*, 106 S. Ct. 525 (1985) *with Evans* v. *Buchanan*, 435 F. Supp. 832, 842-43 (D. Del. 1977) (economic and logistic consequences of implementing a desegration plan pending appeal constituted irreparable injury). That ITA may be overworked does not in itself justify a stay and the government has offered no reason to believe that this remand order will be particularly burdensome.[4]

In balancing the harm to all parties, there is no indication that any interested party other than defendant would suffer any injury if a stay is granted. A preliminary injunction has been issued which bars liquidation of the entries in question pending the "final determination" of this litigation.[5] In addition, if plaintiff ultimately prevails on the merits, it will be able to obtain refunds of any excess deposits of estimated countervailing duties, plus interest. 19 U.S.C. § 1671f(b)(2) (1982). Thus, although the harm to defendant is minimal, the third factor is in defendant's favor. The fourth factor, however, favors plaintiff.

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[3] It is noted that various circuits have adopted a flexible approach to the factors relevant to the grant of interim relief, whether for purposes of stays pending appeal or preliminary injunctions. This approach requires the movant to show irreparable harm if the relief sought is denied, and either (1) likelihood of success on the merits *or* (2) "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships decidedly tipping in [the movant's] favor." *Coca-Cola Co.* v. *Tropicana Products, Inc.*, 690 F.2d 312, 314-15 (2d Cir. 1982); *see Telvest, Inc.* v. *Bradshaw*, 618 F.2d 1029, 1032-33 (4th Cir. 1980) and *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977) (both cited with approval in *American Air Parcel Forwarding Co.* v. *United States*, 1 CIT 293, 298-99, 515 F. Supp. 47, 52-53 (1981)). Thus far, the Court of Appeals for the Federal Circuit has not specifically adopted this approach. *See S.J. Stile Assoc.* v. *Snyder*, 68 CCPA 27, 646 F.2d 522 (1981). *But cf. Zenith Radio Corp.* v. *United States*, 710 F.2d 806, 812 (Fed. Cir. 1983) (Nies, J., concurring) (factors for preliminary injunction should be "evaluated as a whole").

[4] If such a burden existed it might support a request for certification under 28 U.S.C. § 1292(d)(1) (1982). No certification has been sought.

[5] Both parties have indicated that an injunction should remain in effect here until an appeal has been heard on the merits following remand and the final determination of this court, or until the opportunity to file such an appeal has lapsed. Whether or not the injunction in place continues by its own terms until such time, the court grants the parties' implicit request that the original injunction of liquidation so continue.

Stays pending appeal are "always an extraordinary remedy," *Golden Eagle Refining Co.* v. *United Statess*, 4 Cl. Ct. 622, 624 (1984) (quoting *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* v. *National Mediation Board*, 374 F.2d 269, 275 (D.C. Cir. 1966)), and are "disfavored * * * because they interrupt the ordinary process of judicial review and postpone relief for the prevailing party." *Dellums* v. *Smith*, 577 F. Supp. 1456, 1457 (N.D. Cal. 1984). In the case at bar, there is a public interest in keeping the already complex CVD proceedings moving forward toward completion and avoiding additional delay occasioned by stays of the proceedings. *See* 19 U.S.C. §§ 1671a(c), 1671b (b), (c), 1675(a)(1) (1982 & Supp. II 1984) (providing time restrictions on ITA determinations during course of countervailing duty proceedings and that ITA can secure additional time on its own initiative only for "extraordinarily complicated cases"). Although it might be desirable to ease ITA's burdens, the court cannot find a public interest in allowing ITA to delay work that is required by Congress. Thus, the public interest will best be served by having the remand order complied with as issued.[6]

Defendant has demonstrated only a minimal hardship in proceeding with the remand determination. This is not sufficient either to sustain defendant's four-part burden or to satisfy a standard that allows deficiencies as to one factor to be balanced by strong showings as to other factors.[7]

Therefore, the court concludes that a stay pending appeal is not warranted in this case. Defendant's motion is denied and defendant is directed to comply with the court's remand order within 25 days of this opinion.[8]

SO ORDERED.

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[6] The court notes that the government's argument that there is a public interest in having the exhaustion issue resolved by the court of appeals is not persuasive. This court's decision on a stay neither resolves the merits of the appeal nor necessarily prevents the Court of Appeals for the Federal Circuit from going forward.

[7] Even under the alternative approach to the four factors adopted by various circuits, *supra* note 3, defendant would not be entitled to a stay. Although there may be a fair question for litigation, the balance of hardships here does not "decidedly" tip in defendant's favor.

[8] Defendant initially argued that a stay was necessitated by the Federal Circuit's decision in *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924 (Fed. Cir. 1984). According to defendant, *Melamine*, *id.* at 934, dictates that absent a preliminary injunction to preserve the status quo *or* a final court decision on the legality of the challenged determination, liquidation must continue in accordance with ITA's determination. Defendant continues that it is the court of appeal's decision, rather than a decision of this court, which is "final" under *Melamine*. Assuming *arguendo* that this court accepts defendant's interpretation of *Melamine*, a stay would not be necessary in this case. As noted, *supra* note 5 and accompanying text, both parties agree that liquidation should be enjoined pending an opportunity for appellate review and an injunction so providing has been issued. Thus, the status quo vis-a-vis liquidation is preserved.

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U.S. Customs Service

Treasury Decision

19 CFR Part 143

(T.D. 86-143)

Special Procedures for Clearance of Cargo Carried by Courier or Express Air Services

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Customs is amending its regulations relating to the informal entry and clearance of merchandise transported by courier and express air services. The amendments will, for the first time, specifically make the informal entry procedures available to courier and express air services, and, with the exception of restricted and prohibited merchandise, and merchandise subject to quota or quantitative restraints, will apply to merchandise not exceeding $1,000 in value. Customs will provide expedited clearance procedures in recognition of the special needs of the growing courier and express air industry. The amendments will promote uniform, fair, and consistent treatment of the various courier and express air services, while at the same time ensuring the protection of the revenue in accord with all applicable laws and regulations.

EFFECTIVE DATE: August 21, 1986.

FOR FURTHER INFORMATION CONTACT: Jerrold O. Worley, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8151).

SUPPLEMENTARY INFORMATION:

Background

All imported merchandise entering the customs territory of the U.S. is subject to procedures relating to entry and clearance. The procedures ensure the proper appraisement, valuation, and tariff classification of the merchandise for the purpose of collecting the lawful amount of duties, as well as compliance with all other laws and regulations administered and enforced by Customs. Different

procedures are provided for the entry and clearance of merchandise depending upon its value. There are formal entry procedures set forth in Part 141, Customs Regulations (19 CFR Part 141), with certain exceptions, applicable to shipments valued in excess of $1,000, and informal entry procedures set forth in Part 143, Customs Regulations (19 CFR Part 143), for the most part limited to shipments valued at $1,000 or less.

Although the procedures for the informal entry of merchandise are less cumbersome and comprehensive than those for formal entry, they may still present an impediment to courier and express air services seeking to fulfill their obligations.

The most recent development in the express air industry is the planned rapid expansion of services from foreign locations to the U.S. These express air services fly into various hub cities in the midwest U.S. at which Customs has limited manpower, and at nontraditional business hours (generally between 10:00 p.m. and 3:00 a.m.). The interplay of these factors (the necessity for expeditious clearance of merchandise, and the limited Customs service available at the hub locales at off-peak time periods) necessitates the institution of special procedures applicable only to this industry.

The companies concerned are able to provide Customs with certain useful advance information on incoming international shipments. However, other information necessary for the normal entry process is not always available in advance of arrival, such as the importer number and tariff classification item number from the Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202).

In view of the special needs of the courier and express air industry and the inability to have access to complete advance information, by notice published in the Federal Register on October 21, 1985 (50 FR 42569), Customs proposed to amend Part 143, Customs Regulations (19 CFR Part 143), by setting forth new procedures to apply to courier and express air services. Specifically, § 143.21 would be amended to state that cargo transported by courier and express air services may use the informal entry procedures. Additionally, a new § 143.29 set forth the exact procedures applicable to these courier and express air services. The amendment provides that for shipments valued at $250 or less, an invoice or advance manifest must be presented to Customs which contains necessary information such as the shipper's address, name and address of the consignee, value and country of origin of the merchandise, and a description of the merchandise, prior to arrival of a shipment. Submission of this information is permitted as an accommodation to the courier and express air services, and will be submitted in lieu of the normal entry documents (Customs Form 3461, Application for Special Permit for Immediate Delivery; Customs Form 5119, Informal Entry). The amendment requires that for shipments valued over $250 but not more than $1,000, the previous information must

be supplemented by the addition of the appropriate TSUS item number for tariff classification purposes.

Section 321, Tariff Act of 1930, as amended (19 U.S.C. 1321), provides that in order to avoid expense and inconvenience to the Government which is disproportionate to the amount of revenue that would be collected, the Secretary of the Treasury is authorized to promulgate regulations to waive import duties on shipments valued at $5.00 or less in the country of shipment.

Accordingly, § 10.151, Customs Regulations (19 CFR 10.151), provides for the waiver of duty on such shipments, unless the district director has reason to believe that the shipment is one of several lots covered by a single order or contract and that it was sent separately for the express purpose of securing free entry, or of avoiding compliance with any pertinent law or regulation. To expedite the entry and clearance of shipments valued at $5.00 or less, under the amendment the courier and express air services will be required to segregate those shipments from others on the advance manifest, if the manifest is to be used as the entry document. The courier and express air services also will be required to present a properly executed Entry Summary (Customs Form 7501) within 10 days of filing an entry, with estimated duties attached. Finally, the amendment provides that Customs will accept an annual blanket Customs Form 3461, in which the importer of record assumes all liability for shipments released under the new expedited procedures. The blanket form will be required each year before a courier or express air service commences operations using the new procedures.

Analysis of Comments

The numerous comments received in response to the notice were submitted by Customs brokers, air express services, government offices, and members of Congress. A discussion of the issues raised and our response follows:

Many commenters stated that the proposal does not comply with the statutory requirements concerning parties legally authorized to submit written documentation for the entry of merchandise into the U.S. Section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), provides that only the owner, purchaser, or licensed broker may submit entry documentation. The commenters incorrectly perceived the proposal as allowing couriers or express air services to perform this function. The courier and express air services are merely nominal consignees who must designate licensed brokers to make entry of merchandise. The broker becomes the importer of record and the bond of the broker is liable for any deficiencies. Appropriate changes have been made to accurately reflect this point.

Many commenters expressed concern about the ability of Customs to maintain enforcement capabilities under the new procedures. Customs is aware of the potential for smuggling and other abuses. Customs currently conducts random intensive examinations

of merchandise from courier and air express shipments with the use of specially trained personnel and detector dogs, and will continue that practice. Further, audits will be conducted on the operations of the express companies and brokers to ensure that proper duty has been collected. Cooperative agreements are being negotiated with the companies which set forth specific preventative steps that can be taken to ensure that smuggling and other abuses are detected and reported to Customs.

Some parties questioned whether the new procedures might be used to circumvent quota or visa requirements on merchandise. The new procedures are not available for merchandise subject to any prohibition or restriction, or to quota or quantitative restraints, and individual entries must be filed for such articles. Full tariff data is required to be filed on the entry summary documentation so no statistical information will be lost.

Some commenters claim that the new procedure illegally creates different classes of merchandise based upon value and promotes unequal treatment of entries. Under § 498, Tariff Act of 1930, as amended (19 U.S.C. 1498), as amended by § 206 of Pub. L. 98-573, the Trade and Tariff Act of 1984, clear authority is established to prescribe regulations for the entry of merchandise valued at $1250, or less. In fact, different treatment already exists for different classes of informal entries. Passengers are allowed to list accompanied shipments on their baggage declaration, and mail shipments are examined and released on the basis of a simple declaration form on the package. This new procedure is designed to treat small express parcels in a fashion similar to that used for U.S. Postal Service parcels. The information on the commercial invoice is sufficient for examination and release purposes. The broker who files the entry must furnish the full entry summary within 10 days. We will audit brokers employed by the courier and air express industry to ensure that accurate information is supplied. The new procedures simply eliminate the need to prepare Customs documentation on numerous small shipments when the information required is already present on the existing commercial documentation.

Some parties have requested that Customs define courier or express air services. We are aware of no accepted international definition. However, generally, a courier company uses air passengers to carry shipments as baggage on an arriving international air carrier. An express air service ships the freight as air cargo. In both cases, the shipments are limited in size and weight, and the company is responsible for the door to door service to the ultimate consignee. The companies provide a complete "closed loop" transaction including Customs clearance through their brokers. Many of the air express companies use central facilities located in interior U.S. cities to clear the cargo through Customs, and route it to its ultimate destination. Airlines may establish small parcel express serv-

ices and use these procedures, provided they provide door to door service, including Customs clearance.

Comments were received concerning the impact the new rules will have on Customs inspectional manpower and overtime. Generally, service is provided equally to all parties based upon the volume of work and the availability of manpower. However, since service is provided at some express air companies at small inland ports outside of normal port hours and for the sole benefit of the party in interest, Customs is able to obtain complete reimbursement for the costs of personnel assigned, including salary, benefits, and administrative costs. These reimbursable positions are established in addition to the normal complement of Customs personnel assigned to these ports and will not result in a reduction of the level of service to other parties during normal business hours.

Some concern was expressed that the new procedure will give unfair benefits to private companies competing with the express service offered by the U.S. Postal Service. Customs provides officers for the clearance of postal shipments without reimbursement from the Postal Service. There have been complaints from the Postal Service because Customs officers are not usually assigned on weekends or at night. While this is true, it is noted that the private courier and express air services pay overtime or complete reimbursement for services provided outside of normal working hours. The Postal Service can obtain the services of a broker and pay the same charges as private companies.

In this time of Federal deficits and the need to reduce the operating costs of Federal agencies, Customs is not able to provide additional personnel for clearance without reimbursement. Private companies and the Postal Service are treated the same in so far as documentation is concerned. Postal shipments arrive with a postage declaration form affixed which contains less information than the commercial invoice, although the invoice is usually inside the package. The Customs officer at the mail facility makes a decision to examine a parcel based upon information on the declaration form. As in the case of mail shipments, the Customs officer at a private facility examines as many parcels as are necessary. A broker provides the necessary entry paperwork for shipments examined at private facilities, and is liable under his bond for any irregularities. In many ways, the procedure for the clearance of parcels for courier and express air services is more stringent than the procedure for postal parcels.

Several commenters suggested that Customs waive the collection of small amounts of duty on shipments under $25 in value or when $10 or less in duty is involved. As previously discussed in this document, 19 U.S.C. 1321 provides authority to waive duties on shipments valued at $5.00 or less. Congress would have to enact new legislation to enable Customs to waive entry on shipments over

$5.00 in value. It is noted that the costs of collection are minimized to Customs if all the appraisement work is done by a broker.

Several parties have asked Customs to revise the distinction made between shipments $250 and under and those over $250 but not more than $1,000. This distinction was made in the notice due to the special requirements for formal entries concerning sensitive commodities such as textiles. Customs still believes that there is a need to be provided with tariff item numbers for shipments valued over $250. However, we will review our experience in processing shipments under this procedure at a later date to determine if it is feasible to change this requirement. It was suggested that brokers making entries under the new procedure be specifically required to maintain records on their transactions. Customs brokers are already required to maintain records of all transactions pursuant to § 111.21, Customs Regulations (19 CFR 111.21), and to make these records accessible to Customs for audit. It is not necessary to create additional requirements.

It was also suggested that the new procedure be extended to formal as well as informal entries. The requirements for formal shipments are much more rigid than informal shipments. Customs needs additional information, such as tariff item numbers, in order to process a formal shipment through the new computerized Automated Commercial System (ACS) cargo selectivity program. The additional information requirements make Customs aware of other agencies' requirements and examination instructions. Brokers and importers may use the new Automated Brokers Interface (ABI) System in order to transmit entry data and receive timely notice of merchandise release status. Therefore, on both operational and legal grounds, the simplified procedures should not be extended to formal entries.

One commenter requested that the final rule on this matter be delayed until a decision is made on another proposal concerning consolidated shipments. That project, which was published in the Federal Register on December 24, 1985 (50 FR 53532), concerns the right of a nominal consignee to designate a broker if the shipper or owner specifies a different broker, or the consignee wishes to make entry on his own behalf. This is a particular problem when a freight forwarder handles a consolidated shipment consisting of many house bills traveling under one master bill.

While the consolidated shipment proposal is a related matter, it does not directly impact upon this new procedure. The nominal consignee, in this case the courier or air express service, is assumed to have the right to designate a broker. If he does not have that right, the procedure cannot be used by the broker of the courier or air express service. A decision on the consolidated shipment project will be the subject of another Federal Register document.

One commenter asked that the air waybill document of a particular courier service be accepted as the entry/release document

in lieu of the commercial invoice, since it contains an invoice section. This proposal cannot be accepted because the person who completes the air waybill may not be the actual shipper or manufacturer who prepares the commercial invoice. Customs needs the precise data contained on the commercial invoice. However, Customs is willing to accept facsimile invoices or an advance manifest prepared by the automated system of the courier or air express company.

Some commenters questioned the statement in the proposal that the amendment would not have a significant economic impact on a substantial number of small entities under the terms of the Regulatory Flexibility Act. They are apparently concerned about the competitive effect of the proposal on brokers, freight forwarders and other similar organizations, although no specifics are provided.

The purpose of the amendment is clearly explained in the document. Customs does not believe that the amendment will have a significant effect on the business of these groups. Courier and express air service companies must still use a licensed broker to transact Customs business. Some brokers may obtain more business, others less, regardless of this change. We are not aware of any significant impact on freight forwarders or other "similar organizations".

A final issue for consideration is the problem of the proper control of entries at central courier facilities, such as those which are being established at JFK Airport in New York, and at Miami International Airport. Numerous courier services and their brokers will use these facilities, and it will be difficult to ensure that the necessary Entry Summary (CF 7501) is filed within 10 days for the cargo released under the new informal entry procedures. Customs uses the entry number on the Application for Special Permit for Immediate Delivery (CF 3461) as the control mechanism to ensure that entry summaries are presented in a timely manner. This is done through the Customs computerized cargo selectivity system. It would be too labor intensive to maintain a paper control system for the many informal shipments released by brokers at a centralized courier facility. Therefore, at such locations, the district or area director may require a CF 3461 for each day's or each flight's informal entries released under this procedure. The CF 3461 will be completed except for the description of the merchandise. The commercial invoices or advance manifest will be attached to the CF 3461. The CF 3461 will contain a notation that it covers various informal entries released under § 143.29, Customs Regulations (19 CFR 143.29). The CF 3461 should also indicate the total number of invoices attached. This will meet the control objectives of Customs without sacrificing the benefits of reduced documentation.

After consideration of the numerous comments received in response to the notice, and following further review of the matter, it

has been determined advisable to adopt the proposal with minor modifications.

EXECUTIVE ORDER 12291

This is not a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

REGULATORY FLEXIBILITY ACT

Under the provisions of the Regulatory Flexibility Act (5 U.S.C. 301 *et seq.*), it is certified that these amendments will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 143

Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

Part 143, Customs Regulations (19 CFR Part 143), is amended as set forth below:

PART 143—CONSUMPTION, APPRAISEMENT, AND INFORMAL ENTRIES

1. The authority citation for Part 143 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. Section 143.21 is amended by adding, at the end thereof, a new paragraph (l) to read as follows:

§ 143.21 Merchandise eligible for informal entry.

* * * * * * *

(l) Cargo transported by courier and air express services not exceeding $1,000 in value, with the exception of prohibited and restricted merchandise, merchandise subject to quota or quantitative restraints, or in any instance in which the district director may require formal entry under § 143.22 of this Part. (See § 143.29 of this Part).

3. Part 143 is amended by adding a new § 143.29, to read as follows:

§ 143.29 Special informal entry procedures for cargo transported by courier and express air services.

This procedure is available for accompanied or air shipments not exceeding $1,000 in value imported by courier and express air services, with the exception of prohibited and restricted merchandise, merchandise subject to quota or quantitative restraints, or in any instance in which the district director may require formal entry under § 143.22 of this Part.

(a) *Shipments valued at $250 or less.* To obtain expedited clearance under this section, the party with the right to file entry shall submit a copy of the invoice or advance manifest containing necessary information including name and address of the shipper, name and address of the consignee, value of the merchandise, country of origin of the merchandise, and description of the merchandise. The completed invoice or advance manifest will be accepted by Customs in lieu of a Customs Form 3461 (Application for Special Permit for Immediate Delivery), or Customs Forms 7501 or 5119 (Informal Entry), as the entry control document.

(b) *Shipments valued in excess of $250 and not exceeding $1,000.* In addition to the information required on the documentation specified in paragraph (a) of this section, the appropriate item number from the Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), must be furnished for classification purposes.

(c) If an advance manifest is used as the entry document, shipments valued in excess of $5.00 must be segregated from those valued at $5.00 or less.

(d) Within 10 days of the filing of the entry, the Entry Summary (Customs Form 7501) must be presented, in proper form, with estimated duties attached.

(e) An Application for Special Permit for Immediate Delivery (Customs Form 3461), appropriately modified to cover all importations under the special procedures provided in this section for a period of 1-year, shall be submitted to the district director before the procedure permitted by this section shall be commenced by the courier or air express service.

(f) *Centralized courier facilities.* At airports with high volumes of accompanied courier traffic at a central facility with numerous couriers and their brokers, the district director may require an individual Application for Special Permit for Immediate Delivery (Customs Form 3461), from the brokers representing each courier and covering the various eligible shipments per day or per flight. The commercial invoices or advance manifests will be attached to the Customs Form 3461 which will contain the entry number and other necessary information. In lieu of a description of the mer-

chandise, a notation will be inserted indicating that the entry covers multiple shipments in accordance with this section.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 2, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 22, 1986 (51 FR 26243)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 141

Proposed Customs Regulations Amendment Relating to Entry Documentation Filing

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide an optional procedure under which importers could file entry documentation at one port to be analyzed by Customs to determine if an examination of the cargo is necessary. If no examination is necessary, the merchandise could be released when it arrives, even at another port. This would enable importers to obtain an expedited release of their merchandise. Expediting the clearance of cargo would benefit importers, carriers, and Customs.

DATE: Comments must be received on or before September 22, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to, and inspected at, the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Jerrold O. Worley, Office of Cargo Enforcement and Facilitation (202-566-8151);

Legal Aspects: Jerry C. Laderberg, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

Background

Parts 141 through 144, Customs Regulations (19 CFR Parts 141-144), govern the entry of imported merchandise. Release of the merchandise from Customs custody is secured by filing the entry documentation required by §§ 142.3 *et seq.*, Customs Regulations (19 CFR 142.3 *et seq.*).

If merchandise is imported at one port and the importer of record desires to have the merchandise delivered to another port (usually where the importer's premises are located), there are two alternatives available to the importer. He may make entry by submitting entry documentation at the port where the merchandise has arrived, either in person or through an agent, to obtain release of the merchandise at that port. He then makes arrangements for transportation of the merchandise to the inland location, free of any Customs control or custody of the merchandise. Alternatively, the importer may make arrangements at the port of arrival to have the merchandise transported under Customs bond from that port to the destination port, utilizing the transportation in-bond procedures of §§ 18.1 *et seq.*, Customs Regulations (19 CFR 18.1 *et seq.*). These procedures entail using a Customs bonded carrier for the transportation process and complying with the documentary and sealing requirements of Parts 18 and 24, Customs Regulations (19 CFR Parts 18, 24). When the merchandise arrives at the destination port, the importer makes entry by filing the appropriate documentation. He then may obtain release of the merchandise.

Under a program known as PAIRED (Port of Arrival Immediate Release and Enforcement Determination), which has been tested at a number of locations in the U.S., importers are allowed to file entry documentation at one port, usually an inland or interior location, to be analyzed by Customs to determine if an examination of the cargo is necessary. With the permission of the district director at the inland port, the importer files such documentation as is necessary to enable Customs to decide if the merchandise may be released or if it must be retained in Customs custody for reasons such as examination or extraction of a sample for an admissibility determination, verification of manifest, etc. The documentation is usually submitted before the merchandise has arrived in the U.S. Then, if no examination or extraction is required, the importer or broker is notified that the shipment can be released upon arrival. The shipment may then proceed directly to its intended destination without going to another Customs port for further Customs processing. Thus, the importer will receive his shipment more expeditiously and with fewer transportation costs.

Customs experience with the PAIRED program, which is voluntary on the part of importers, has demonstrated that it benefits importers and carriers by expediting the delivery of merchandise and reducing congestion at the port of arrival. Approximately 80% of all entries under PAIRED are released immediately at the port of arrival, without the need for examination of the merchandise or in-bond transportation to another port. It benefits Customs by reducing the costs and expenditures of manpower and other resources for maintaining the transportation in-bond system.

Section 484(a)(2)(A), Tariff Act of 1930, as amended (19 U.S.C. 1484(a)(2)(A)), requires that an entry be filed at a place within the

Customs-collection district where merchandise covered by the entry will be released from Customs custody. Release occurs whenever Customs determines that it has no further need to maintain actual custody of the merchandise. Under the PAIRED program, this occurs at the port where the entry documentation is filed (usually an inland port). Entry filing at an inland port and release of the merchandise by the appropriate Customs officer at that port (which order is thereby conveyed to the arrival port) is therefore consistent with 19 U.S.C. 1484(a)(2)(A).

Examination of merchandise entered under the PAIRED program may occur either at the port of arrival or the port of destination of the merchandise. Such examination is authorized by § 499, Tariff Act of 1930, as amended (19 U.S.C. 1499). Pending the examination, the merchandise may not be released from Customs custody.

PROPOSAL

To implement the PAIRED program in all Customs districts, it is proposed to amend § 141.63, Customs Regulations (19 CFR 141.63), relating to the submission of entry documentation for preliminary review. A new paragraph (c) would be added to § 141.63, allowing an importer to request the district director to approve the filing of entry documentation at a port other than the port of arrival of the merchandise, to obtain release of the merchandise at the port of arrival. The use of this procedure would be optional on the part of the importer.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 141

Customs duties and inspection, Imports, Entry documentation filing.

PROPOSED AMENDMENT

It is proposed to amend Part 141, Customs Regulations (19 CFR Part 141), as set forth below.

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 would continue to read as follows:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to amend § 141.63 by adding a new paragraph (c) to read as follows:

§ 141.63 Submission of entry summary documentation for preliminary review.

* * * * * * *

(c) *For merchandise entered other than at port of arrival.* If merchandise is to arrive or has arrived at one port and the importer wishes to file his entry documentation at another port to which the merchandise is destined, he may do so upon approval of the district director at the port of destination. The district director at the destination port may then authorize release of the merchandise, after its importation at the port of arrival, or postpone its release if he believes it is necessary for examination or other purposes.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 2, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 22, 1986 (51 FR 26266)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
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Jane A. Restani
Dominick L. DiCarlo
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Senior Judges

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Decisions of the United States Court of International Trade

(Slip Op. 86-68)

BADGER-POWHATAN, A DIVISION OF FIGGIE INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, RUBINETTERIE A. GIACOMINI, S.P.A., INTERVENOR

Court No. 85-4-00467

OPINION

[Intervenor's motion for stay pending appeal denied.]

(Decided June 27, 1986)

Stewart & Stewart (Eugene L. Stewart and *Terence P. Stewart)* for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Velta A. Melnbrencis,* Civil Division, Department of Justice, for defendant.

Klayman & Gurley, P.C. (Larry Klayman) for intervenor.

RESTANI, *Judge:* Intervenor Rubinetterie A. Giacomini, S.P.A. (Giacomini), moves for a stay of enforcement of this court's opinion and order remanding this case to the Department of Commerce International Trade Administration (ITA) for issuance of an amended final determination and corresponding antidumping duty order. CIT Rule 62(d) (provides for stays pending appeal upon filing of supersedeas bond); *Badger-Powhatan* v. *United States,* 10 CIT ——, Slip Op. 86-38 (Apr. 2, 1986), *appeal docketed,* No. 86-1251 (Fed. Cir. May 13, 1986). Plaintiff Badger-Powhatan opposes the motion. Defendant ITA does not oppose the motion.

In the appealed opinion, the court held that ITA erred in failing to recalculate the less than fair value (LTFV) margin of certain brass fire protection products imported from Italy, after the International Trade Commission determined that only a subclass of the class of merchandise sold at LTFV is causing material injury to an industry in the United States. ITA was ordered to recalculate the margin based on information available in the agency record. An amendment to the final determination and antidumping order containing the recalculated margin was issued on May 15, 1986. 51 Fed. Reg. 17,783 (1986).

Defendant ITA contends that intervenor's appeal prevents ITA from implementing the latest final determination and antidumping

duty order until a final judicial decision has been reached, citing *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924 (Fed. Cir. 1984). In *Melamine,* the Court of Appeals for the Federal Circuit held that "[a]bsent an injunction of liquidation, 19 U.S.C. § 1516a requires that the challenged determination shall govern the liquidation of entries 'while the litigation is proceeding.'" *Id.* at 934 (quoting S. Rep. No. 249, 96th Cong., 1st Sess. 248, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 634).[1] The court also indicated that a "final court decision" would govern over the challenged determination. The court notes that *Melamine* involved the question of whether a challenged negative determination of the agency should govern the process of liquidation pending appeal of a decision rescinding the determination. It did not address the question raised by intervenor of whether the agency should undertake other administrative procedures consistent with appealed CIT opinions. Whether or not the decision reached by the CIT here may be considered a controlling final court decision, nothing in *Melamine* prevents ITA from amending the final determination and order at this point in the proceedings, as it has done, and, as discussed *infra,* the agency must implement its new determination.

The essential issue here is which agency determination governs the amount of estimated antidumping duties importers must deposit on entries occurring between the time of this court's order and the last judicial decision rendered in this case. The court rejects defendant's contention that *Melamine* mandates a stay pending appeal in this case, for at least two reasons. First, *Melamine* addressed the issue of when a challenged determination should govern the process of *liquidation,* pursuant to section 1516a(c)(1). This provision does not apply in this case because neither of the determinations here will result in any immediate liquidations. In the instant case, duties will not actually be assessed until after the first annual review is completed, and that annual review may alter the results of the present determinations. *See* 19 U.S.C. § 1675(a) (1982).[2] Therefore, it is incorrect to assume that the antidumping determination and order will govern liquidation if no stay pending appeal is granted. Because *Melamine* involved a challenged final negative determination, liquidation could have occurred at any time following issuance of the determination. The CIT's recision

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[1] 19 U.S.C. § 1516a(c)(1) (1982) reads in pertinent part:

Liquidation in accordance with determination.—Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with [such] determination * * * if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination.

[2] In 1984, 19 U.S.C. § 1675(a)(1) was amended to only require periodic review "if a request for such a review has been received." Pub. L. No. 98-573, § 611(a)(2)(A), 98 Stat. 3031 (1984) (codified as amended 19 U.S.C. § 1675(a)(1) (Supp. II 1984)). This amendment is only applicable to investigations initiated on or after October 30, 1984. Pub. L. No. 98-573, § 626(b)(1), 98 Stat. 3042 (1984). Plaintiff filed the antidumping petition in this case on January 3, 1984. Consequently, the 1984 amendments are not applicable and a review of the order must be conducted at least once during "the 12-month period beginning on the anniversary of the date of publication [of the] antidumping duty order" pursuant to the 1982 version of the statute.

order and subsequent suspension order interfered with this liquidation process. Such a late imposed suspension is not the equivalent of an injunction which results from a fully considered motion for preliminary injunction, sought at the outset of a case. The *Melamine* court stated it was concerned about a "yoyo" effect on liquidations. *Melamine,* 732 F.2d at 934. In *Melamine,* liquidations were subject to a start-stop effect. In this case, no liquidation could have occurred and none will occur until the annual review is completed.

Second, this case presents an unusual situation in which subsequent to plaintiff's filing of suit challenging a final determination, ITA altered its position to agree with plaintiff that the challenged determination was incorrect. If intervenor had not already entered the suit on behalf of ITA's original position, the case would have been dismissed and defendant would have recalculated the LTFV margin in precisely the way it has now done pursuant to the court's order. Inasmuch as ITA now acknowledges that the challenged determination was incorrect, requiring deposits to be made in accordance with that determination constitutes deference to a position supported only by intervenor, and disavowed by both the agency and the court. Although the court finds *Melamine* not controlling on the issue of the amount of deposit required, the *Melamine* facts present an interesting parallel to the facts at hand. In *Melamine,* ITA initially issued an affirmative final determination. On reconsideration, and after a hearing and additional briefing, ITA amended its original findings. This amended final negative determination was the subject of the suit. *Melamine,* 732 F.2d at 925. The Federal Circuit considered this amended determination to be the determination which controlled the liquidation process. *Id.* at 934–35. For purposes of the pending motion, the court finds no basis for distinguishing between a determination which is amended by the agency on its own because of errors in the original determination and one which is amended after the court agrees with the agency that amendment is necessary. Thus, even if *Melamine* has broader application than the court believes it does, that is, that the rule of *Melamine* applies to the entire entry process, a stay pending appeal is not required in this case. Given these factors, the court finds that the most recent determination and order must govern the amount of deposits to be made while the appeal is pending, unless a stay of the judgment is appropriate under CIT Rule 62 or otherwise.

As indicated, intervenor contends that it is entitled to a stay of the judgment as of right under CIT Rule 62(d). Rule 62(d) provides that a party who has appealed "may obtain a stay" by giving a supersedeas bond.[3] This language is generally interpreted as standing

[3] CIT Rule 62(d) reads as follows:
(d) Stay Upon Appeal. When an appeal is taken, the appellant, by giving a supersedeas bond, may obtain a stay subject to the exception contained in subdivision (a) of this rule. The bond may be given at or after
Continued

for the proposition that "the appellant who files a satisfactory supersedeas bond [is entitled] to a stay of money judgment as a matter of right." *Federal Prescription Service, Inc.* v. *American Pharmaceutical Association,* 636 F.2d 755, 759 (D.C. Cir. 1980) (emphasis omitted) (citing *American Manufactures Insurance Co.* v. *American Broadcasting Paramount Theatres, Inc.,* 87 S. Ct. 1, 3 (1966) (Harlan, J., Circuit Justice)); *see American Grape Growers Alliance for Fair Trade* v. *United States,* 9 CIT ——, Slip Op. 85-104 at 4 (Oct. 7, 1985). *Compare J. Perez & Cia, Inc.* v. *United States,* 578 F. Supp. 1318, 1320 (D.P.R.) ("Traditionally, the supersedeas bond has been confined to money judgments from which a writ of execution can issue.") (citing *Harvey* v. *McDonald,* 109 U.S. 150 (1883)), *aff'd,* 747 F.2d 813 (1st Cir. 1984) *and* 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 62.06 (2d ed. 1985) ("Under Rule 62(d), a party taxing an appeal from a money judgment rendered against him in a district court can stay proceedings to enforce that judgment pending appeal by furnishing a supersedeas bond.") *with Donovan* v. *Fall River Foundry Co.,* 696 F.2d 524, 526 (7th Cir. 1982) ("The reference in Rule 62(d) to supersedeas bond suggests that had the framers thought about the point they would have limited the right to automatic stay to cases where the judgment being appealed from was a 'money judgment.'").

Intervenor contends that the order of this court in Slip Op. 86-38 is a money judgment because "it will result in the payment of additional amounts of antidumping duty deposits on future entries of pressure restricting valves and siamese connectors." Memorandum in Support of Intervenor, Rubinetterie A. Giacomini, S.P.A., for Stay Pending Appeal at 3. Plaintiff argues that such is not the case because this court's order "did not itself grant a money judgment, or even calculate and impose estimated duties." Plaintiff's Opposition to Intervenor's Motion for Stay Pending Appeal at 4.

A money judgment "adjudges a defendant * * * absolutely liable to pay a sum certain to the plaintiff, * * * awards execution therefor, and * * * may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs." *Fuller* v. *Aylesworth,* 75 F. 694, 701 (6th Cir. 1896). Initially, the court notes that the judgment in this case does not comport with this classic definition.[4] As noted *supra,* the final determination and

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the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.
The exception contained in subdivision (a) referred to in Rule 62(d) relates to actions seeking injunctions and is thus not relevant to this action.

[4] *Zenith Radio Corp.* v. *United States,* 2 CIT 8, 518 F. Supp. 1347 (1981), cited by intervenor as support for the proposition that the judgment in the instant case is a "money judgment," is inapposite. First, the rule at issue in *Zenith* was CIT Rule 65(c). Id. at 8 & n.1, 518 F. Supp. at 1348 & n.1. This rule requires the posting of security as a prerequisite to injunctive relief. The purpose of this security is to provide recoverable damages that arise from operation of the injunction itself, not from damages occasioned by the underlying suit. *Lever Bros. Co.* v. *International Chemical Workers Union, Local 217,* 554 F.2d 115, 120 (4th Cir. 1976). Thus, the fact that the court required the *Zenith* plaintiff to post security in an antidumping suit does not indicate that the court considered the suit one for a money judgment. Second, at issue in *Zenith* was the propriety of a $77 million settlement between the Secretary of Commerce and importers for uncollected antidumping duties. 2 CIT at 8, 518 F. Supp. at 1348. Litigating the propriety of a settlement in an antidumping case is fundamentally different from litigating the proper calculation of the antidumping deposits.

antidumping duty order will not result in the actual assessment of antidumping duties, rather importers will be required to deposit estimated antidumping duties. 19 U.S.C. § 1673e(a)(3) (1982). The permanent exchange of money will occur only after a periodic review of the duty. *See supra* note 2 and accompanying text. Moreover, the use of a supersedeas bond to stay the remand order in this case would not further the policy considerations underlying Rule 62(d).

"The purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal." *Poplar Grove Planting and Refining Co.* v. *Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190-91 (5th Cir. 1979). The bond protects a judgment debtor from the risk of satisfying the judgment, only to be unable to obtain restitution if reversal occurs on appeal. *Id.* at 1191. Likewise, the bond secures the judgment creditor against the possibility of loss sustained as a result of being forced to forego execution on the judgment during the course of an ineffectual appeal. *Id.* As noted above, the order challenged in this case remanded the case to ITA for issuance of an amended final determination and antidumping duty order requiring certain deposits. *Badger-Powhatan* v. *United States*, 10 CIT ——, Slip Op. 86-38 (Apr. 2, 1986), *appeal docketed*, No. 86-1251 (Fed. Cir. May 13, 1986). This order is not, however, the type of money judgment for which an automatic stay is warranted for the purposes of Rule 62(d). First, as plaintiff notes, intervenor is not responsible for paying antidumping duties or interim deposits. For that reason, among others, no judgment may be entered directing intervenor to pay a specific sum. The responsibility for eventual payment falls to the importers of intervenor's goods. 19 U.S.C. § 1673g (1982).[5] Such importers are not parties to this suit. The filing of a bond by *intervenor* will not guarantee the payment of the duties by those required to pay, and the statutory scheme is carefully designed to require payment from importers, so that the equalizing purposes of the act are carried out. *See* 19 U.S.C. § 1673g(b) (3), (4) (1982) (importer must state under oath that "he is not an exporter, or if he is an exporter," must indicate the exporter's sales price of the merchandise and must pay, or agree to pay on demand, antidumping duties); S. Rep. No. 249, 96th Cong., 1st Sess. 37, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 423 (Dumping is one of "the most pernicious practices which distort international trade to the disadvantage of United States commerce. * * * Antidumping duties are special duties imposed to offset the amount of the difference between the fair value of the merchandise and the price for which it is sold in the United States, *i.e.*, the dumping margin"). Second, as indicated by such legislative history, the antidumping act is not designed to compensate plain-

[5] Intervenor notes that the domestic importers of Giacomini's pressure restricting valves and siamese connectors are already fully bonded for the payment of any and all customs duties to the U.S. government. Presumably Customs is requiring bonds sufficient to cover the deposits for duties as formerly calculated. There is no evidence that the bonds will cover the newly calculated duties. In any case, this factor is irrelevant, as demonstrated by the discussion in the text.

tiff directly for damages or to raise revenue for the United States. Posting a bond here, therefore, would not preserve for the prevailing parties the benefits of the court's decision applying the antidumping laws. Thus, the posting of a bond will not serve any of the purposes that normally make a stay as of right available when a money judgment is involved.

Having determined that intervenor is not entitled to a stay as of right, the court must determine whether intervenor has demonstrated that it is entitled to a discretionary stay. In determining whether the interests of justice will be served by the grant of a stay, the court must consider the following four factors:

> (1) whether the petitioner is likely to prevail on the merits of his appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceeding, and (4) wherein lies the public interest.

Philipp Brothers, Inc. v. *United States,* 10 CIT ——, Slip Op. 86-67 at 2 (June 27, 1986) (quoting *McSurely* v. *McClellan,* 697 F.2d 309, 317 (D.C. Cir. 1982), *cert. denied,* 106 S. Ct. 525 (1985)).

The court finds the first factor to be of limited significance in this determination. While intervenor's argument is not frivolous, the court has no reason to doubt the validity of its original holding. *See Philipp Brothers,* 10 CIT at ——, Slip Op. 86-67 at 9; *American Grape Growers Alliance for Fair Trade* v. *United States,* 9 CIT ——, Slip Op. 85-104 at 5-6 (Oct. 7, 1985). Thus, the focus of the court's discussion will be on the remaining factors.

The second, and critical, factor requires the movant to affirmatively demonstrate that it will suffer irreparable harm unless the stay is granted. Intervenor has not even attempted to meet this burden, stating that granting the stay "would work no harm or prejudice to any party." Memorandum in Support of Motion of Intervenor, Rubinetterie A. Giacomini, S.P.A., for Stay Pending Appeal at 7. Intervenor has not met its burden of claiming irreparable harm, much less its burden of substantiating the claim. *See Wisconsin Gas Co.* v. *FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985).

Furthermore, the mere statement that no party will be harmed is insufficient to satisfy intervenor's burden of establishing that the stay will not harm any other party. *Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Association,* 409 F. Supp. 233, 268 (W.D. Mo.), *aff'd,* 532 F.2d 615 (8th Cir. 1976). In fact, if anything, this factor weighs against intervenor, in that plaintiff has argued in its brief that it will suffer harm if a stay is granted. Intervenor has not disputed this claim. Thus, intervenor has also failed to provide any basis for a finding in its favor on the third factor, that of absence of harm to parties other than the movant if the stay is granted.

Finally, intervenor claims that granting of a stay would be in the public interest because it would facilitate a lawful appeal without

causing harm to any party. Even if there is no such harm, this argument virtually eliminates the fourth factor as a useful standard and overlooks the fact that "[a] stay pending appeal is always an extraordinary remedy." *Golden Eagle Refining Co.* v. *United States*, 4 Cl. Ct. 622, 624 (1984) (quoting *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* v. *National Mediation Board*, 374 F.2d 269, 275 (D.C. Cir. 1966)). There is some public interest in denying stays pending appeal "because they interrupt the ordinary process of judicial review and postpone relief for the prevailing party." *Dellums* v. *Smith*, 577 F. Supp. 1456, 1457 (N.D. Cal. 1984); *see also Philipp Brothers, supra*, 10 CIT at ——, Slip Op. 86-67 at 12. Intervenor has offered no substantial public interest reason for the granting of a stay. In its own words, no party will be harmed by the granting of, or the denial of, a stay. In such a situation the public interest in following the ordinary methods of proceeding must prevail.

Intervenor has failed to demonstrate that a stay is available as a matter of right or should be granted at the discretion of the court. Intervenor's motion for a stay pending appeal is denied.

(Slip Op. 86-69)

M.W. KASCH CO. AND THE TSAISUN INC. D/B/A JRL TOYS, PLAINTIFFS *v.* UNITED STATES AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 86-05-00579

OPINION AND ORDER

[Plaintiffs' application for a preliminary injunction denied; defendants' motion to dismiss denied.]

(Dated July 10, 1986)

Grunfeld, Desiderio, Lebowitz & Silverman (Robert B. Silverman and *Michael P. Maxwell)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice for the defendants.

AQUILINO, *Judge:* The plaintiffs commenced this action to obtain the release of goods detained by the U.S. Customs Service and to enjoin the Commissioner of Customs "from issuing a determination that the copyright registration for JRL Toys for its 'LONELY PUPPY' is invalid or that the 'LONELY PUPPY' is a piratical copy of Tonka Corp.'s copyrighted 'POUND PUPPY' ", to quote from their complaint's prayer for relief.

BACKGROUND

According to the complaint, M.W. Kasch Co. is the importer of record of the merchandise at issue herein. The Tsaisun Inc. d/b/a JRL Toys ("JRL") is alleged to have created the "Lonely Puppy", which is characterized as a stuffed-animal toy derived from JRL's "Napping Beagle". A Certificate of Copyright Registration was issued for the Lonely Puppy in or about March 1986.

Prior thereto, however, the complaint alleges that Tonka Corporation registered a copyright in February 1985 for a "stuffed dog marketed as the POUND PUPPY" (para. 7); that in July Tonka filed an application to record its copyright with Customs (para. 8); that JRL requested in October a Service ruling that the Lonely Puppy does not infringe Tonka's copyright (para. 11); that in November Tonka commenced an action against JRL in the United States District Court for the District of Minnesota, Third Division, Civil File No. 3-85-1885, alleging copyright infringement (para. 13); that Customs recorded Tonka's copyright in December (para. 14); and that in February 1986 the Service seized shipments of JRL's toy (paras. 15, 16).

JRL sought injunctive relief from the district court. However, the judge entered an order, denying the requested relief and stating, in part:

> * * * Any challenge to the authority of Customs to act under 19 C.F.R. §§ 133.41-.45 or to the conduct of Customs under such regulations is perhaps more appropriately addressed to the Court of International Trade in which exclusive jurisdiction of such matters is vested. *See* 28 U.S.C. § 1581.

On March 18, 1986, JRL filed a protest pursuant to Section 514 of the Tariff Act of 1930 with the office of the Customs District Director, Milwaukee District, which had seized the shipments in question. According to an affidavit of the Acting District Director, on March 21, 1986 "the seizures were cancelled and changed to detentions in accordance with 19 C.F.R. 133.43." [1] The affidavit further indicates that Tonka was notified of the detentions and that

> [b]y letter dated April 25, 1986, Tonka Corp. properly transmitted the necessary bonds, totalling $120,000.00, to preclude release of the merchandise in accordance with 19 C.F.R. 133.43(c)(1). * * *. The bond amount represents the entered value of the merchandise available for detention as of February 25, 1986. Tonka's letter dated April 29, 1986 provided a written demand for exclusion from entry of the imported articles.[2]

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[1] Section 603(c) of Title 17, U.S.C. states that "[a]rticles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws." Subsection (a) of 19 C.F.R. § 133.43 provides, in part:

> * * * If the district director has any reason to believe that an imported article may be a piratical copy of a recorded copyrighted work, he shall withhold delivery * * *.

[2] Affidavit of Paul N. Draeger, Jr., para. 13 (May 15, 1986) (citations omitted).

Finally, the affidavit states that JRL and Tonka were notified that they had until May 13, 1986 "to submit further evidence concerning the claim of piratical copying" [3] and that the file was then transmitted to Washington "for a decision on the disputed claim * * * in accordance with 19 C.F.R. 133.43." [4]

The plaintiffs commenced this action, alleging jurisdiction pursuant to 19 U.S.C. § 1581(a) and making an immediate application for a preliminary injunction. The defendants countered with a motion to dismiss on the ground of lack of subject-matter jurisdiction.

I

At the hearing held on the motions, the plaintiffs abandoned any request for immediate release of the merchandise already under detention.[5] Rather, as articulated by counsel, the plaintiffs "seek to prevent Customs from detaining future imports of merchandise, or entering into the question of copyright validity." Tr. at 12. In other words, the relief sought is "[j]ust the status quo, pending the District Court proceedings." *Id.* at 14.

This court is not persuaded that it has jurisdiction to grant the preliminary relief requested. That is, the Tariff Act of 1930, 19 U.S.C. § 1514, does not provide for the filing of protests as to future entries. *See, e.g., Sanho Collections, Limited* v. *Chasen,* 1 CIT 6, 505 F.Supp. 204 (1980); *Wear Me Apparel Corporation* v. *United States,* 1 CIT 194, 511 F.Supp. 814 (1981). On the other hand, the Customs Courts Act of 1980, 28 U.S.C. § 1581(i), granted this Court of International Trade residual jurisdiction over import matters, including prospective entries. *See, e.g., Vivitar Corporation* v. *United States,* 7 CIT 170, 585 F.Supp. 1419 (1984). But this grant cannot be used to bypass administrative review by meaningful protest—unless the available remedy is manifestly inadequate. *Compare United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 687 F.2d 467 (1982), *with United States Cane Sugar Refiners' Association* v. *Block,* 69 CCPA 172, 683 F.2d 399 (1982).

In this action, Customs has detained plaintiffs' merchandise, and they have protested, as contrasted with *Vivitar,* where the Service refused to exclude merchandise bearing the plaintiff's trademark, thereby leaving that allegedly aggrieved markholder without ground to protest pursuant to 19 U.S.C. §1514. *See* 585 F.Supp. at 1424-25. Thus, the traditional administrative remedy afforded by the Tariff Act of 1930, with subsequent judicial review under 28 U.S.C. § 1581(a), was manifestly inadequate. Such is not the case here.

Furthermore, in *Vivitar* it was clear from the language of Customs' own regulation, 19 C.F.R. § 133.21(c), and from the Service's performance thereunder that so-called gray-market goods would

[3] *Id.,* para. 14.
[4] *Id.,* para. 15.
[5] *Compare* plaintiffs' Motion for a Preliminary Injunction *with* Tr. at 4, 12 and 14.

not be seized pursuant to statutory authority, 19 U.S.C. § 1526. *See generally Vivitar Corporation* v. *United States,* 8 CIT 109, 593 F.Supp. 420 (1984), *aff'd,* 761 F.2d 1552 (Fed.Cir. 1985), *cert. denied,* 106 S.Ct. 791 (1986). In this action, the future performance of Customs is not nearly so predictable. On the one hand, the controlling Service regulation, 19 C.F.R. § 133.43(a), is broad, and the plaintiffs have produced a copy of a Customs communication dated March 13, 1986 to all District Directors to the effect that a copyright certificate obtained *after* importation (and seizure) of merchandise will not be accepted as "conclusive proof of original authorship".[6] On the other hand, in its denial of their protest, the Service assured the plaintiffs that "[e]ach [future] shipment imported will be reviewed on an individual basis, and only then would a determination be made whether the articles would be detained" [7] and that the detention was "limited" to the goods already seized. Moreover, complainant Tonka posted bonds to cover those shipments, and there is no reason to doubt that Customs will abide by its regulation, 19 C.F.R. § 133.43(b)(2), requiring security for any detention of future JRL imports. Finally, counsel stated at the hearing herein that trial of the Minnesota action would take place in July 1986.

In sum, the current circumstances of this action constitute no more of a factual basis for the grant of extraordinary equitable relief than does 28 U.S.C. § 1581(a) provide a proper jurisdictional predicate. Plaintiffs' application for a preliminary injunction must therefore be denied. *Cf. American Air Parcel Forwarding Co.* v. *United States,* 6 CIT 146, 573 F.Supp. 117 (1983).

II

Reaching the foregoing conclusion, however, does not lead the court to adopt the ultimate conclusion proposed by the defendants, to wit, dismissal of this action on the ground that the claims raised herein are exclusively the province of the Minnesota district court pursuant to 28 U.S.C. § 1338(a).

As shown above, page 2, the district judge does not share this viewpoint, nor does the Federal Circuit agree in its analysis and comparison of sections 1338(a) and 1581 of Title 28 in *Vivitar.*[8] Moreover, a recent comment on this point states that

> * * * [T]he mere fact that the case involves trademarks or copyrights does not mean that the Court [of International Trade] does not possess jurisdiction to review actions of the Customs Service which relate to trademarks or copyrights.[9]

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[6] Plaintiffs' Exhibit H. Here, JRL received its copyright certificate (under statutory threat of criminal sanction for false representation, 17 U.S.C. § 506(e)) after Customs had seized its goods, but the plaintiffs have apparently determined to permit the detention of that merchandise to run its course. In fact, Exhibit H simply states that the procedures provided in 19 C.F.R. §§ 133.42 and 133.43, as appropriate, will be followed.

[7] Draeger Affidavit, Exhibit 2 (letter from District Director dated April 9, 1986). *See* 17 U.S.C. § 410(c).

[8] *See generally* 761 F.2d at 1557–60. *Compare Coalition to Preserve the Integrity of American Trademarks* v. *United States,* 598 F.Supp. 884 (D.D.C. 1984), *rev'd,* 790 F.2d 903 (D.C. Cir. 1986), *with Olympus Corporation* v. *United States,* 627 F.Supp. 911 (E.D.N.Y. 1985), *aff'd,* — F.2d — (2d Cir. June 9, 1986).

[9] Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction and Procedure: The Past Eighteen Months in Review,* U.S. Court of Int'l Trade Second Annual Judicial Conference, p. 140 (Oct. 23, 1985).

Defendants' further position that there has been no "exclusion" of merchandise herein and thus no protestable act on the part of Customs is also not conclusive. While the copyright law, 17 U.S.C. § 603(c), is the statutory underpinning of the regulations (and actions) of the Customs Service, that section itself is tied directly to the manner of enforcement of the "customs revenue laws", a term also found in section 514 of the Tariff Act of 1922. In *McKesson & Robbins (Inc.)* v. *United States*, 43 Treas.Dec. 214, T.D. 39511 (1923), the Board of General Appraisers held that the "exclusion" protest provision contained in that section 514 enabled an importer to obtain review of a collector's refusal to withdraw an opium shipment that was under warehouse entry in New York for transportation to New Orleans. The latter port was not designated for the importation of opium by the Federal Narcotics Control Board, which was composed of the Secretaries of State, Treasury and Commerce and empowered by the "Narcotic drugs import and export act" of 1922 to promulgate regulations restricting opium importation. Likewise, in *Wm. A. Brown & Co.* v. *United States*, 47 Treas.Dec. 862, T.D. 41001 (1925), the Board of General Appraisers denied a government motion to dismiss for lack of jurisdiction over a protest to a collector's decision to exclude opium-smoking pipe bowls since they were "articles of an immoral nature" prohibited from being imported.

In other words, the court's predecessor agency had jurisdiction to review protests precipitated in one instance by a controlled-substance law and in the other by a public morals law.

As indicated above, JRL interposed its protest pursuant to section 514 of the Tariff Act of 1930, specifically 19 U.S.C. § 1514(a)(4), which deleted the word "revenue" from the earlier section's usage of "customs laws". In *Norwood Imports* v. *United States*, 48 Cust.Ct. 1, C.D. 2306 (1961), the plaintiff invoked the court's jurisdiction as a result of a protest pursuant to that section 514 to claim that Customs had erroneously excluded artificial geraniums from entry into the country on the ground that they were piratical copies. It is unclear from the report of the decision whether jurisdiction was contested by the government, but, in any event, the court reached the merits in deciding the case.

The plaintiff in *Schaper Manufacturing Co.* v. *Regan*, 5 CIT 266, 566 F.Supp. 894 (1983), was a copyright owner. A controversy arose with Customs over release of bonds posted by the owner in conformity with 19 C.F.R. § 133.43(b)(2). In that case, as here, the defendants moved to dismiss on the ground of lack of jurisdiction, which motion was denied for the following reasons, among others:

> * * * [T]he subject matter of an action relating to the *existence* of a copyright alone does not suffice to grant exclusive jurisdiction to the United States District Court * * *. 5 CIT at 271, 566 F.Supp. at 898 (emphasis in original).

* * * * * * *

> * * * The jurisdiction of this court is not so evanescent as to preclude the plaintiff from seeking review with respect to the administration by customs of its regulations relating to the subject merchandise merely because some of the merchandise has been found by customs to be piratical in character. Whether the plaintiff may or may not intend to institute an action against the importer for "infringement" pursuant to the provisions of the copyright laws of the United States is not a matter that concerns this court. Until a claim for such "infringement" is made with an accompanying prayer for the relief provided by the copyright laws of the United States, no cause of action has been instituted within the exclusive jurisdiction of the United States District Court.[10]

The court in *Schaper* found two cases apparently relied on by the government, namely, *Bally/Midway Mfg. Co.* v. *Regan,* 5 CIT 237, 565 F.Supp. 1045 (1983), and *Kidco, Inc.* v. *United States,* 4 CIT 103 (1982), to be distinguishable. These cases are referred to again by the defendants herein, but this court concurs with the *Schaper* analysis. That is, in neither did the cause of action or claim for relief relate to the administration and enforcement of the Customs regulations governing the importation and/or exclusion of the particular merchandise in question. Rather, the relief sought appeared to be within district-court jurisdiction, and both actions were transferred accordingly.

The defendants also contend that the plaintiffs have failed to exhaust their administrative remedies in that the Commissioner of Customs has yet to decide whether to release the detained goods. However, the government admits that the Commissioner has an unlimited amount of time to reach a decision. *See* Tr. at 15. But courts have not permitted federal agencies to detain property for unlimited periods of time. For example, in *Gonzales* v. *Rivkind,* 629 F.Supp. 236 (M.D.Fla. 1986), the court held that the Immigration and Naturalization Service's conveyance detention procedures in enforcing 8 U.S.C. § 1324 which subject seized vehicles to "standard customs forfeiture provisions"[11] do "not comport with the minimum constitutional requirements of due process". 629 F.Supp. at 238. The court refused to condone

> a situation in which the government takes a man's automobile, tells him to go home and then holds the car while administrative persons review the seizure to decide whether to press charges or proceed to forfeiture. The decision making process alone may take weeks or longer under the present program. 629 F.Supp. at 239.

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[10] 5 CIT at 271-72, 566 F.Supp. at 899. This conclusion is preceded by a representation that the government considered exclusion of merchandise on the ground of piracy to be protestable pursuant to 19 U.S.C. § 1514. The court denied a subsequent motion for reconsideration of this point in 6 CIT 24 (1983), characterizing the motion as a "changed position" on the part of the defendants which did not warrant reversal of the decision in view of the gravamen of the case.

[11] 629 F.Supp. at 237.

There was no procedure "to assure that a prompt probable cause determination before a neutral judicial officer is available to the owner of a seized vehicle." *Id.*

In *Azurin* v. *Von Raab,* Civil No. 86-0189 (D. Hawaii June 6, 1986), the court required Customs to release detained property of former Philippines president Ferdinand Marcos. There the Service had argued that the plaintiffs lacked a remedy since detentions are not protestable, but the court recognized that by not making "any final protestable decision, defendant can indefinitely detain the merchandise and evade any challenge by plaintiffs through administrative procedures." Slip op. at 24.

In *Azurin,* the district court exercised jurisdiction pursuant to 28 U.S.C. § 1361 as a result of the plaintiffs' failure to allege "any duty arising out of a customs law or regulation by which the defendant is compelled to release the merchandise" [*id.* at 7] and the judge's conclusion that "this action for mandamus cannot arise from a Customs law or regulation." [12]

The same cannot be said for the action at bar. However narrow the definition of "exclusion of merchandise * * * under any provision of the customs laws" within the meaning of 19 U.S.C. § 1514(a)(4), such definition still encompasses the acts of Customs complained of herein. Furthermore, if exclusive jurisdiction is anything more than an element of defendants' advocacy, the district court which will decide the competing copyright claims considers such jurisdiction to rest with this court insofar as plaintiffs' grievances with the Service are concerned.

To reiterate, in view of the foregoing, plaintiffs' application for a preliminary injunction and defendants' motion to dismiss the complaint on the ground of lack of subject-matter jurisdiction must both be denied.

So ordered.

(Slip Op. 86-70)

SIMOD AMERICA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consol. Court No. 85-05-00649

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff moves pursuant to 28 U.S. § 256(b) and USCIT Rule 77(c)(3) for the chief judge to authorize a judge of this court to hold an evidentiary hearing in Padova, Italy. Plaintiff contends that on-site view of manufacturing processes in factory in Italy is essential to plaintiff's case, and that important witnesses are available in Italy.

[12] Slip op. at 8. The district court rendered its decision notwithstanding this Court of International Trade's subject-matter jurisdiction pursuant to 28 U.S.C. § 1581(i) to grant the same mandamus relief as to the Marcos property. *See Azurin* v. *United States,* 10 CIT ——, 632 F.Supp. 30, 31 (1986).

Held: The chief judge is authorized to order an evidentiary hearing in a foreign country upon a showing that "interests of economy, efficiency, and justice will be served" thereby. In this case, plaintiff's motion is premature because issues pertaining to discovery remain unresolved and plaintiff has not made a showing that alternative means of presenting the desired evidence are inadequate. Since the motion is premature, the motion to authorize a hearing in the foreign country is denied without prejudice.

[Plaintiff's motion denied without prejudice.]

(Dated July 16, 1986)

Rode & Qualey (Michael S. O'Rourke) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office *(Barbara M. Epstein)*, for the defendant.

Re, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Italy, and described on the customs invoices as shoe "uppers."

The merchandise was classified by the Customs Service as unfinished footwear under TSUS item 700.67 or 700.35, depending upon the amount of leather on the exterior surface.

Plaintiff has protested the classification, and contends that the merchandise is properly classifiable as shoe "uppers" under TSUS items 386.07, 386.50, or 386.04, or under TSUS items 791.90 or 791.27, depending on the leather content. Although the duties assessed and claimed varied depending on the amount of leather on the exterior surface, the duties on unfinished footwear are considerably higher than those assessed for parts or components of shoes.

Plaintiff contends that the Customs Service erred in determining that the imported shoe "uppers," which contained an underfoot or midsole, were substantially complete, and thus were classifiable as unfinished footwear. Rather, plaintiff submits that the imported merchandise required substantial additional manufacturing processes in the United States before it could be sold as footwear. Relying upon *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States*, 66 CCPA 97, C.A.D. 1228, 600 F.2d 799 (1979), plaintiff urges that the nature, extent, and relative value of these additional manufacturing processes, in the United States, prevent classification as unfinished footwear, and require that the merchandise as imported be classified as parts or components of shoes or shoe "uppers." *See also Authentic Furniture Prod., Inc.* v. *United States*, 68 Cust. Ct. 204, C.D. 4362, 343 F. Supp. 1372 (1972), *aff'd*, 61 CCPA 5, C.A.D. 1109, 486 F.2d 1062 (1973).

Pursuant to 28 U.S.C. § 256(b) (1982), and USCIT R. 77(c)(3), plaintiff has made a motion that the chief judge of the United States Court of International Trade authorize a judge of this Court to preside at an evidentiary hearing in Padova, Italy. Plaintiff maintains that the hearing in Padova will afford the court an opportunity "to view the manufacturing process in issue * * * and to receive testimony relating to the diverse and complex manufacturing processes associated with the creation of finished footwear."

In essence, plaintiff contends that an on-site view of these manufacturing processes is critical in carrying its burden of proof that the merchandise as imported could not be classified as unfinished footwear.

Plaintiff states that it operated a factory in Middletown, Rhode Island, and, utilizing a Desma twenty-four station bidensity polyurethane injection molding machine, manufactured sneakers and tennis shoes from the shoe "uppers" imported from Italy. Plaintiff further states that the decision by Customs to classify the shoe "uppers" in issue as unfinished footwear, made it uneconomical for it to continue to manufacture athletic footwear at the Middletown factory. The resulting economic hardship caused the factory to close.

According to plaintiff, only one other manufacturer in the United States uses the Desma injection molding technique, and that manufacturer is unwilling to allow competitors or other outside parties to view its factory. Although other American manufacturers use the injection molding process, their equipment is incompatible with the Desma injection molding technique.

Plaintiff maintains that the layout and manufacturing processes at the Middletown factory were identical in all respects to those at the factory of plaintiff's parent company in Padova, Italy. In addition, several of plaintiff's principal witnesses are presently employed at the Padova factory, and to require that they travel to the United States to testify at trial would impose an economic hardship upon the plaintiff. Therefore, plaintiff urges that Padova is the only place where the court may observe the manufacturing processes to which the imported shoe "uppers" were subjected at the Middletown factory, and also obtain the testimony of key witnesses.

Defendant acknowledges that the chief judge has the statutory authority to order an evidentiary hearing in Padova, but contends that the facts and circumstances of this case do not warrant such a hearing at this time. Defendant opposes plaintiff's motion on several grounds. Initially, defendant maintains that the motion is premature because the parties have not completed discovery.

Assuming *arguendo* that plaintiff's motion is timely, defendant contends that plaintiff has failed to make the requisite showing that "the interests of economy, efficiency and justice" will be served by holding a hearing in Padova. The defendant submits that plaintiff has not demonstrated that its manufacturing processes are "so special" that they require that the chief judge exercise the statutory authority under 28 U.S.C. § 256(b) to authorize a hearing abroad. Moreover, defendant maintains that plaintiff has not established that the processes and machinery in Padova are identical to those at plaintiff's Middletown factory, and thus relevant to the issues in this case.

Defendant also alleges that plaintiff has not substantiated its assertions that the witnesses who are "critical" to its case could not

be present at a trial in the United States to testify about the manufacture of athletic footwear utilizing the Desma injection molding technique on the shoe "uppers" in issue. Defendant submits that one of plaintiff's primary contentions is that it would be costly for plaintiff to bring its witnesses to the United States to testify at a trial. For the chief judge to authorize the holding of a hearing in Padova, on this basis, would, in defendant's view, serve to transfer the cost and inconvenience from the plaintiff to the defendant and the court. In addition, the defendant states that plaintiff has not provided the court with any evidence that Italy has no objection to an evidentiary hearing of the type contemplated by section 256(b). Nevertheless, the defendant requests that, if the plaintiff's motion is granted, the court should order plaintiff to bear a portion of the additional expenses incurred by defendant in traveling to Padova.

When a trial or hearing before this Court is sought to be held outside New York City, 28 U.S.C. § 256 authorizes the chief judge to designate a judge of the court to preside at any place within the jurisdiction of the United States, or at an evidentiary hearing in a foreign country. Section 256(b), in particular, provides that:

> Upon application of a party or upon his own initiative, and upon a showing that the interests of economy, efficiency, and justice will be served, the chief judge may issue an order authorizing a judge of the court to preside in an evidentiary hearing in a foreign country whose laws do not prohibit such a hearing: Provided, however, That an interlocutory appeal may be from such an order pursuant to the provisions of section 1292(d)(1) of this title, and the United States Court of Appeals for the Federal Circuit may, in its discretion, consider the appeal.

28 U.S.C. § 256(b)(1982).

A motion for an evidentiary hearing in a foreign country under 28 U.S.C. § 256(b) is comparable to a request, pursuant to 28 U.S.C. § 256(a), for a trial or hearing at a place within the United States other than New York City. It is obvious that a party cannot, as a matter of right, select the venue for a trial or hearing before the court. *See Shannon Luminous Material Co.* v. *United States,* 69 Cust. Ct. 317, 319, C.R.D. 72-21, 349 F. Supp. 1000, 1003 (1972). To the contrary, it is clear that, pursuant to the statutory authority, the granting of a request for a trial or hearing outside New York City lies within the sound discretion of the chief judge. 69 Cust. Ct. at 320, 349 F. Supp. at 1004. The courts have long recognized this principle or policy of customs jurisprudence. In *United States* v. *Sanchez,* 15 Ct. Cust. Apps. 443, T.D. 42642 (1928), the Court of Customs Appeals stated that:

> The business of the * * * Court is so extensive that disorder and inefficiency would quickly result if assignment of cases and places of hearing were not constantly within the control of some centralized authority with that court.

Id. at 448, *quoted in Shannon Luminous,* 69 Cust. Ct. at 321, 349 F. Supp. at 1005.

Whether the trial or hearing is requested to take place in the United States, or in a foreign country, the chief judge will consider a variety of factors in exercising the statutory authority and responsibility to authorize a trial or hearing outside the City of New York. Among the factors to be considered are: (1) the procedural posture of the litigation; (2) the question presented, and whether the issues in dispute are of fact or law; (3) the availability and convenience of the witnesses of both parties; (4) the availability of alternate means to obtain the evidence and testimony that may be presented outside of New York City; (5) the importance and relevance of the place of manufacture of the merchandise in issue, and the port of importation; (6) the cost to the parties and the court; and (7) the importance of the case to the parties, as well as the public interest.

Section 256(b) has its origins in the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 277 (1970). In enacting section 256(b), Congress granted the chief judge discretionary authority to issue an order authorizing a judge of the court to preside at an evidentiary hearing in a foreign country. The exercise of this statutory authority presupposes that there has been a showing, to the satisfaction of the chief judge, that the hearing would serve "the interests of economy, efficiency and justice." S. Rep. No. 576, 91st Cong., lst Sess. 16 (1970); *see also* H.R. Rep. No. 1067, 91st Cong., lst Sess. 15-16 (1970).

The public interest in reaching a legally correct and just determination as to the lawful classification of the imported merchandise is substantial. In this litigation alone, the plaintiff alleges that over $700,000 in disputed duties are at stake. It is also relevant that the Footwear Division of the Rubber Manufacturers Association, Inc., a trade association representing domestic manufacturers of rubber and plastic soled footwear, has requested, and been granted, leave to file a brief *amicus curiae* in support of the plaintiff's position on the merits. It also may be observed that the expense and time necessary to hold a hearing in Italy may not be disproportionate to those incurred in holding a trial at certain ports in the United States.

When appropriate factors or circumstances are shown to the satisfaction of the chief judge, before exercising the statutory authority and responsibility, the chief judge will determine whether the foreign country will permit a hearing of the type requested. Indeed, Congress clearly contemplated that the chief judge, rather than the parties, "will work closely with the State Department to assure that the host country has no objection to holding the evidentiary hearing within its boundaries." H.R. Rep. 1067, at 15. On this point, the court may take judicial notice of the commendable degree of cooperation that exists between the United States and

Italy in matters of judicial assistance. *See, e.g., Treaty on Mutual Assistance in Criminal Matters,* Nov. 9, 1982, United States—Italy, —— U.S.T. ——, T.I.A.S. No. ——; *Convention on Taking of Evidence Abroad in Civil or Commercial Matters,* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C. § 1781 (1982)); *Convention on Service Abroad of Judicial and Extrajudicial Documents,* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 659 U.N.T.S. 163; *International Agreements: Two Treaties between The United States and Italy,* 26 Harv. Int'l L.J. 601 (1985); *see also* Fed. R. Evid. 44.1. Of course, should the motion be granted, the chief judge will undertake the necessary and appropriate procedures to hold the hearing in the foreign country.

The legislative history of section 256(b) suggests that Congress envisioned an evidentiary hearing in a foreign country within the context of a trial commenced in the United States. The advantage of this procedure is to afford the court the opportunity to view a site in cases in which an inspection by the court is relevant to the issues in litigation. It is axiomatic in customs law that a sample can be a potent witness. *See United States* v. *May Department Stores Co.,* 16 Ct. Cust. Apps. 353, 356, T.D. 43090 (1928); *Marshall Field & Co.* v. *United States,* 45 CCPA 72, 81, C.A.D. 676 (1958). Similarly, when relevant, an on-site viewing or inspection can be of inestimable value in permitting the court to learn and evaluate the various processes involved in the manufacture of the imported merchandise, as well as the merchandise's intended use. *See, e.g., Pistorino & Co.* v. *United States,* 82 Cust. Ct. 168, 172, C.D. 4799 (1979); *Dolliff & Co.* v. *United States,* 81 Cust. Ct. 1, 2, C.D. 4755 (1978); *see also Northwestern National Casualty Co.* v. *Global Moving & Storage, Inc.,* 533 F.2d 320, 323 (6th Cir. 1976) (trial courts possess inherent authority to conduct on-site view of area in litigation); IV Wigmore on Evidence § 1162 (1972). Certainly, the authority to order such viewings resides in the sound discretion of the court. 533 F.2d at 323. Moreover, the court may observe the witnesses whose testimony is taken abroad and evaluate that testimony in light of the entire record. S. Rep. No. 576, at 15–16.

In this case, on the present procedural posture of the litigation, plaintiff's motion for an evidentiary hearing in Padova, Italy, is premature. Certain issues pertaining to pretrial discovery, including possible depositions of plaintiff's witnesses, remain unresolved. There are issues that may be resolved by mutual agreement between counsel for the parties. Hence, at this time, the court cannot conclude that the plaintiff has made the necessary showing that a hearing abroad would serve "the interests of economy, efficiency and justice."

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied without prejudice; and it is further

ORDERED that within 30 days of this order, the parties shall submit to the court a schedule for the completion of pretrial discovery and the submission of any pre-trial motions; and it is further

ORDERED that within 30 days after the completion of pretrial discovery, plaintiff shall file a request for trial, which may include a renewed request for an evidentiary hearing in Padova, Italy.

(Slip Op. 86–71)

INTERNOR TRADE INC. AND PETROBAS COMERCIO INTERNATIONAL S.A. INTERBRAS, PLAINTIFFS *v.* UNITED STATES AND MALCOLM BALDRIGE, SECRETARY OF COMMERCE, DEFENDANTS

Court No. 86-04-00510

MEMORANDUM AND ORDER

[Defendants' motion (1) to extend time to file record granted in part and (2) to file record on microfilm denied; plaintiffs' motion to extend time to respond to defendants' motion to dismiss granted in part and denied in part.]

(Dated July 16, 1986)

Rogers & Wells (Eugene T. Rossides and *Robert E. Ruggeri)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Elizabeth C. Seastrum)* for the defendants; *Andrea E. Migdal,* U.S. Department of Commerce, of counsel.

AQUILINO, *Judge:* The court is in receipt of an untimely motion by the defendants to extend their time to file the administrative record until 45 days after decision of their earlier motion to dismiss the complaint. Were it not for the fact that the relief requested is clearly in the interest of orderly and efficient proceedings herein, the motion to extend would be denied.

I

Both the Customs Courts Act of 1980, 28 U.S.C. § 2635(b)(1), and CIT Rule 71(a) require that the record in an action such as this be filed within 40 days after service of the complaint, which apparently occurred in this action on May 20, 1986. The defendants compute their filing deadline to have been July 3, 1986,[1] the date on which their instant motion for an extension was served.

Such motions are governed by CIT Rule 6(b), subparagraph (2) of which provides:

> The motion for extension of time must set forth the specific number of additional days requested, the date to which the extension is to run, the extent to which the time for the performance of the particular act has been previously extended, and

[1] *See* Defendant's Motion for Extension of Time for Filing the Administrative Record and for Leave to File the Record on Microfilm, [hereinafter cited as "Defendants' Memorandum"], p. 1.

> the reason or reasons upon which the motion is based. *The motion shall be filed prior to the expiration of the period allowed for the performance of the act to which the motion relates* (including any previous extension of time); except, when for good cause shown, the delay in filing was the result of excusable neglect or circumstances beyond the control of the party. [emphasis added]

Defendants' motion was received in the Clerk's office on July 8, 1986 and thereafter referred to this court for disposition. Self-evidently, the motion does not meet the dictate of Rule 6(b)(2) underscored above, notwithstanding the provisions of CIT Rules 5(g) and 6(c) regarding timing. Rather, the dictate is that motions for extensions of time, which require prompt attention, be made far enough in advance of deadlines so as to afford the court at least some time within the litigants' periods to perform to decide them.[2] Otherwise, parties like the defendants herein could automatically extend the time mandates of Congress and this Court of International Trade.

The motion at bar does not call into account the exceptions contained in Rule 6(b)(2) ("excusable neglect" or "circumstances beyond the control of the party"). On June 11, 1986, the defendants served their motion to dismiss on the ground of lack of subject-matter jurisdiction over this action where the International Trade Administration (ITA) has reached a final affirmative antidumping-duty determination,[3] but where the International Trade Commission has reached a final negative determination[4] that the domestic industry is being materially injured, or threatened with material injury, by reason of the dumped imports.[5] This being the primary reason for defendants' request for an extension of time, it could have and should have been made around June 11, 1986—definitely not on July 3rd.

The interest of orderly and efficient proceedings which is raised by defendants' request is of sufficient moment on its face, however, to transcend the method of its presentment. That part of their motion which seeks an extension of time to file the administrative record until after determination of the dispositive motion should therefore be granted.

Microfilmed Record

Defendants' motion contains a secondary request, couched as follows:

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[2] To the extent the time required for decision goes beyond the deadline sought to be extended, Rule 6(b)(4) protects the movant in the event of denial. Indeed, the 10 days provided therein constitute a good rule of thumb for the minimum length of time in advance for the making of motions for extensions, certainly where they are contested [*compare* CIT Rule 7(d)] or the period to perform the act is as lengthy (40 days) as herein.

[3] *See Antidumping; Fuel Ethanol From Brazil, Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 5572 (Feb. 14, 1986).

[4] *See Import Investigations; Ethyl Alcohol From Brazil*, 51 Fed. Reg. 9538 (March 19, 1986); USITC Pub. 1818 (March 1986).

[5] The plaintiffs herein seek judicial review of the ITA's determination.

> * * * If * * * the Court rules against the Government * * * then the ITA will need an additional 45 days to finalize the record, prepare the index, send it to the microfilmer, and review the microfilm tapes for accuracy.[6]

Of course, insofar as the request for leave to submit microfilm is contingent upon the filing deadline for the administrative record, the court's decision to grant the extension of time makes that matter moot. However, issues raised remain.

Clearly, the ITA is free to process and maintain its record as it deems appropriate. But agency expediency is not, in itself, ground for extension of the time for filing that record mandated by both Congress[7] and this Court of International Trade. Although the ITA may well labor under a heavy paper burden in view of the nature and number of proceedings within its area of responsibility, counsel make no showing what distinguishes the agency record here from the records in other proceedings.

Furthermore, while the defendants are correct when they indicate that the Clerk's office now has "technical facilities which will allow persons to review a microfilm copy of the record", this court is convinced that, however refined those facilities may be, they do not enhance actual review by parties, the court, or the public, of individual elements of the record; only its overall handling and storage, which, admittedly, can be compelling considerations. Therefore, defendants' request to microfilm should be denied without prejudice.

II

For their part, the plaintiffs have served and filed a motion for an extension of time to respond to defendants' motion to dismiss which complies with Rule 6(b)(2).[8] The motion falls short on the merits, however. That is, it seeks an extension that would run until 35 days after another judge has decided another government motion to dismiss another, unrelated action. While the gravamen of that motion is apparently the same as the one defendants have posited herein, and while this Court of International Trade consistently makes every effort to administer justice as efficiently as practicable, the plaintiffs have failed to bear their burden of persuasion that the mere existence of a similar issue of law in another action is ground for an extension of time to be delimited by that action rather than by the one they have brought to court. In other words, a plaintiff's response to a motion to dismiss its action generally

[6] Defendants' Memorandum, p. 2. This memorandum goes on to state at page 3:
> The ITA proposes to reproduce the record in microfilm and to submit a microfilm copy to the Court because this procedure will make the record easier to compile, deliver and maintain. It will also relieve some of the practical problems ordinarily encountered when working with large quantities of papers. Defendant has been advised that the Court has technical facilities which will allow persons to review a microfilm copy of the record at the Court.

[7] Indeed, the congressional intent is that there be expeditious judicial review of agency determinations of important international trade matters.

[8] The motion was deemed filed 14 days before the deadline in question, thereby affording the court adequate time to consider it.

should not abide the outcome of a motion to dismiss another action, and that is true here as well.

In any event, implicit in plaintiffs' motion, however timely made, is the need for an additional period for response to the motion to dismiss. Apparently, the position of the defendants is that "they 'do not consent to but will not object to the Motion.'" [9]

Now, therefore, in view of the foregoing, and after due deliberation, it is

ORDERED that that part of defendants' Motion for Extension of Time for Filing the Administrative Record and for Leave to File the Record on Microfilm as requests an extension of time to file the administrative record until after the court has decided defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction dated June 11, 1986 be, and it hereby is, granted; and it is further hereby

ORDERED that the administrative record be filed within 40 days of any denial of defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction dated June 11, 1986; and it is further

ORDERED that that part of defendants' Motion for Extension of Time for Filing the Administrative Record and for Leave to File the Record on Microfilm as requests leave to file the administrative record on microfilm be, and it hereby is, denied, without prejudice; and it is further

ORDERED that plaintiffs' Motion for Extension of Time to File Response to Defendants' Motion to Dismiss be, and it hereby is, granted to the extent that the plaintiffs shall have until August 15, 1986 to serve and file any such response.

[9] Plaintiffs' Motion for Extension of Time to File Response to Defendants' Motion to Dismiss, pp. 2-3.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/109	Restani, J. June 25, 1986	FAG Bearings, Ltd.	80-8-01310	Item 680.35 1.7¢ per lb. plus 7.5%	Item 680.33 6%	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts
C86/110	Restani, J. June 26, 1986	FAG Bearings, Ltd.	83-12-01745	Item 680.39 9.8%	Item 680.33 5.1%	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts
C86/111	Restani, J. June 26, 1986	FAG Bearings, Ltd.	84-6-00787	Item 680.39 9.8%	Item 680.33 5.1%	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts
C86/112	Restani, J. June 26, 1986	FAG Bearings, Ltd.	85-8-01000	Item 680.39 9.8%	Item 680.33 4.9%	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/186	Newman, S.J. June 24, 1986	Ford Motor Co.	85-7-00943	Transaction value	U.S. $5,612.96	Agreed statement of facts	Champlain Rouses Point, N.Y. Automobile parts
V86/187	Watson, J. June 25, 1986	Durlacher & Co.	269893A, etc.	Export value	F.o.b. unit in voice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs
V86/188	Watson, J. June 25, 1986	Nichimen Co.	R62/3877	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Sewing machine parts
V86/189	Watson, J. June 25, 1986	Starlight Trading Inc.	R61/13708, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Cotton blouses
V86/190	Watson, J. June 26, 1986	Domast Inc.	R65/6472	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Boston Radios
V86/191	Watson, J. June 26, 1986	Durlacher & Co.	270431A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk scarfs
V86/192	Watson, J. June 26, 1986	Durlacher & Co.	283336A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk scarfs
V86/193	Watson, J. June 26, 1986	Durlacher & Co.	290684A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Rayon fabric

V86/194	Watson, J. June 26, 1986	Judson Sheld-on Int'l Corp.	R65/23279, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Tiles
V86/195	Watson, J. June 26, 1986	M.G. Deppe & Co.	R61/12503, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	San Francisco Binoculars
V86/196	Watson, J. June 26, 1986	National Silver	R59/15357	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	San Francisco Flatware
V86/197	Watson, J. June 26, 1986	Nichimen Co.	R59/11255, etc.	Export value	Appraised values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/198	Watson, J. June 26, 1986	Providence Import Co.	R62/3169, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Rugs
V86/199	Watson, J. June 26, 1986	Providence Import Co.	R64/18524	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Tube rugs
V86/200	Watson, J. June 26, 1986	Trans-Oceanic Importing Corp.	R61/17041	Export value	Appraised values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Transistor radios; together with their accessories and parts; an entirety
V86/201	Watson, J. June 26, 1986	Trans-Oceanic Imports Co.	R64/3864, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angles Tube mats, etc.
V86/202	Watson, J. June 26, 1986	Veri Best Trading Corp.	R62/13676	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New Bedford Knives and forks

Appeals to the U.S. Court of Appeals for the Federal Circuit

Ceramica Regiomontana, S.A. v. United States, 10 CIT —, Slip Op. 86-58 (May 29, 1986), *appeal docketed,* No. 86-1441 (Fed. Cir. July 8, 1986).

Bingham & Taylor v. United States, No. 85-7-00909 (CIT June 3, 1986), *appeal docketed,* No. 86-1140 (Fed. Cir. July 8, 1986).

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The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 175

(T.D. 86-144)

Decision on Domestic Interested Party Petition Concerning Tariff Classification of Imported Duck-Type Footwear

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Decision concerning a domestic interested party petition.

SUMMARY: Customs has completed review of a petition filed by a domestic interested party, seeking reclassification of certain imported unfinished duck-type footwear. The petitioner contends that the articles are currently incorrectly classified under a provision of the Tariff Schedules of the United States (TSUS) which has a low duty rate and entitles the articles to duty-free treatment under the Generalized System of Preferences (GSP), if they are imported from a beneficiary developing country. The petitioner believes that the articles should be reclassified under either of two provisions of the TSUS, both of which carry a higher duty rate and do not entitle the articles to duty-free treatment under the GSP. Following review of the petition and responses to a solicitation of comments, Customs has concluded that the petitioner is correct. Accordingly, the petition requesting reclassification is granted.

DATES: This decision will be effective with respect to merchandise entered, or withdrawn from warehouse, for consumption after September 12, 1986.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

On November 23, 1984, a notice was published in the Federal Register (49 FR 46163) indicating that Customs had received a petition from a domestic interested party filed under § 516, Tariff Act

of 1930, as amended (19 U.S.C. 1516), requesting the reclassification of imported unfinished duck-type footwear.

The articles, in their imported condition, consist of gum rubber rolled soles to which heels of the same material have been attached. The interiors of the footwear possess heel counters and textile linings, as well as vamps, boxed toes, quarters, molded portions of the uppers, shanks, and formed in-steps. The articles are fully and permanently lasted and they have been manufactured to the point that their shoe sizes, both as to length and width, have been established. The unfinished footwear is completed in the U.S. by having the remaining portion of the upper stitched to it and, in some cases, an insole inserted.

The described articles are currently classified under the provision for "Articles not specially provided for, of rubber or plastics: Other: Parts of Footwear," in item 774.50, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), at a 6.9 percent duty rate. Articles classified under this provision are eligible for duty-free treatment under the Generalized System of Preferences (GSP); (19 U.S.C. 2461 *et seq.*) if imported from a beneficiary developing country.

The petitioner sought reclassification under the provision for "Footwear * * * which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics: Hunting boots, galoshes, rainwear, etc.: * * * Other" in item 700.53, TSUS, which carries a duty rate of 37.5 percent. In the alternative, the petitioner contended that the imported articles are correctly classifiable under the residual provision for "Other footwear: * * * Other" in item 700.95, TSUS, which has a duty rate of 12.5 percent. The imported articles are not eligible for GSP treatment under these two tariff classifications.

Customs current classification of the imported articles under the provision for other articles not specially provided for, of rubber or plastics, parts of footwear, is based upon past Customs rulings wherein unfinished footwear susceptible to more than one tariff classification in its contemplated finished condition had been classified under the provision for parts of footwear according to component material of chief value, rather than as finished footwear under other provisions of the TSUS. In these rulings, Customs stated that General Interpretative Rule 10(h), TSUS, which provides that "unless the context requires otherwise, a tariff description for an article covers such article whether assembled or not assembled and whether finished or not finished", was not applicable in cases in which the imported article was not susceptible of proper classification. The unfinished footwear in these cases, in their contemplated finished condition, would be classifiable under different tariff provisions, depending upon the nature of the finishing operation. The footwear was therefore deemed not susceptible of proper

classification in its condition as imported and, consequently, the "not finished" principle of General Interpretative Rule 10(h) was inapplicable.

The petitioner claimed that despite the fact that the imported articles could be finished into articles which would fall into different footwear classification provisions, depending upon the nature of the finishing operation, the imported articles should nevertheless be classifiable under tariff provisions for finished footwear, in accordance with long-recognized statutory and judicial principles of Customs jurisprudence. The petitioner stated that the exclusion of the unfinished footwear from the purview of General Interpretative Rule 10(h) and its classification under a tariff provision for parts of footwear, which disregards the finishing operation altogether, is unwarranted and unjustified.

The petitioner further claimed that since more than one tariff provision could embrace the duck-type unfinished footwear after the finishing operation, General Interpretative Rule 10(d), TSUS, becomes applicable in determining under which of the competing tariff provisions the imported footwear should be classified. Under this rule, in part, if two or more tariff descriptions are equally applicable to an article, the article is subject to duty under the description for which the original statutory rate is highest. Petitioner stated that of all the finished footwear tariff provisions, item 700.53, TSUS, carries the highest original statutory duty rate of 75 percent for column 2 countries and 37.5 percent for column 1 countries. Therefore, item 700.53, TSUS, must be the footwear provision under which the imported unfinished duck-type footwear is classifiable.

In the alternative, the petitioner argued that if Customs were to reject classification of the imported articles as finished footwear under any of the specific footwear provisions contained in items 700.05 through 700.90, TSUS, because they potentially satisfy more than one specific footwear classification provision, they would qualify for classification under item 700.95, TSUS, the residual footwear classification provision. Petitioner contended that this is mandated by Headnote 1 of Subpart A, Part 1, Schedule 7, TSUS, which provides that all footwear, including unfinished footwear, by operation of General Interpretative Rule 10(h), must be classified in Subpart A, Part 1 of Schedule 7, TSUS, which covers items 700.05 through 700.95, with exceptions for footwear with permanently attached skates or snowshoes, hosiery, and imported knit footwear.

Analysis of Comments

Four comments were submitted in opposition to the petition. Two of the comments were general in nature. One of these stated that the current tariff classification of the footwear under item 774.50, TSUS, is correct and should not be changed. The other commenter

asserted that Customs has already resolved the problem correctly in Internal Advice Request No. 147/79, October 17, 1980, which held that rubber bottoms of the type in issue are classified as parts of footwear under item 774.50, TSUS.

The two commenters presenting substantive legal arguments in opposition to the petition made the following points:

(1) The condition of the footwear as imported controls its classification, rather than what it is made into after importation. As imported, the rubber or plastics bottoms are parts of footwear properly classifiable under item 774.50, TSUS.

(2) General Interpretative Rule 10(d), TSUS, only comes into effect if there are equally applicable descriptions which describe the merchandise. Here, the petitioner assumes that the footwear in its imported condition comes within two competing provisions. There is no description under any provisions of the tariff schedules which equally meets the description of "parts of footwear of rubber or plastics". Comparisons cannot be based upon results after modifications have been made.

(3) An imported article may not be classified as the unfinished article when at the time of importation the import has no predetermined, completed state, and, can be and is completed into articles classified under different tariff provisions. General Interpretative Rule 10(h), TSUS, and its predecessors apply only to imported merchandise dedicated to use as the complete article. This rule has no application when the final tariff identity of the article is not fixed at the time of importation. *Avins Industrial Products Co.* v. *United States,* 62 CCPA 83, C.A.D. 1150 (1975); *American Import Co.* v. *United States,* 26 CCPA 72, T.D. 49612 (1938); *The Harding Co.* v. *United States,* 23 CCPA 250, T.D. 48109 (1936).

(4) General Interpretative Rule 10(h), TSUS, does not apply where "the context requires otherwise". Congress has provided for the classification of footwear parts. Therefore, to invoke Rule 10(h) so as to classify the imported articles as unfinished footwear, when Congress has made a provision for parts of footwear, would be misuse of the Rule and must be avoided. *United States* v. *J. Gerber and Co., et al.,* 58 CCPA 110, C.A.D. 1013 (1971).

(5) General Interpretative Rule 10(d), TSUS, applies only when "two or more tariff descriptions are equally applicable". Here, none of the various tariff descriptions urged by petitioner are applicable unless Rule 10(h) may be invoked. However, Rule 10(h) may not be invoked when the imported article is finished into articles classified under various tariff provisions. If Rule 10(h) may not be invoked, there is no basis on which to proceed under Rule 10(d) because in the absence of Rule 10(h), there is but a single applicable provision.

(6) The alternative argument that the imported articles are classifiable under item 700.95, TSUS, covering other footwear is based on an unsupportable premise. The premise is that the imported ar-

ticles are classifiable as footwear. This is not so. The articles, as imported, are unfinished. Classification as the finished article may proceed only in the event Rule 10(h) applies. However, for the reasons set forth previously, Rule 10(h) does not apply and consequently classification under item 700.95, TSUS, is precluded.

Decision on Petition

It is our position that the unfinished duck-type footwear in issue has been incorrectly classified under item 774.50, TSUS, and is properly classifiable under item 700.53, TSUS, pursuant to General Interpretative Rules 10(h) and 10(d), TSUS, for the following reasons:

(1) General Interpretative Rule 10(h) is in its essence prospective and requires us to consider what an item will become in terms of its ultimate use or construction rather than its condition as imported. See 14 Cust. Bull. 737, C.S.D. 80-8 (1980).

(2) General Interpretative Rule 10(d) is applicable to the unfinished duck-type footwear because several footwear provisions are equally applicable to the footwear in its contemplated finished conditions.

(3) In the case of *American Import Co.* v. *United States,* 26 CCPA 72, TD 49612 (1938), the court stated that "It has long been the generally accepted rule that a thing may be classified for tariff duty purposes under the eo nomine provision for the article unfinished if that thing has been so far processed toward its ultimate completed form as to be dedicated to the making of that article or *that class of articles alone*" (italic added). Thus, the articles in issue may be considered unfinished footwear because they are so far processed as to be dedicated to the making of a class of articles alone, namely, footwear. It is not necessary that the article be completed into one specific category of footwear.

(4) We do not discern a legislative intent that the unfinished duck-type footwear be classified under a parts provision rather than as unfinished footwear. It is our observation that the merchandise in its condition as imported is substantially complete footwear. See *Daisy-Heddon, Div. of Victor Comptometer* v. *United States,* 66 CCPA 97, C.A.D. 1228 (1979).

Authority

This notice is published under the authority of § 516(b), Tariff Act of 1930, as amended (19 U.S.C. 1516(b)), and § 175.22(a), Customs Regulations (19 CFR 175.22(a)).

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S.

Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: July 10, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 29, 1986 (51 FR 27019)]

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19 CFR Part 101

(T.D. 86-145)

Customs Regulations Amendment Relating to the Customs Field Organization; Shreveport and Bossier City, Louisiana

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This notice changes the field organization of the Customs Service by establishing a new port of entry, on a 2-year trial basis, at Shreveport and Bossier City, Louisiana. This change is being made as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

EFFECTIVE DATE: September 4, 1986.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs ports of entry are places (seaports, airports, or land border ports) designated by the Secretary of the Treasury where Customs officers or employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of Customs and related laws.

The Caddo-Bossier Port Commission filed an application with Customs requesting the establishment of a new Customs port of entry at Shreveport and Bossier City, Louisiana. A review of that application confirmed that the proposed port met the minimum Customs criteria for establishing ports of entry.

A notice proposing the establishment of the Shreveport-Bossier City port of entry, on a 2-year trial basis, was published in the Federal Register on January 22, 1986 (51 FR 2897). The notice solicited public comment on the matter.

Discussion of Comments

Seventy-three comments were received in response to the notice. Seventy-one commenters supported establishment citing the benefits that such a port would provide to the region's growing international trade business, as well as the over-all positive effect on the area's economic and employment outlook. Of the two opposing comments, one doubted the new port would have a sufficient workload, and the other expressed concern that opening a new port would somehow drain the resources available for existing ports.

As to the workload argument, Customs has a commitment from the port that it will meet the minimum workload standards of a port of entry. At the end of the 2-year period, the practicality of maintaining a port of entry at Shreveport-Bossier City will be reevaluated in light of the actual Customs workload. As to the second argument, the opening of this port will in no way make the operation of any existing port less efficient.

After analysis of the comments and further review of the matter, Customs is establishing, on a 2-year trial basis, a port of entry at Shreveport-Bossier City, Louisiana.

Changes in the Customs Field Organization

The Secretary of the Treasury is advised by the Commissioner of Customs in matters affecting the establishment, abolishment, or other change in ports of entry. Customs ports of entry are established under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by E.O. No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

Customs has determined that it is in the public interest to establish, on a 2-year trial basis, a port of entry at Shreveport-Bossier City, Louisiana. The limits of the port of entry of Shreveport-Bossier City are the city limits of Shreveport and Bossier City, Louisiana.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

To reflect this change, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by adding, "Shreveport-Bossier City, La., including the territory described in T.D. 86–145." directly below, "Nashville, Tenn., including the territory described in T.D. 84–126." in the

column headed, "Ports of entry" in the New Orleans, Louisiana district.

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this document relates to agency organization it is not subject to E.O. 12291. Accordingly, a regulatory impact analysis and the review prescribed by § 3 of that E.O. is not required. Similarly, this document is not subject to the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*) and the regulatory analysis and other requirements of 5 U.S.C. 603 and 604 are not applicable.

Customs routinely establishes and expands Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this amendment may have a limited effect upon some small entities in the area affected, it is not expected to be significant because establishing and expanding port limits at Customs ports of entry in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 9, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 5, 1986 (51 FR 28070)]

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19 CFR Part 6

(T.D. 86-146)

Customs Regulations Amendments Relating to Reporting Requirements for Certain Private Aircraft

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document announces the removal of San Diego International Airport (Lindbergh Field) from the list of airports at which private aircraft arriving from areas south of the U.S. must

land for Customs processing. Currently, private aircraft can comply with Customs Regulations by making Lindbergh Field their first landing site after crossing the U.S.-Mexican border.

Lindbergh Field is approximately 15 miles from the border. This distance gives smugglers the opportunity to engage in "touch and go" or air drop smuggling of illegal drugs and contraband. "Touch and go" smuggling involves reporting Lindbergh Field as the first U.S. destination but actually landing somewhere else first, quickly unloading contraband, and continuing on to Lindbergh Field. Air drop smuggling involves flying very low over some point between the border and Lindbergh Field, pushing contraband out of the aircraft to be retrieved on the ground, and continuing on to Lindbergh Field. Additionally, the high volume of air traffic in the Lindbergh Field area makes tracking of individual aircraft very difficult. This is a further impediment to effective drug interdiction in the area.

By removing the designated airport status from Lindbergh Field, aircraft will have to report to one of two other airports, both very close to the U.S.-Mexican border and therefore less likely the targets of smugglers. Lindbergh Field's status as an international airport is not affected.

EFFECTIVE DATE: August 4, 1986.

FOR FURTHER INFORMATION CONTACT: Dennis Benjamin, Office of Passenger Enforcement and Facilitation, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5608).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of Customs efforts to combat the problem of drug smuggling by air, in 1975 the Customs Regulations were amended to add a new § 6.14 (19 CFR 6.14), that provides in part that private aircraft arriving in the U.S. via the U.S.-Mexican border must provide a notice of intended arrival with Customs (T.D. 75-201; 40 FR 33203). The section further provides that these private aircraft must land at any one of the designated airports near the U.S.-Mexican border. The purpose of this regulation was to provide Customs with increased enforcement efficiency by providing tight control over air traffic arriving from the direction of countries that are major sources of illegal drugs destined for the U.S.

In our diligence to fight the national epidemic of illegal drugs, Customs has amended § 6.14, Customs Regulations, several times since 1975. Amendments have included extending coverage to private aircraft arriving via the Pacific, Gulf of Mexico, or Atlantic coasts (T.D. 83-192; 48 FR 41381); expanding coverage by modifying the definition of private aircraft (T.D. 84-236; 49 FR 46885); and extending the coverage to include some flights arriving from Puerto Rico and all flights arriving from the U.S. Virgin Islands, increas-

ing from 15 minutes to one hour the minimum time required for notice to be given prior to penetrating U.S. air space, and requiring aircraft seeking exemption from landing requirements to be equipped with functioning transponders (T.D. 86–72; 51 FR 11004).

Customs again finds it necessary to amend § 6.14(g), which lists designated airports at which subject aircraft must land. San Diego International Airport (Lindbergh Field) is on that list. However, Customs has discovered smugglers are taking advantage of Lindbergh Field's location approximately 15 miles from the border by engaging in "touch and go" or air drop smuggling of illegal drugs and contraband. "Touch and go" smuggling involves reporting Lindbergh Field as the first U.S. destination but actually landing somewhere else first, quickly unloading illegal drugs or contraband, and continuing on to Lindbergh Field. Air drop smuggling involves flying very low over some point between the border and Lindbergh Field, pushing illegal drugs or contraband out of the aircraft to be retrieved on the ground, and continuing on to Lindbergh Field.

By removing Lindbergh Field from the list of designated airports in § 6.14(g), aircraft subject to the reporting requirements of § 6.14 will have to land at either Calexico International Airport, Calexico, California, or Brown Field, San Diego, California. Both of these airports are very close to the U.S.-Mexican border and therefore will be unlikely targets of "touch and go" or air drop smuggling. They are also less congested than Lindbergh Field which makes it easier to track individual aircraft by means of radar devices. These factors will combine to make Customs enforcement activities more effective and more easily manageable in this area of the country.

Brown Field is already the preferred destination of most private aircraft arriving from foreign countries in the San Diego area. In FY 1985, there were 870 private aircraft arrivals from foreign countries at Lindbergh Field compared to 4,115 such arrivals at Brown Field and 5,262 such arrivals at Calexico International Airport. This revocation in no way affects Lindbergh Field's status as an international airport under § 6.13, Customs Regulations (19 CFR 6.13), and in no way prohibits private aircraft that have crossed the U.S.-Mexican border and complied with § 6.14 by landing at Brown Field or Calexico International Airport, from subsequently landing at Lindbergh Field.

Inapplicability of Public Notice and Delayed Effective Date Requirements

This amendment is being published without an opportunity for public comment or a delayed effective date under the authority of 5 U.S.C. 553(b)(B). The severity of the drug problem in the U.S. is well documented. Customs is always looking for weak links in our drug interdiction efforts and when found, seeks to correct them as expeditiously as possible. The situation surrounding Lindbergh

Field is providing a loophole in our enforcement efforts that is allowing illegal drugs and contraband to enter the U.S. It must be stopped as quickly as possible. Therefore, Customs has determined that it would be contrary to the public interest to unnecessarily delay the removal of the designated airport status of Lindbergh Field.

Regulatory Flexibility Act

This document is not subject to the provisions of 5 U.S.C. 603, 604, as added by § 3 of Pub. L. 96-354, the "Regulatory Flexibility Act." That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

Amendment to the Regulations

List of Subjects in 19 CFR Part 6

Customs duties and inspection, Imports, Air Carriers, Aircraft, Airports.

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624; 49 U.S.C. 1474, 1509.

2. Section 6.14(g) is amended by removing the entry that reads, "San Diego, Calif. * * * San Diego International Airport (Lindbergh Field)" from the list of designated airports.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Alfred R. DeAngelus,
Acting Commissioner of Customs.

Approved: July 14, 1986.
Francis A. Keating II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 4, 1986 (51 FR 27836)]

159-255 O - 86 - 2

(T.D. 86-147)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
May 1, 1986	$0.007305
May 2, 1986	.007194
Israel shekel:	
May 1, 1986	N/A
May 2, 1986	N/A
South Korea won:	
May 1, 1986	.001126
May 2, 1986	.001126
Taiwan N.T. dollar:	
May 1, 1986	.025920
May 2, 1986	.025927

(LIQ-03-01 S:COM CIE)

Dated: May 2, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-148)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise ex-

ported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
May 1, 1986	$0.064506
May 2, 1986	.064350
Belgium franc:	
May 1, 1986	.022242
May 2, 1986	.022183
Denmark krone:	
May 1, 1986	.122594
May 2, 1986	.122324
Finland markka:	
May 1, 1986	.201207
May 2, 1986	N/A
Germany deutsche mark:	
May 1, 1986	.453515
May 2, 1986	.451467
Ireland pound:	
May 1, 1986	1.3820
May 2, 1986	1.3805
Italy lira:	
May 1, 1986	.000661
May 2, 1986	.000661
Japan yen:	
May 1, 1986	.005894
May 2, 1986	N/A
Netherlands guilder:	
May 1, 1986	.402495
May 2, 1986	.400721
New Zealand dollar:	
May 1, 1986	.57650
May 2, 1986	.57500
Switzerland franc:	
May 1, 1986	.541712
May 2, 1986	.539084

(LIQ-03-01 S:COM CIE)

Dated: May 2, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 134

Country-of-Origin Marking Requirement for Imported Fruit Juice Concentrate

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed interpretive rule; solicitation of public comments on effective date.

SUMMARY: This notice is to advise the public that Customs is extending to other imported fruit juice concentrate undergoing similar processing, the ruling which held that imported orange juice concentrate which is used in the production of frozen concentrated or reconstituted orange juice is not substantially transformed after undergoing further processing in the U.S. (blending with other batches of concentrate, water, oils and essences, pasteurization or freezing and repacking). Accordingly, labels on these frozen concentrated and reconstituted fruit juice products which contain imported concentrate will have to be marked to indicate the foreign country-of-origin of the products. Customs is seeking public comments on the date this requirement should become effective. All comments received will be considered before reaching a decision on this issue.

DATE: Comments (preferably in triplicate) must be received on or before September 29, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In response to a formal request, Customs published a ruling dated September 4, 1985, in the CUSTOMS BULLETIN of September 25, 1985 (C.S.D. 85-47, 19 Cust. Bull. No. 39 at 21), stating that containers of orange juice in frozen concentrated or reconstituted forms, which contain imported concentrate, must be labeled to comply with the country-of-origin marking requirements of § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304). The ruling was based on the determination that the imported concentrate which is used in the production of frozen concentrated or reconstituted orange juice is not substantially transformed after undergoing further processing in the U.S. including blending with other batches of concentrate, water, oils and essences, pasteurization or freezing, and repacking.

In a case brought by the National Juice Products Association, *et al.* challenging C.S.D. 85-47, *National Juice Products Association* v. *United States*, —— CIT ——, Slip Op. 86-13 (January 30, 1986), the Court of International Trade held that C.S.D. 85-47 was substantively valid. The Court, however, remanded the case to Customs for reconsideration of the effective date. The Court directed Customs to adhere to the notice and comment provisions of § 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)), and to carefully consider all possible issues relating to a reasonable time to implement the new ruling. Accordingly, by notice published in the Federal Register on March 3, 1986 (51 FR 7285), Customs solicited the views of the public on the issue of a reasonable implementation date. Comments received in response to that notice were considered. The public was advised of the February 1, 1987, effective date of C.S.D. 85-47 by publication of T.D. 86-120 in the Federal Register of June 25, 1986 (51 FR 23045).

Customs is of the opinion that the principles set forth in C.S.D. 85-47 are also applicable to other fruit juice products and is therefore extending the orange juice ruling to all other imported fruit juice concentrates which undergo processing in the U.S. similar to that performed with regard to orange juice.

Customs is seeking public comments related solely to the issue of the best practicable implementation date for the new requirement that frozen concentrated or reconstituted fruit juices which contain imported content be labeled to reveal that content. Of particular interest is any information concerning the time it generally takes suppliers to provide new or changed labels and containers to the packagers of juice products, as well as the quantity of labels and printed retail containers usually kept in inventory.

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted. Comments submit-

ted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: July 14, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 30, 1986 (51 FR 27195)]

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19 CFR Part 113

Proposed Customs Regulations Amendments Relating to Customs Bonds

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: On October 19, 1984, Customs published a final rule in the Federal Register which extensively modified the Customs bond structure. Customs ongoing review of the revised bond structure has revealed that it is necessary to clarify a provision in the instruments of international traffic bond condition to recognize a counterpart substantive requirement in the regulations. Specifically, this document proposes to recognize in the instruments of international traffic bond condition the regulatory exemption from entry filing for diverted or withdrawn U.S. instruments of international traffic not increased in value or improved in condition abroad. It is also necessary to establish, as an additional enforcement tool, a consequence of default provision in the basic importation and entry bond condition for failure to satisfy regulatory requirements. Specifically it is proposed to establish a liquidated damage provision in the basic importation and entry bond condition for failure to timely deposit estimated duties.

DATE: Written comments must be received on or before October 3, 1986.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: William Rosoff, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5856).

SUPPLEMENTARY INFORMATION:

BACKGROUND

By a final rule published in the Federal Register as T.D. 84-213 on October 19, 1984 (49 FR 41152), the Customs bond structure was extensively revised by consolidating and reducing the number of bond forms in use. The purpose of the revision was to simplify transactions between Customs and the importing public and to facilitate establishment of an efficient computerized bond control system.

A part of the foregoing involved incorporating specific bond conditions into Part 113, Customs Regulations (19 CFR Part 113), which established a contractual obligation on the part of the bond principal to comply with substantive requirements of the regulations. As a necessary part of this scheme, the bond conditions incorporated specific consequences of default provisions for failure to comply with the substantive requirements of the regulations and bond provisions.

Customs ongoing review of the revised bond structure since then has revealed that it is necessary to clarify a provision in the instruments of international traffic bond condition to recognize a counterpart substantive regulatory requirement.

Specifically, § 10.41a, Customs Regulations (19 CFR 10.41a), relates to instruments of international traffic such as lift vans, cargo vans, shipping tanks, skids, pallets, and similar instruments. Paragraph (d) of § 10.41a provides that if an instrument of foreign origin, or of U.S. origin which has been increased in value or improved in condition by a process of manufacture or other means while abroad, is released under § 10.41a and is subsequently diverted to point-to-point local traffic within the U.S., or is otherwise withdrawn within the U.S. from its use as an instrument of international traffic, it becomes subject to entry and the payment of any applicable duties. Section 10.41a(d) also provides that an instrument of U.S. origin which has not been increased in value or improved in condition by a process of manufacture or other means while abroad and which is released under § 10.41a is not subject to entry filing or the payment of duty if it is diverted or otherwise withdrawn.

The bond condition relating to control of containers and instruments of international traffic is found in § 113.66, Customs Regula-

tions (19 CFR 113.66). However, a review of the bond condition reveals that no provision has been made in § 113.66(a)(2) for the exemption from entry for a U.S. instrument which has not been increased in value or improved in condition as set forth in the latter part of § 10.41a(d). Accordingly, it is proposed to amend § 113.66(a)(2) to incorporate this exemption.

Another area where Customs believes an amendment would be appropriate relates to the consequences of default provision of the basic importation and entry bond condition of § 113.62, Customs Regulations (19 CFR 113.62). As presently written there is no liquidated damages provision for failure to deposit estimated duties and taxes within the time prescribed by law or regulation.

Under the provisions of § 505, Tariff Act of 1930, as amended (19 U.S.C. 1505), duties must be deposited with Customs at the time of making entry, or at such later time as may be prescribed by regulations. Section 141.101, Customs Regulations (19 CFR 141.101), generally provides, with certain identified exceptions, that estimated duties must be deposited with Customs at the time of filing the entry documentation or the entry summary documentation when it serves as both the entry and entry summary. One of the identified exceptions relates to merchandise released under entry documentation. Under this exception, deposit of estimated duties must be made at the time the entry summary is filed. Section 142.12, Customs Regulations (19 CFR 142.12), requires the filing of the entry summary, with estimated duties attached, within 10 working days after the time of entry.

Section 113.62, Customs Regulations, incorporates the above requirements into paragraph (a) of the bond condition relating to the agreement to pay duties, taxes, and charges. In order to provide an additional enforcement tool to insure timely deposit of estimated duties, Customs proposes to amend the consequences of default provisions found in § 113.62(i) by adding a new paragraph (4) which provides for payment of liquidated damages for each default involving failure to deposit estimated duties and taxes within the time prescribed by law or regulation in the amount of $50 and, for each day late, 1 percent of the undeposited estimated duties and taxes due. These amounts are consistent with the amount of liquidated damages assessed under the old General Term Bond, Customs Form 7595, and Immediate Delivery and Consumption Entry Bond (Term), Customs Form 7553, prior to the revision of the Customs bond structure by T.D. 84-213.

Further, to avoid any unnecessary litigation if we attempt to collect liquidated damages under a bond, it is proposed to amend the bond conditions set forth in §§ 113.62(a), 113.63(g)(1), 113.64(a), 113.64(c), 113.65(a)(3), 113.65(b), 113.66(c), 113.67(b)(1), 113.68(b), 113.69, 113.70, 113.71(b), 113.72, and 113.73(a)(2), Customs Regulations (19 CFR 113.62(a), 113.63(g)(1), 113.64(a), 113.64(c), 113.65(a)(3), 113.65(b), 113.66(c), 113.67(b)(1), 113.68(b), 113.69, 113.70, 113.71(b),

113.72, 113.73(a)(2)), to specify that the principal and surety are "jointly and severally" liable under the bond.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 1229.. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), it is certified that, if adopted, the proposed regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, the regulations are not subject to the regulatory analysis requirement of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 113

Customs duties and inspection, Imports, Surety bonds.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Part 113, Customs Regulations (19 CFR Part 113), as set forth below.

PART 113—CUSTOMS BONDS

1. It is proposed that the authority for Part 113 continue to read as follows:

AUTHORITY: 19 U.S.C. 66, 1623, 1624.

2. It is proposed to amend § 113.62(i) by adding a new paragraph (4) to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * * * *

(i) * * *

(4) If the principal defaults on the agreements in condition (a)(1)(i) by failing to deposit estimated duties and taxes within the time prescribed by law or regulation, the obligors agree to pay liquidated damages for each default in the amount of $50 and, for each day late, 1 percent of the undeposited estimated duties and taxes due.

3. It is proposed to revise § 113.66(a)(2) to read as follows:

§ 113.66 Control of containers and instruments of international traffic bond conditions.

* * * * * * *

(a) * * *

(2) Promptly enter the instrument unless exempt from entry; and

* * * * * * *

4. It is proposed to amend §§ 113.62(a), 113.63(g)(1), 113.66(c), 113.67(b)(1), 113.68(b), 113.69, 113.70, 113.71(b), 113.72, and 113.73(a)(2) by adding a comma and "jointly and severally" after the word "surety".

5. It is proposed to amend § 113.64(a) by adding "(principal and surety, jointly and severally)", after the word "obligors".

6. It is proposed to amend § 113.64(c) by removing "(principal and surety)" from the second sentence.

7. It is proposed to amend §§ 113.65(a)(3) and 113.65(b) by removing "agrees" and inserting, in its place, "and surety, jointly and severally agree".

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 11, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 4, 1986 (51 FR 27875)]

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19 CFR Part 12

Proposed Customs Regulations Amendment Relating to Enforcement of Protection of Semiconductor Chip Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to require that persons seeking exclusion of infringing semiconductor chip products first obtain a court order enjoining, or an order of the U.S. International Trade Commission excluding, the

importation of the products. Customs will then enforce the court order or exclusion order. This action is being taken to protect the rights that have been granted to owners of semiconductor chip products under the Semiconductor Chip Protection Act of 1984.

DATE: Comments must be received on or before September 29, 1986.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Samuel Orandle, (202) 566-5765; Operational Aspects: Louis S. Alfano, (202-566-8651).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 8, 1984, the President signed into law (Pub. L. 98-620) a bill (H.R. 6163) containing a wide array of intellectual property reforms. Title III of Pub. L. 98-620, cited as the "Semiconductor Chip Protection Act of 1984," adds a new chapter 9 to title 17, United States Code (17 U.S.C. 901-914), providing for protection of mask works that are fixed in semiconductor chip products. A mask work is defined as a series of related images, however fixed or encoded, that represent the three-dimensional patterns in the layers of a semiconductor chip. It is fixed in a semiconductor chip product when its embodiment in the product is sufficiently permanent or stable to permit the mask work to be perceived or reproduced from the product for a period of more than transitory duration.

The development costs for a single new semiconductor chip can reach $100 million. The same chip can be copied for approximately $50,000. As a result, firms with no research and development costs to recoup can set their prices far lower than can firms which have underwritten the development costs. Thus, firms producing unauthorized copies of mask works have a large unearned competitive advantage over the innovating firm. This suggests that the scope of the problem of unauthorized importations of infringing semiconductor chips may be considerable. However, no factual data exists as to the extent of unauthorized importations.

As a condition of the protection extended to mask works under 17 U.S.C. 908(a), protection terminates "if application for registration of a claim of protection in the mask work is not made * * * within 2 years after the date on which the mask work is first commercially exploited." The U.S. Copyright Office has been designated to administer the registration system for mask works.

The owner of a registered mask work has the exclusive right, under 17 U.S.C. 905, to reproduce it and to import and distribute a semiconductor chip product in which the mask work is embodied. In addition, pursuant to 17 U.S.C. 906, the owner of a particular semiconductor chip product made by the owner of the mask work may import or distribute or otherwise dispose of or use, but not reproduce, that particular semiconductor chip product without the authority of the owner of the mask work. The term of protection for the mask work owner is 10 years from the date on which the mask work is registered, or the date on which the mask work is first commercially exploited anywhere in the world, whichever occurs first.

Under 17 U.S.C. 910(c)(1), the Secretary of the Treasury and the U.S. Postal Service are empowered to separately or jointly issue regulations for the protection of the rights of the mask work owner with respect to importations. These regulations may require, as a condition for the exclusion of articles from the U.S., that the person seeking exclusion take any one or more of the following actions:

(1) obtain a court order enjoining, or an order of the U.S. International Trade Commission under §337, Tariff Act of 1930 (19 U.S.C. 1337), excluding, importation of the articles;

(2) furnish proof that the mask work involved is protected under 17 U.S.C. 905 and that the importation of the articles would infringe the rights of the mask work owner; and/or

(3) post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

Under options (2) or (3), which involve a Customs determination on its own that an imported mask work is infringing, without the intervention of a court or the USITC, articles which are imported in violation of the rights set forth in 17 U.S.C. 905 are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Any such forfeited article may be destroyed as directed by the Secretary of the Treasury, except that the article may be returned to the country of export whenever it is shown to the satisfaction of the Secretary that the importer had no reasonable grounds for believing that his acts constituted a violation of the law.

The Semiconductor Chip Protection Act became effective upon its enactment on November 8, 1984. However, 17 U.S.C. 913(a) held the registration and enforcement mechanisms in abeyance for 60 days. These registration mechanisms and enforcement provisions, therefore, went into effect on January 9, 1985.

Customs has considered all three of the options for protection of the mask work owner's rights under 17 U.S.C. 905 and decided that options (2) and (3) are not advisable. These options would require that Customs provide mask work protection in a similar manner to the way it protects copyrights. Under either of these options,

owners would be required to record their registered mask works with Customs for a prescribed fee and Customs officers would have to interdict imported articles containing semiconductor chip products in order to identify those which infringe a recorded mask work.

There are several reasons which militate against Customs adoption of procedures similar to those used for enforcement of the copyright laws to protect the rights of mask work owners. First, an expert knowledge of semiconductor chip technology is required of anyone testing a semiconductor chip to determine whether the mask work embodied in the chip is infringing. Customs has neither the required expertise on the part of its inspectional staff nor the resources or funds to allocate or to train Customs officers for this task.

Secondly, the suspected infringing semiconductor chip is often incorporated in such consumer articles as personal computers, microwave ovens and projection televisions. These articles would have to be disassembled in order to extract the suspected infringing chip for testing purposes. Considering Customs limited resources and the time-consuming nature of this enterprise, it would be operationally unfeasible.

Thirdly, once a chip is extracted for testing, the process of determining whether infringement exists would involve a full adjudicatory review by Customs, with most likely multiple presentations of evidence and in-depth analysis of highly technical material. Customs does not have hearing examiners for such adjudications, nor a panel of experts to review the technical evidence. It would most likely be necessary for Customs to resort to outside expert witnesses to assist in the administrative review process. This could easily lead to a period in excess of 18 months, particularly since Customs is involved in many enforcement tasks and does not have the time or resources to commit to an expedited adjudication of semiconductor infringement cases. Also, the necessity to adjudicate mask work infringement matters would place Customs in a position of adjudicating in an area in which there are no legal guidelines for making an infringement determination (as there are for copyright cases), due to the recentness of the semiconductor protection law. Absent such guidelines, Customs would not be in a position to deal with infringement issues effectively. Any attempt to do so could result in lengthy and costly administrative proceedings, without effective enforcement. During the pendency of the administrative proceedings, Customs would anticipate considerable difficulties in locating storage facilities for articles under detention. Also, the costs of storage to the government and the importer would be considerable. Under the option Customs is proposing, high storage costs would not be anticipated.

Customs believes that the adjudication of semiconductor chip infringement issues is the appropriate domain of the USITC or the

courts for several reasons. First, the USITC was created to decide issues relating to trade. This Commission, because of its experience with such matters as patents, has acquired an expertise that is essential to the resolution of complex infringement issues such as those raised by the Semiconductor Chip Protection Act. Secondly, in consideration of the novelty and controversial nature of chip infringement cases, and the lack of any guidelines upon the matter, it is appropriate for the courts or the USITC to decide these cases in order to establish legal precedents, as they now do with respect to patent, trademark, and copyright infringement issues. Once the case is decided, Customs will enforce the court order, or USITC orders pursuant to § 12.39(b), Customs Regulations (19 CFR 12.39(b)), as modified by this proposal.

Customs further believes that an adjudication of the subject infringement issue in the courts or the USITC would be preferable to its own enforcement because the courts and the USITC can expeditiously and successfully balance the competing interests of the importer and the domestic producer of semiconductor chips. The importer of suspected infringing chips would prefer to have the chips or the articles incorporating the chips allowed into the U.S. pending resolution of the infringement question. Also, the domestic producer of semiconductor chips would prefer to have all suspected infringing chips or articles containing them detained pending the determination. The adjudication procedures of the USITC and the courts can expeditiously accommodate these interests. Pursuant to § 210.12, U.S. International Trade Commission Regulations (19 CFR 210.12), the USITC has 30 days after receipt of a complaint or, in exceptional circumstances, as soon after such period as possible, in which to institute an investigation. Thereafter, under § 337(b), Tariff Act of 1930 (19 U.S.C. 1337(b)), the USITC is required to conclude its investigation and make a determination at the earliest practicable date, but not later than one year (or 18 months in more complicated cases) after the date of publication of notice of the investigation. During the course of investigation, however, if the Commission determines that there is reason to believe that there is a violation of 19 U.S.C. 1337(a), it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the U.S., unless such exclusion is deemed not to be in the public interest. The courts may also expedite and provide for several alternative procedures in handling infringement cases.

It should be noted that, as stated in House Report 98-781, dated May 15, 1984, Customs assistance in enforcing the protection extended to owners of rights in a mask work incorporated into a semiconductor chip is in addition to, not in lieu of, the owner's other rights and remedies, such as the right to attempt to secure an injunction against importation from a court or an exclusion

order from the USITC under 19 U.S.C. 1337. However, as the House Report further notes, Customs may insist upon such orders as a condition precedent to its action, when the nature of the case so requires to prevent error or injustice.

ACTION

To address this problem, Customs proposes to amend § 12.39, Customs Regulations (19 CFR 12.39), by adding a new paragraph (d) to require that persons seeking exclusion of infringing semiconductor chip products first obtain a court order enjoining, or an order of the U.S. International Trade Commission (USITC) under § 337, Tariff Act of 1930 (19 U.S.C. 1337), excluding, importation of the articles. Exclusion orders issued by the USITC are enforceable by Customs under § 12.39(b), Customs Regulations.

The proposed amendment would specify that the regulation would be effective against all importers regardless of whether they have knowledge that their importations are in violation of the Semiconductor Chip Protection Act. Thus, importers who claim that they had no knowledge that their importations were violative would not be able to use this claim as a defense against injunctive relief obtained by the mask work owner.

It is noted that the Commissioner of Customs would not be a party to the action in which injunctive relief is being sought from the court. Inasmuch as Customs will enforce any order of the court, it is not necessary to name the Commissioner as a defendant in the action. The proper parties to be named as defendants before the court are those persons involved in the importation of the alleged violative articles.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. In particular, we are requesting the submission of information that would contribute to an improved understanding concerning the extent of importations alleged to infringe protected mask works embodied in semiconductor chips. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. It will affect only importers of semiconductor chip products and owners of these products who register them. Accordingly, the proposed amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 12

Customs duties and inspection, Imports, Unfair competition.

Proposed Amendments

It is proposed to amend Part 12, Customs Regulations (19 CFR Part 12), as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 would continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624.

§ 12.39 also issued under 19 U.S.C. 1337, 1623; 17 U.S.C. 910;

2. It is proposed to amend § 12.39, Customs Regulations, by adding a new paragraph (d) to read as follows:

§ 12.39 Imported articles involving unfair methods of competition or practices.

* * * * * * *

(d) *Importations of semiconductor chip products.*

(1) When the owner of a mask work which is registered with the Copyright Office seeks to have Customs deny entry to any imported semiconductor chip products which infringe his rights in such mask work, the owner must obtain a court order enjoining, or an order of the U.S. International Trade Commission (USITC) under § 337, Tariff Act of 1930, as amended, excluding, importation of such products. Exclusion orders issued by the USITC are enforceable by Customs under § 12.39(b), Customs Regulations (19 CFR 12.39(b)). Court orders or exclusion orders issued by the USITC shall be forwarded, for enforcement purposes, to the Director,

Entry, Procedures and Penalties Division, U.S. Customs Service, Washington, D.C. 20229.

(2) The district director shall enforce any court order based upon a mask work recordation in accordance with the terms of such order. Court orders may require either denial of entry or the seizure of violative semiconductor chip products. Forfeiture proceedings in accordance with Part 162 of this chapter shall be instituted against any such products so seized.

(3) This regulation will be effective against all importers regardless of whether they have knowledge that their importations are in violation of the Semiconductor Chip Protection Act (17 U.S.C. 901-904).

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 11, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 29, 1986 (51 FR 27057)]

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19 CFR Part 175

Receipt of Domestic Interested Party Petition Concerning Classification of Orange Juice Concentrate-Based Product

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed interpretive rule; solicitation of comments.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party with respect to a Customs ruling that an orange juice concentrate-based product consisting of orange juice concentrated to 65° Brix to which certain ingredients were added was classified under item 183.05, Tariff Schedules of the United States (TSUS), as other edible preparations, not specially provided for. The petitioner contends that the subject product should be classified under item 165.29, TSUS, as concentrated orange juice or orange juice made from concentrated orange juice. The petitioner argues that orange juice is now provided for *eo nomine* in the TSUS because of an amendment by the Trade and Tariff Act of 1984 (P.L. 98-573). This document invites comments with respect to the correctness of the classification.

DATE: Comments must be received on or before September 29, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Thomas L. Lobred, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a domestic interested party petition has been filed with respect to a decision in which Customs ruled that an orange juice concentrate-based product consisting of orange juice concentrated to 65° Brix to which certain ingredients were added was classified under item 183.05, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202).

On July 26, 1984, Customs issued ruling 553167 (C.S.D. 84-117, 18 Cust. B. and Dec. No. 49 at 43, December 5, 1984), which stated that a product consisting of 87 percent orange juice concentrate (65= Brix), 10.5 percent orange peel extract, 2.25 percent citrus acid and less than one percent total of sodium benzoate, orange oil and artificial color was properly classifiable under the provision for other edible preparations, not specially provided for, in item 183.05, TSUS.

In this ruling, Customs dismissed classification under item 166.40, TSUS, as beverages, not specially provided for, and item 165.35, TSUS, as other citrus fruit juice concentrate (now item 165.36, TSUS). Customs did not find item 166.40, TSUS, applicable because Headnote 1, schedule 1, part 12, subpart B, TSUS, indicates that item 166.40, TSUS, only covers products fit for use as beverages, and the subject product is not, in its condition as imported, potable and ready to consume. Classification under item 165.35, TSUS, was stated to be precluded because the subject product was not within the common or commercial understanding of orange juice concentrate, having been processed beyond the scope thereof by the addition of significant and substantial "foreign" or excess ingredients.

On October 17, 1985, a petition was submitted on behalf of a domestic interested party representing domestic citrus growers. The petitioner challenges the tariff classification holding in C.S.D. 84-117. The petition states that the tariff provision relating to fruit juices was amended by § 117 of the Trade and Tariff Act of 1984 (P. L. 98-573), to include in new items 165.27 and 165.29, TSUS, an *eo nomine* provision for orange juices, both in natural and in all other forms.

The petitioner argues that the basic principles of tariff classification require that the subject product be classified under item 165.29, TSUS, because an *eo nomine* designation such as item 165.29, TSUS, without limitation or shown contrary legislative intent, judicial decision or administrative practice, and without proof of commercial designation, will include all forms of the arti-

cle. The mere fact that there may be some added ingredients does not preclude its classification in the *eo nomine* provision. It is argued that the added ingredients do not alter the subject product's essential character as orange juice concentrate.

The petitioner also argues that Customs definition of orange juice, which is adopted from FDA's standards of identity, is questionable as FDA regulations should not define or determine the common meaning of the term for tariff purposes.

COMMENTS

Pursuant to § 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on this issue. The domestic interested party petition, as well as all comments received in response to this notice, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This notice is published in accordance with § 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: July 14, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 30, 1986 (51 FR 27196)]

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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Vol. 20 AUGUST 20, 1986 No. 33

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

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U.S. Customs Service

Treasury Decision

(T.D. 86-150)

Recordation of Trade Name: "CHRISTIAN KIM, INC."

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On April 28, 1986, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CHRISTIAN KIM, INC." was published in the Federal Register (51 FR 15857). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in opposition to the recordation and received not later than June 27, 1986. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "CHRISTIAN KIM, INC." is recorded as the trade name used by Christian Kim, Inc., a corporation organized under the laws of the State of California, located at 124 East Olympic Boulevard, Los Angeles, California 90015. The trade name is used in connection with footwear, manufactured in Korea.

DATE: August 7, 1986.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: August 4, 1986.

EDWARD T. ROSSE
(For Director, Entry Procedures
and Penalties Division).

[Published in the Federal Register, August 7, 1986 (51 FR 28480)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 6, 1986.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 86-17)

This ruling holds that Customs bonds are to be interpreted in accordance with applicable statutes and regulations and not in accordance with the doctrine pertaining to contracts of adhesion. The face amount of a Customs bond establishes the bond obligors' limit of liability. This ruling further addresses the proper interpretation of a Customs bond and analyzes the provisions of a proprietor's warehouse bond (19 U.S.C. 1555, 19 U.S.C. 1623(a), 19 CFR 19.6, 19.12 and 144.39).

July 9, 1985
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Issues: 1. Whether the obligation in a proprietor's warehouse bond to get permission to withdraw merchandise before withdrawing merchandise or the obligation to put permits in the permit file folder is ambiguous?

2. If language in a proprietor's warehouse bond is ambiguous what rule of construction applies?

3. Whether the face amount of a bond given by a warehouse proprietor is the bond obligors' liability limit for a breach?

Facts: Customs made 8 demands for liquidated damages totaling $418,379.60 against the bond of a proprietor of a Customs bonded warehouse. The bond was in the principal amount of $50,000. Customs asserted the demands for unauthorized withdrawals of mer-

chandise from the warehouse for and failure to file permits in the proprietor's warehouse folder.

Law and Analysis:

Is the bond language ambiguous?

The first issue is whether the bond language in issue is ambiguous. The bond was published in appendix A to T.D. 82-204 (16 Cust. Bull. 575 (1982)). Paragraph 5(a) provides that the proprietor will before any removal insure that Customs has given either specific or blanket permission for the removal. Paragraph 3 contains agreements to record identification data of all packages and file a record in the permit file folder, to file within 2 business days after the event occurs all specific removals and blanket removals, and to maintain that permit file folder for Customs inspection.

The bond was required under 19 U.S.C. 1555 and 19 U.S.C. 1623(a). The latter statute confers authority to require a bond for the protection of the revenue or to assure compliance with any Customs Regulation. The requirements for withdrawal of merchandise are in 19 CFR 19.6 and 144.39. The recordkeeping requirements for the proprietor of a Customs bonded warehouse are in 19 CFR 19.12. With respect to permit file folders, the requirements are set in paragraph (a)(2) of that section.

As required by the Administrative Procedure Act with respect to informal rulemaking, the bases for regulatory requirements were discussed. In T.D. 82-204 at 16 Cust. Bull. 540 with respect to withdrawal requirements:

> One commenter, citing language from the NPRM which indicated that the notice proposed to provide for release of goods directly to the warehouse proprietor by Customs officers at the customhouse, rather than at the warehouse, objected, because it believed it would be necessary to have all withdrawals "signed off" at the customhouse.
>
> Under section 19.6(a) a warehouse officer may release goods to a proprietor only upon a permit signed by the district director. Since no warehouse officer will be present at the warehouse under the revised system, the permit of the district director extends directly to the proprietor. The purpose of the permit is to assure the district director that all duties and taxes are paid and all laws and regulations are complied with before the goods are removed from Customs custody in the warehouse.

In the same document, at 16 Cust. Bull. 529-531, the recordkeeping requirements were discussed. At 16 Cust. Bull. 539 the underlying basis for those requirements was set forth:

> The new warehouse program will require intense audits of warehouse facilities on a random basis. To provide for the least disruption to the warehouse facility operation, audits will be coordinated with the warehouse proprietor. To assure Customs that warehouse operations are in accordance with regulatory

> requirements, inspectional teams will make unannounced visits to all warehouse premises and perform spot check inventory counts and limited reviews of warehouse proprietor records. Although these reviews will not be as intense as an audit, they will provide Customs an opportunity to view warehouse proprietor compliance with the regulations. Any questionable practices uncovered during an inspectional visit may be used by the Customs Regulatory Audit Division to initiate an audit of the warehouse proprietor.

The discussion of the provisions and of the comments received provides a basis for judicial review in interpreting the regulations. In this respect, the discussion under supplementary information in the final rule document is akin to legislative history. *Automotive Parts and Accessories Ass'n., Inc.* v. *Boyd,* 407 F. 2d. 330, 338 (DC Cir. 1968). In that case at page 338, the court said:

> The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future.

The reason for requiring a proprietor to insure that Customs has given permission for a removal before allowing the merchandise to be withdrawn is clearly stated in 19 CFR 19.6(b). That is, a district director must determine whether physical supervision of the withdrawal is desirable. By withdrawing before permission is given, a proprietor cuts off that function. It seems equally obvious that a system which is keyed to control by a random spot-check and audit procedure needs accurate, up-to-date records. Otherwise, random spot-checks will lack validity. The failure to have accurate, up-to-date records challenges the integrity of the entire concept of random spot-checks as a means of assuring Government control over warehoused goods.

Depriving the Customs Service of an independent verification before withdrawal is as critical in a warehouse situation as it was in the case of *U.S.* v. *Lockheed Petroleum Services,* Fed. Cir. Appl. No. 82-35 (May 11, 1983). It is clear that the bond language merely repeats or paraphrases the regulatory language.

Petitioner contends that the provision becomes effective only if approval is never given. In its petition dated April 2, 1985, at page 2 and the one dated October 26, 1984, at page 14, petitioner conceeded that the merchandise was withdrawn before permission was given by Customs. Petitioner points to the word "due" in the provision in support of its argument. Petitioner cites the case of *Scutti Pontiac, Inc.* v. *Rund,* 402 N.Y.S. 2d. 144, 92 Misc. 2d. 881 (1978) in support of its view. The issue in *Scutti Pontiac* was whether a contract existed. Here, in its petition dated October 26, 1984, petitioner, at page 6, states that the bond was signed by the petitioner and does not challange the bond's validity on those grounds. The case of

Connie's Const. v. *Fireman's Fund Ins.*, 227 N.W. 2d. 207 (Iowa 1975) also cited by petitioner, involved an interpretation of the words "care, custody, or control" and "physical control" within the meaning of a construction insurance policy. The relevance of those words to the word "due" here is not clear. A liquidated damages provision similar to the one at issue was discussed by the court in *Kreatz and Co.* v. *U.S.*, 20 C.C.P.A. 109, 113, T.D. 45752 (1932). It said that a bond provision which required an importer to export certain articles under Customs supervision or be liable under the bond for an amount equal to the invoice value of the goods together with the duty thereon did not contemplate the payment of duty as such. Instead, the reference to invoice value and duties was simply for the purpose of determining the penalty. Since the condition would likely be breached without knowledge of Customs it could well be impossible to calculate the duties as of the time of withdrawal. The provision simply provides a measure, it does not seek the duties as such. In view of the foregoing, we conclude the language is not ambiguous.

What rule of interpretation is appropriate with respect to a Customs bond provision?

The second issue is what interpretive rules apply to Customs bond language. The petitioner contends that ambiguous language in a Customs bond should be construed against the Customs Service based on the doctrine of contracts of adhesion. Petitioner also contends that if the bond is to be interpreted in light of the statute, the statutory purpose was satisfied by the payment of duty and that the breach was de minimis.

Although we have concluded that the language is not ambiguous, we believe it will be useful to address the points raised by the petitioner in this issue.

The petitioner cites several cases in support of its contention that a Customs bond is a contract of adhesion. None of those cases are persuasive. None of those cases involved a bond required by a Government agency pursuant to statutory authority. A contract of adhesion has been defined as a standardized contract form offered to consumers of goods and services under such conditions that a consumer cannot obtain the desired product or service except by acquiesing in a form contract. Blacks Law Dictionary, 4th Ed. (1968). The doctrine was developed on grounds of public policy. *Steven* v. *Fidelity and Casualty Co. of New York*, 27 Cal. Rptr. 172, 185, 337 P. 2d. 284 (1962); *Neal* v. *State Farm Ins. Co.*, 10 Cal. Rptr. 781, 784 (1961); and *C and J Fert. Inc.* v. *Allied Mutual Ins., Co.*, 227 N.W. 2d. 169. (Sup. Ct. Iowa, 1975).

The first case cited by the petitioner is *Almers* v. S.C. *Nat. Bank of Charleston*, 217 S.E. 2d. 135 (1975). The contract in issue involved a noncompetition provision. The court refused to enforce it because it found that the provision was contrary to the public interest. In the second case, *Steven* v. *Fidelity and Casualty Co. of New York*,

supra, an insurance company tried to avoid paying the beneficiary of the deceased insured by claiming that the use of nonscheduled air carriers was an excluded risk. The court refused to enforce the provision because there was an absence of plain and clear notification to the public of the exclusion when the company sold its policy by vending machines. Compare that salient fact in *Steven* with the informal rulemaking procedure required in publishing the Customs bond and regulations here. In *Neal* v. *State Farm Ins. Co., supra*, the court found that a careful analysis of an employment contract failed to reveal any ambiguity and enforced the provision. In view of the result, it is unclear what support is given to the petitioner's contention by the *Neal* decision. In *C and J Fert. Inc.* v. *Allied Mutual Ins. Co., supra*, the contract provision in issue defined burglary to mean that the exterior of the protected building had to be damaged, regardless of the interior's condition, before the insurance would apply. The court held that the only legitimate purpose of the provision was to prevent "inside jobs." The court found no evidence of an "inside job" because the interior doors were damaged to complete the theft. The court's reasoning at page 174 in the *C and J Fert.* case clearly demonstrates why a Customs bond, which is required pursuant to a statute, is not a contract of adhesion.

> The concept that persons must obey public laws enacted by their own representatives does not affect a fundamental sense of justice: an inherent element of assent pervades the process. But the inevitable result of enforcing all provisions of the adhesion contract, frequently, as here, delivered subsequent to the transaction and containing provisions never assented to, would be an abdication of judicial responsibility in the face of basic unfairness and a recognition that persons' rights shall be controlled by private lawmakers without the consent, express or implied, of those affected.

The next case cited is *Ferguson* v. *Phoenix Assurance Co. of N.Y.*, 370 P. 2d. 379, 189 Kan. 459 (1962). This case also involved a burglary insurance policy provision substantially the same as the one involved in the *C and J Fert. Inc.* case, *supra*, with much the same result and reasoning by the court. The next case cited, *USAchem, Inc.* v. *Goldstein*, 512 F. 2d. 163 (2nd Cir. 1975), involved a covenant not to compete. That is, the same type of contract that was involved in the *Almers* v. *S.C. Nat. Bank of Charleston* case, *supra*. There the court found that New York cases show an unsympathetic view of postemployment restrictions because such provisions tended to obstruct the public policy in favor of fair and open competition. In distinction to such contracts, a bond required by a Federal agency, pursuant to statute, is itself an expression of public policy because the public policy of a government is to be found in its statutes and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government

officials. *Simmons* v. *U.S.*, 120 F. Supp. 641, 648 (M.D. Pa. 1954). The final cases cited on this point by the petitioner are the trial and appellate decisions in *United Equities Co.* v. *First Nat. City Bank*, 374 N.Y.S. 2d. 937 (1975) rev'd. 383 N.Y.S. 2d. 6 (1976). The *United Equities* case concerned a contract for the future purchase of foreign currency. At page 19 of the petition dated October 26, 1984, certain language purportedly from one of the cases is quoted. It is unclear which decision is meant to be quoted. However, the quoted passage does not appear in either decision. In any event, the appellate decision held that the trial court erred in applying the rule of construction that the petitioner here urges. At 383 N.Y.S. 2d. 12 the appellate court said:

> It is true that the paragraph goes on to say that the "time of delivery shall be automatically extended" etc. and that the contract was drawn by the defendant and thus according to accepted canons of construction is to be construed most strictly against the party drawing it. But the realities of the situation should not be sacrificed on the altar of a canon of construction.

In the *United Equities* case the plaintiff contended that it could use the contract's extension provision to its own benefit. The appellate court held that the provision was for the benefit of the defendant and, regardless of a canon of construction, it only applied if the defendant lost control over the transaction. Since the appellate court found that the defendant did not lose control over the transaction, the appellate court refused to give effect to the extension provision. In short, the appellate court, unlike the petitioner here, held that blind application of a canon of construction was improper.

In summary, none of the cases on which the petitioner relies holds that a Federal Government bond is a contract of adhesion. None of the cases holds that a canon of construction is to be applied regardless of the facts. On the contrary, each of the cited cases show that the respective courts were more concerned with the actual facts than with a rule of construction. It is clear that the cited cases show that the rule of construction, when appropriately applied, is based on the grounds of public policy. For these reasons, the cited cases fail to demonstrate that a performance bond required by a Federal agency pursuant to a statute is against public policy and is a contract of adhesion.

The petitioner asserts that the subsequent payment of duty by the petitioner cures the breach and therefore satisfies the statutory purpose. The petitioner also asserts that the breach was a harmless error and was de minimis. The obligation to pay duty is independent of the obligation to obtain permission to withdraw warehoused merchandise before withdrawing that merchandise and is independent of the obligation to properly keep records of the warehoused merchandise. As has already been pointed out, paragraph 5(a) of the bond concerns compliance with withdrawal procedures and paragraph 3 of the bond concerns recordkeeping requirements.

Paragraph 1 of the bond contains the agreement of a warehouse proprietor to indemnify the Government against loss. To hold that three separate bond paragraphs cover only one situation simply ignores the plain language of those paragraphs. When the petitioner withdrew the merchandise before it had permission to do so, the breach was complete. Subsequent payment of the duty does not cure the breach. The best answer to the petitioner's assertion of a so-called cure is found in another case cited by the petitioner, *Coughlin* v. *Blair*, 262 P. 2d. 305 (Sup. Ct., Cal., 1953). That case involved a realty sales contract. The defendant had contracted to perform certain work, such as building roads and utilities. The work was not performed and the plaintiff sued. After the suit was filed the defendant performed some of the work. The defendant argued that it should receive credit for any work that it performed after the suit was filed. At 262 P. 2d. 314 the court said:

> Subsequent work to that end would not be performance of a contract then existent but would be entirely voluntary. If prompted by defendants' self interest in the sale of other lots, such gratuitous benefit, wholly speculative on the record, would not constitute unjust enrichment to plaintiffs. Parties who have breached a contract cannot force performance on the injured parties.

Paying the duty simply has no bearing on the obligation to obtain permission before withdrawing any warehoused merchandise or the obligation to comply with the regulations on recordkeeping; paying the duty does not cure either breach.

With respect to the contention that failure to comply with the regulatory procedures on withdrawals and recordkeeping are harmless clerical errors and de minimis, it should be observed that both breaches strike at the very heart of the random sample inventory and audit concept. Because of their importance to the functioning of the new warehouse system, they were expressly provided for in the regulations and in the bond.

A Customs bond is properly construed in accordance with the statute and regulations. 12 Am Jur. 2d., Bonds, sections 2 and 26; *Williston On Contracts*, section 625, page 835 (3rd Ed. 1972); *Simmons* v. *U.S.*, 120 F. Supp. 641, 646 (M.D. Pa. 1954); *Heifner* v. *Soderstrom*, 134 F. Supp. 174, 180 (M.D. Iowa, 1955); *U.S.* v. *De Visser*, 10 F. 642, 648 (S.D. N.Y. 1882); *U.S.* v. *Dieckerhoff*, 202 U.S. 303, 309–310 (1905); *Eagle Indemnity Co.* v. *U.S.*, 22 F. 2d. 388, 391 (4th. Cir. 1927), cert. den. 276 U.S. 624; *Kreutz and Co.* v. *U.S.*, 20 CCPA 109, 113, T.D. 45752 (1932); *U.S.* v. *Anchor Warehouses, Inc.*, 92 F. 2d. 57, 58 (2nd Cir. 1937), cert. den. 302 U.S. 755; *U.S.* v. *Gissel*, 353 F. Supp. 768, T.D. 73–86 (1973) aff'd. 493 F. 2d. 27 (5th. Cir. 1974), cert. den. 419 U.S. 1012; and *U.S.* v. *St. Paul-Mercury Indemnity Co.*, 194 F. 2d. 68 (3rd Cir. 1952).

The petitioner argues that the law of California governs the amount of damages and cites the *Coughlin* v. *Blair* case, *supra*.

That case dealt with damages measured by the value of realty if the defendants had performed compared with the value of the realty without performance. It is clear from the opinion that the dispute did not involve a liquidated damages provision as does the Customs bond here. Further, since this is a Federal bond exacted pursuant to a Federal statute it is unclear whether a state decision is applicable.

In the case of *Simmons* v. *U.S., supra,* the court, speaking of a National Service Life Insurance policy, said at page 646:

> The validity and construction of such policies and their consequences on the rights and obligations of the parties present questions of federal law and are not controlled by the law of any state. *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 366, 63 S. Ct. 573, 87 L.Ed. 838; *United States* v. *Allegheny County,* 1944, 322 U.S. 174, 183, 64 S. Ct. 908, 88 L.Ed 1209; *Woodward* v. *United States,* 8 Cir. 167 F. 2d. 774, at pages 778–779; *Pack* v. *United States,* 9 Cir., 1949, 176 F. 2d. 770, at page 771. Similarly the interpretation of words used therein is a federal question, *N.L.R.B.* v. *Hearst Publications, Inc.,* 322 U.S. 111, 64 S.Ct. 851, 88 L. Ed. 1170, not to be determined by local law unless a particular statute is construed so as to have the meaning of a particular term depend upon applicable state law. *Lembcke* v. *United States,* 2 Cir., 1950, 181 F. 2d. 703, at page 706.
>
> Speaking of the National Service Life Insurance Act, the Supreme Court stated: "* * * the statute is an expression of legislative intent rather than the embodiment of an agreement between Congress and the insured person. Only the intent of Congress, which in this case is the insurer, need be ascertained to fix the meaning of the statutory terms; the layman understanding of the policy holder does not have the relevance here that it has in the construction of a commercial contract." *United States* v. *Zazove, supra,* 334 U.S. at page 611, 68 S.Ct. at page 1288.

In Williston supra it is stated that:

> Although it is said that contracts of sureties furnishing bonds of various types for government construction projects are to be interpreted as are other contracts, it is noteworthy that they are read in conjunction with certain federal statutes. These statutes, it has frequently been declared, are to be construed in favor of their intended beneficiaries, namely, those parties furnishing material or labor on these government projects.

If insurance policies for individual servicemen and government construction bonds to benefit subcontractors and materialmen are to be interpreted in conjunction with the applicable statutes and regulations, how can it be argued that bond provisions which were taken to enforce regulations are subject to state law? If that is the case, then interpretation of the bond could result in the same language being construed 50 different ways. As was said by the court

in the case of *U.S.* v. *St. Paul-Mercury Indemnity Co.*, 194 F. 2d. 68 (3rd Cir. 1952) at page 71:

> Such a course of dealing, fantastically impractical and without justification, could hardly be ascribed to the realistic customs and tax collecting branch of the Treasury Department concerned.

The citation of *Coke* v. *Shanks*, 291, S.W. 362 (Ky, 1927) by the petitioner with respect to the Government's interest being moot is likewise unpersuasive. There, the plaintiff sued to enjoin certain acts and to prevent future acts. The plaintiff did not ask the court to preserve status quo. During the pendency of the suit, the acts sought to be enjoined were completed. The court simply declined to decide the case. Here, the breaches were complete when done, and since the demands for liquidated damages have not been satisfied, this situation is not moot.

As a corollary to its contention that the damages suffered by the Government were harmless or slight, the petitioner contends that the amount of liquidated damages should be slight or nonexistent otherwise they should be construed as penalties. It asserts that the sole Government interest is the collection of duty. Numerous cases are cited by the petitioner on this point, however, those cases are not persuasive.

The petitioner cites various cases in support of the proposition that liquidated damages are to compensate an injured party rather than to penalize the other party. In *Keeble* v. *Keeble*, 5 So. 149, 85 Ala. 552 (1888), the contract provided that the employee was not to become intoxicated and to diligently perform his duties as business manager of the defendant's sole proprietorship or pay $1,000 as liquidated damages. The employee became drunk, abused customers, and otherwise deported himself in such a manner as to injure the business. The employee contended that inasmuch as the breach could have occurred with no actual damages, the court should construe the provision as a penalty and not liquidated damages. That the court refused to do. The court said that it is competent for the parties to stipulate liquidated damages for the breach of an agreement for the very reason that such damages are uncertain, fluctuating, and incapable of easy ascertainment. The warehouse proprietor's bond provision here is similar to the contract in *Keeble* v. *Keeble, supra*. By moving the merchandise without permission, and by failing to have up-to-date records, the proprietor deprived Customs of the ability to supervise the withdrawal and challenged the integrity of the spot check and audit control system. As in the *Keeble* case, *supra*, the damage may be slight or it could be great. In any event, it is not easily ascertainable. If anything, the reasoning and decision in the *Keeble* case, *supra*, supports the Government's position and not the petitioner's. In *Eakin* v. *Scott*, 7 S.W. 777, 70 Tex. 442 (1888), the next case cited by petitioner, the case involved the sale of cattle. The sales contract provided that the

first installment of $8,000 on a total sales price of $50,000 was to serve as a forfeiture if the buyer failed to complete the transaction. The court noted that even though the damages for breach of a sales contract are easily ascertainable under the rules of law, the parties could choose to substitute liquidated damages as the sole consequence of a breach. Under that contract the buyer could limit his damages for failure to complete the sale to $8,000 rather than to be liable for provable actual damages. Again, it is not obvious how this decision offers support to the petitioner. In *Christianson* v. *Haugland,* 203 N.W. 433 (Sup. Ct. Minn. 1925), the court held that a bond provision which fixed the amount to be paid as liquidated damages in lieu of transferring land by a specified time was compensation and not a penalty. In *Davidow* v. *Wadsworth,* 178 N.W. 776 (Supp. Ct. Mich. 1920), the provision involving liquidated damages was in a statute and not in a contract. That alone distinguishes that case from the present case. The case concerned the constitutionality of the statute rather than an interpretation of a contractual provision. In view of the holding that the statute was unreasonable class legislation, it is unclear how that decision supports the petitioner here unless it is now challanging the constitutionality of 19 U.S.C. 1555, 1557, or 1623. In *Forsythe* v. *Central Foundary,* 193 So. 706 (Sup. Ct. Ala. 1940) the issue was whether an Alabama court could entertain a lawsuit under a federal statute, namely the Fair Labor Standards Act of 1938. The statutory provision involved in the case provided an employee with a right to liquidated damages if the employer violated the statutory provisions that set the amount for compensation and weekly work hours. The employer argued that the liquidated damages provision was a penalty, and that 28 U.S.C. 371 gave exclusive jurisdiction to United States courts for penalties and forfeitures incurred under the laws of the United States. The court rejected that argument. It found that the jurisdictional language of the statute was broad enough to confer concurrent jurisdiction on a state court. It reasoned that the provision was not a penalty because elsewhere in the Act, there were express provisions for penalties and that Congress must have known of the distinction. The case concerns a court's jurisdiction rather than an analysis of a liquidated damages provision. In *Shields* v. *Early,* 95 So. 839 (Sup. Ct. Miss. 1923) the issue was whether a down payment on a land purchase contract that was to be forfeited if the buyer failed to perform was a penalty. The court first noted that an interpretation of such a provision is to be decided on the terms and circumstances at the time the contract was made and not as of the time of breach. The court concluded that the damages resulting from a breach of the contract were so uncertain and difficult of computation that the parties must have intended the provision as compensation rather that as a penalty. How that case helps the petitioner is inexplicable. As in *Shields* v. *Early,* when the bond in this case was executed, goods withdrawn

without permission could have resulted in grave damage or little damage to the Government. For example, how can the damage be calculated if the breach occurred with quota goods? It seems obvious that the withdrawal without approval of goods subject to a quota damages the Government even if the duty is paid because the policy underlying the quota has been frustrated. But can such damage be quantified to any greater extent than the breach of a land purchase agreement as in *Shields* v. *Early*?

In *City of Rye* v. *Public Service Mutual Ins. Co.*, 358 N.Y.S. 2d. 391, 34 N.Y. 2d. 470 (1974), the court found that the City lacked statutory authority to demand a penal bond. Unlike the City of Rye, the U.S. Customs Service has authority to require bonds under 19 U.S.C. 1623. The court found the damages alleged by the City were insufficient to support the bond. The basic issue in the *City of Rye* case was stated by the court at 358 N.Y.S. 2d. 394:

> Whether, and under what circumstances, the drastic remedy of penal bonds may be exacted is a matter best left to legislated authority, standards, and limitations.

The case is primarily concerned with municipal authority. That issue simply does not exist here because Congress has conferred on the Customs Service the authority to enact bonds under 19 U.S.C. 1623. In *Dean Vincent, Inc.* v. *McDonough*, 574 P. 2d. 1096, (Sup. Ct. Ore. 1978), the appellate court merely held that there was sufficient evidence to support the jury's findings that the defendants withdrew from the real estate broker's listing contract the next day before any expenses were incurred by the real estate broker and that under those findings, the contract provision for liquidated damages would have been grossly disproportionate. Further, the case involved a burden of proof issue. At the time of trial the rule in Oregon was that a plaintiff had to prove a contract provision for liquidated damages was not invalid. As such, the case does little to advance the petitioner's contention.

Stephen v. *Melson*, 426 F. Supp. 1022 (Del. 1977), like the *Forsythe* v. *Central Foundary* case, is concerned with a court's jurisdiction. It does not involve a contract that contains a liquidated damages provision. The court held that it lacked jurisdiction because the $10,000 diversity limit could not be met. It found that under Delaware law exemplary damages are not available for breach of contract. But this case does not involve exemplary damages; it involves a contractual provision for liquidated damages. As such, the *Stephen* v. *Melson* case appears to have little relevance to the present case.

There are cases which involve Customs bonds that were not discussed by the petitioner's counsel. In *U.S.* v. *Dickerhoff*, 202 U.S. 302 (1906), the Supreme Court dealt with a Customs bond provision that required the return of a conditionally released package unopened. A package ordered to be redelivered was not returned. The importer argued that in many cases, unless the Government was

required to prove actual damages, enforcement of the bond provision would work a serious hardship. That argument is not unlike the petitioner's. The court held that such a consideration should not overcome the purpose of the statute and the terms of the bond given to the Government. In *Eagle Indemnity Co.* v. *U.S.*, 22 F. 2d, 388 (4th Cir. 1927) cert. den. 276 U.S. 624, the court held the Government was entitled to collect the full amount of the bond, which had required the obligors to furnish a landing certificate to Customs, on proof that the obligors failed to provide that landing certificate. In the case of *U.S.* v. *Anchor Warehouses, Inc.*, 92 F. 2d. 57 (2nd. Cir. 1937), cert. den. 302 U.S. 755, the court held that the United States was entitled to collect an amount equal to the full duty due on merchandise surreptitiously removed from a warehouse under the warehouse proprietor's bond even though the importer had given a bond which guaranteed the payment of duty. The loss which the proprietor's bond was held liable for compensation was the loss of the lien on the goods rather than the duty itself. In the case of *U.S.* v. *Atkinson*, 575 F. Supp. 791 (C.I.T., 1983) aff'd. 748 F. 2d. 659 (Fed. Cir. Appeal Nos. 84-808/852, 1984), the ccurt held that the failure to redeliver certain automobiles to Customs made the bond obligors liable for liquidated damages under the bond.

In summary, a Customs bond is to be interpreted in accordance with the applicable statute and regulations. In this instance the statute, 19 U.S.C. 1623, authorizes the Customs Service to demand a bond to enforce compliance with Customs laws and regulations. The applicable regulations, 19 CFR 19.6, 19.12 and 144.39, were secured by the bond provisions in issue. There is no question that the provisions were breached. The cases cited by the petitioner in support of its contentions do not purport to interpret Federal bonds and did not involve the bond language in issue. They are not persuasive.

Does the face amount of a bond set the bond obligors' bond liability?

The final argument is that the face amount of the bond sets the limit of liability for the bond obligors under the bond. To the extent that delay in payment is not a factor, we agree. See *U.S.* v. *Atkinson*, 575 F. Supp. 791 (C.I.T., 1983) aff'd. 748 F. 2d. 659 (Fed. Cir. Appl. Nos. 84-808/852, 1984); *U.S.* v. *Anchor Warehouses*, 92 F. 2d. 57 (2nd Cir. 1937) cert. den. 302 U.S. 755, 58 S. Ct. 282; 12 Am. Jur. 2d., Bonds, sections 28, 45, and 46; and Wisner, "Liability In Excess of the Contract Bond Penalty," 43 Ins. Counsel Journal 105 (October, 1976). A good illustration of the acknowledgement of this general rule by the Customs Service is found in the case of *U.S.* v. *Gissel*, 353 F. Supp. 768 (S.D. Tex, 1973) T.D. 73-86, aff'd. 493 F. 2d. 27 (1974), cert. den. 419 U.S. 1012, 95 S. Ct. 332. There, two bonds, each with a face amount of $10,000 were involved. One bond was obligated on a vessel entry in which duties on foreign vessel repairs

were liquidated at $14,216.96. The other bond was obligated on a second vessel entry in which duties on foreign vessel repairs were liquidated at $57,674.26. The Government there contended that the bond obligors were liable for the payment of the foreign vessel repair entry duties up to the $10,000 limit of each bond. See the lower court's discussion in T.D. 73-86 at 7 Cust. Bull. pages 210-212.

Accordingly, the contractual liability of the bond obligors is limited to $50,000, the face amount of the bond.

Holdings: 1. The bond language which secures the requirement to get permission for withdrawal before withdrawal and the requirement to file permits in the permit file folder, is not ambiguous.

2. Customs bonds are to be construed in accordance with the applicable statute and regulation and not in accordance with the doctrine pertaining to contracts of adhesion. A breach which goes to the substance of a proprietor's obligation is not harmless or de minimis.

3. The face amount of a Customs bond generally forms the bond obligors' limit of liability.

(C.S.D. 86-18)

This ruling holds that calligraphy, an art form using hand-lettering, is considered to be pictorial rather than literary material for purposes of determining if the "manufacturing clause" of the Copyright Revision Act of 1976 (17 U.S.C. 601) applies.

February 24, 1986
Refer to CPR-1 CO:R:E:E
729356 SO

Mr. MARK D. TAYLOR,
Tyndale House Publishers, 336 Gundersen Drive, Box 80, Wheaton, Illinois 60189.

DEAR MR. TAYLOR: This is in response to your letter of February 13, 1986, concerning the publication of an art book entitled DOOR-POSTS. The book will be made up of Bible passages rendered in calligraphy, an art form using hand-lettering. The book will consist preponderantly of this artwork. The Bible passages are from THE LIVING BIBLE, a modern translation of the Bible which is protected by U.S. copyright. You believe that the pages done in calligraphy should be considered to be pictorial or graphic rather than as literary material for purposes of determining if the "manufacturing clause" of the Copyright Law applies. You submitted several sample pages of calligraphy and asked if the book would be subject to the manufacturing restrictions if imported bearing the notice of copyright.

159-256 O - 86 - 2

In general, the "manufacturing clause" of the Copyright Revision Act of 1976 (17 U.S.C. 601) prohibits the importation and public distribution in the United States of a work authored by a U.S. National or domiciliary consisting preponderantly of nondramatic literary material that is in the English language and protected by copyright, unless the portions consisting of such material have been manufactured in the United States or Canada. However, the manufacturing restrictions would not extend to dramatic, musical, pictorial, or graphic works; foreign-language works; or public domain material. In cases such as this, where the work consists partially of text and partially of calligraphy, the test is whether the work, taken as a whole, consists, "Preponderantly of nondramatic literary material that is in the English language."

The legislative history of the Copyright Revision Act of 1976 indicates that the manufacturing requirements of the law would apply if the English language nondramatic literary text exceeds the pictorial or other exempt material in importance. However, as you may know, the test that Customs officers use to determine if an imported work is "preponderantly" nondramatic literary material subject to the manufacturing requirement is found in *Stonehill Communications, Inc.* v. *John Martuge, New York Area Director of United States Customs Service,* 512 F. Supp. 349 (S.D.N.Y. 1981). That decision states that the test according to the legislative history, is a mechanical one. You measure the surface area of the text and pictures (or other exempt material), exclusive of margins, respectively. If there are more square inches of text than pictures, the book is "preponderantly" text and is subject to the manufacturing restrictions. Otherwise, it is not.

We would agree that the pages of calligraphy which you submitted constitute artwork, so that these pages would be considered pictorial rather than literary material for purposes of determining if the manufacturing restrictions apply. When you are ready to enter the book into the United States, we suggest that you provide Customs officers at the port(s) of entry with an exact measurement of the text and pictorial parts, following the guidelines set forth in the *Stonehill* decision. Assuming the measurements follow the *Stonehill* guidelines and confirm your statement that the book consists preponderantly of this artwork (calligraphy), the book would be found to be "preponderantly" pictorial and not subject to the import restrictions of the "manufacturing clause." Accordingly, you would be able to import an unlimited number of copies, bearing the notice of copyright, without restriction.

(C.S.D. 86-19)

This ruling holds that orange juice processors may, in order to comply with the requirements set forth in C.S.D. 85-47, list only their major suppliers of foreign concentrate; specifying domestic as well as foreign origin concentrate. The top lid of the container may be lithographed with an appropriate designation of country of origin even though the identification of the United States distributor is located on another surface of the container (19 CFR 134.46).

March 19, 1986
Refer to MAR-3 CO:R:E:E
729410 LR

LAUREN R. HOWARD, Esq.,
Collier, Shannon, Rill & Scott, 1055 Thomas Jefferson Street, NW., Washington, D.C. 20007.

DEAR MS. HOWARD: This is in response to your letter dated March 11, 1986, on behalf of the National Juice Products Association, requesting a definitive statement of Customs position on several issues relating to compliance with C.S.D. 85-47, the ruling that orange juice products which contain imported concentrate must be marked to indicate the country of origin of that concentrate. The specific issues you raise will be addressed in turn.

1. Is it permissible for U.S. orange juice processors to list only their major suppliers of foreign manufacturing concentrate, so that processors will be able to adopt a standardized label format?

You indicate in your letter that according to data from the U.S. Department of Commerce, a single foreign country—Brazil—has accounted for the overwhelming majority of U.S. imports of manufacturing concentrate for each of the past six years. Between 1980 and 1985, Brazil accounted for between 92.4 and 97.7 percent of U.S. imports of this commodity. The second largest source in each year has been Mexico, which has accounted for an average of 3.6 percent of total imports in each year. Only in 1981 did a third country—Belize—account for more than one percent (*i.e.*, 1.2 percent) of U.S. imports of manufacturing concentrate. You note that while U.S. processors do import manufacturing concentrate from as many as 15 other foreign countries, in almost all cases, this is done only on a sporadic basis because of short-term supply considerations.

In light of the above circumstances, we conclude that the disclosure of only the major foreign sources of the imported product will adequately inform the ultimate purchaser of the country of origin and would constitute compliance with C.S.D. 85-47. It should be noted that the Customs Service previously approved this method of marking in connection with repackaged honey where it was simi-

larly shown that most imports would likely be confined to a few major suppliers. *See* C.S.D. 84-44, October 14, 1983, as affirmed in C.S.D. 84-112, July 2, 1984. The "major supplier" rule applies for individual packers or processors; that is, processors or packers must indicate the major foreign sources of the imported concentrate they use in their own manufacturing process, whether or not that foreign source is a major one for the United States generally.

> 2. Is it permissible for orange juice processors using a blend of U.S. and foreign origin manufacturing concentrate to specify domestic, as well as foreign content?

We have no objection to showing that the orange juice is a blend of domestic and imported concentrate, if that in fact is the case. An example of an acceptable designation is: "Contains a blend of Florida and Brazilian concentrate."

> 3. In the case of frozen concentrated orange juice and orange juice from concentrate sold in cans, is the marking obligation satisfied if processors lithograph the lids of the cans with an appropriate designation of origin, even though the identification of the U.S. distributor is located on another surface of the can?

You indicate that cans are widely used as a form of packaging for frozen concentrated orange juice and orange juice from concentrate in the United States. These include composite cans (having a body composed of foil-lined cardboard) for frozen concentrate ranging from six ounces to 46 ounces in volume and all-metal cans between six and 32 ounces in volume for packaging single-strength orange juice from concentrate. In both cases, however, both the bottom and top lids are metal, and can be permanently and legibly marked using the lithography process.

In your opinion the mark placed on either lid of a can of frozen concentrate or the top lid of a can of orange juice from concentrate would be far more conspicuous than a mark placed in the text of a printed label. You also indicate that lithographing can ends would be a significantly less expensive method of marking for U.S. processors, at least until existing inventories of labels are exhausted.

Section 134.46 of the Customs Regulations (19 CFR 134.46) requires that the country of origin marking appear in close proximity to and in at least comparable size letters to any U.S. address on the product. The close proximity requirement has been interpreted to mean the same side or surface. The purpose of the regulation is to prevent any confusion as to the country of origin that may be caused as a result of the U.S. address.

In this case, we find that the underlying purpose of section 134.46 would be satisfied if the country of origin appears on the lid provided the following two conditions are met: 1) the marking appears on the top of the can (*i.e.* the side that is to be opened by the consumer) and 2) the marking is legible and conspicuous and in at

least comparable size letters to the U.S. address. In our view, so long as these conditions are met, a marking on the top of the can will fully inform the consumer of the country of origin. Our approval of this method of marking should allow for an earlier implementation date of C.S.D. 85-47 and should facilitate future compliance when there is a change in a processor's major suppliers of concentrate. Lithographing the top of the can is, however, optional and the country of origin may instead appear in a conspicuous location on the same side or surface as the U.S. address in accordance with the requirements of section 134.46.

The procedures approved above are for the purpose of facilitating compliance with the marking statute. Customs may disallow their use if they are utilized for a deceptive purpose.

(C.S.D. 86-20)

This ruling holds, pursuant to 19 U.S.C. 1304(a) and 19 CFR 134.46, that certain trade brochures marked "Printed in Canada" in tiny white letters oriented vertically and hidden in a grid pattern of thin white lines on the back page of the brochure are inconspicuous for country of origin marking purposes.

March 31, 1986
Refer to MAR-2-05 CO:R:E:E
729398 SO

Mr. THOMAS E. BLANCHARD,
Acting DARC (Classification & Value), U.S. Customs Service, 55 East Monroe Street, Chicago, Illinois 60603-5790.

Re: Decision on Application for Further Review of Protest No. 3801-5-002676 of October 24, 1985.

The protest was filed by C.J. Tower & Sons of Buffalo on behalf of their client, Warner-Lambert Co., against the assessment of marking duties on a shipment of trade brochures printed in Canada. The Acting Assistant District Director (C&V) at Detroit, Michigan, did not consider the marking of country of origin to be conspicuous. The words "Printed in Canada" appear in tiny white letters oriented vertically along the right hand edge of the back page of the four page cardboard brochure, so that the words must be read from the bottom up. The tiny letters are hidden in a grid pattern of thin white lines which crisscross parts of every page of the brochure (except where the text or illustrations appear). Also appearing at the top of the same page in large black type against a plain grey background are the addresses in the United States and seven other countries of suppliers of the volumetric infusion pumps being promoted in the brochure.

A marking notice (CF-4647) was issued in order to allow the importer to correctly mark the brochures. The importer stated that

the brochures had been distributed. Accordingly, additional marking duties (10 percent) were assessed. You accepted the importer's application for further review (CF-19) and submitted the matter to Customs Headquarters for decision. You concurred with the recommendation of the Acting Assistant District Director, that the protest should be denied and additional marking duties assessed for failure to mark.

We are of the opinion that the inconspicuous marking of country of origin on the brochure fails to meet the requirements of section 134.46 of the Customs Regulations, 19 CFR 134.46 which states that, "In any case in which the words 'U.S.,' or 'American,' the letters 'U.S.A.,' any variation of such words or letters, or the name of any city or locality in the U.S., or the name of any foreign country or locality in which the article was manufactured or produced, appear on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters or name and in at least a comparable size, the name of the country of origin preceded by 'Made in,' 'Product of,' or other words of similar meaning."

The argument submitted by the importer in support of his protest is that the marking "Printed in Canada" is sufficiently conspicuous and in close enough proximity to the importer's name. The importer submitted a copy of a 1971 decision concerning books which holds that the marking of country of origin may appear in a location other than the title page, even though the title page bears the name and address of the importer, consignee, or publisher in the United States. We are of the opinion that this ruling is not on point because the imported article is not a book and the location of the country of origin marking on other than the title page is not at issue. The controversy in this case centers on whether the marking is in a conspicuous place (as required by 19 U.S.C. 1304(a) and 19 CFR 134.46). Enclosed is a copy of a 1920 decision (T.D. 44370(18)) concerning boxes of safety matches on which the words "Made in Russia (U.S.S.R.)" were printed in an inconspicuous manner in black letters over slanting red and yellow lines, which is more on point. In that case, the additional marking duties (10 percent) were assessed pursuant to section 304(c) of the Tariff Act of 1930 (19 U.S.C. 1304(c)). Accordingly, the protest should be denied and marking duties assessed.

A copy of this decision may be furnished to all concerned parties. Your sample is returned herewith.

(C.S.D. 86-21)

This ruling holds that unless a specific prior period is otherwise determined, liquidation of an entry constitutes the final determination on the admissibility of merchandise imported into the United States. The end of a conditional release period, as discussed in 19 CFR 113.62(d), refers to set time limitations established by regulation and does not refer to the liquidation of the entry.

May 16, 1986
Refer to BON-1-CO:R:CD:D
218637 WR

Issues: 1. When is the final determination made on the admissibility of imported merchandise with respect to the Customs bond obligations on redelivery, destruction, exportation, or any other performance that might be required to comply with the laws governing admission into the United States?

2. What is the time limit in section 113.62(d) of the Customs Regulations for the Customs Service to demand redelivery of merchandise?

Facts: No facts were presented.

Law and Analysis: Apparently some confusion exists with respect to the proper Customs officer to decide questions with respect to bond matters. This should not be the case since Congress required all Agencies to publish a list of the Agency employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions in accordance with 5 U.S.C. 552(a)(1)(A). Pursuant to that legislative requirement, the Commissioner of Customs published Customs Delegation Order No. 1 (Revision 1) as T.D. 69-126 (34 F.R. 8208). Under that order, as amended by T.D. 72-321 (37 F.R. 25060), the Director, Carriers, Drawback and Bonds Division, was made responsible for decisions relating to legal questions on bonds. The interpretation of the language in a customs bond is best characterized as a decision relating to a legal question on a bond.

In the past some laws expressly provided that the issue of admissibility of merchandise was to be decided within a specific time interval from the date of entry. An example of this procedure was illustrated in the case of *V.G. Nahrgang* v. *U.S.*, T.D. 47134 (Cust. Ct., 1934). In that case the court discussed the law and regulations of the Food and Drugs Act of June 30, 1906, as amended, as they related to the importation of food. Under section 11 of that Act, the Secretary of the Treasury was required to deliver samples of imported foods and drugs to the Secretary of Agriculture on the latter's request and to notify the importer of that delivery. The importer had a statutory right to appear before the Secretary of Agriculture to give testimony on the issue of admissibility before a decision to exclude was made. The section went on to provide that after

the hearing, if the Secretary of Agriculture determined the food to be adulterated or falsely labeled, the Secretary was to refuse admission and notify the importer of that refusal. At that point the Secretary of the Treasury was to act to destroy any of the merchandise which was not exported by the importer.

The regulations promulgated under section 11 of the Act required Customs to show the Food and Drug Administration (FDA) all invoices on the imported food or drugs as soon as the importer made entry. The FDA officer was required either to stamp the invoices "no sample desired" or to request samples. On the same day that samples were requested, Customs was required to notify the importer that samples were to be taken and that the rest of the shipment was to be held intact pending notice of the result of the inspection and analysis. If no violation was disclosed by the inspection and analysis, the FDA officer was required to notify the importer of that fact in writing, with a copy to Customs. If the FDA officer tentatively determined that the shipment was in violation, a notice of the violation was to be sent to the importer to enable the importer to present evidence in opposition. One day after the hearing, if there was a finding of a violation, or if the importer failed to respond, the importer was to be notified of the refusal to admit.

It can be seen that within a definite time period shortly after entry, the importer and its surety knew whether the bond condition with respect to admissibility was satisfied.

The situation is less clear when the legal basis for the prohibition does not specify a definite time for the final determination of inadmissibility to the importer. A review of the relevant statutes suggests that the final determination on admissibility must occur before the entry is liquidated.

The first import exclusion law, the Act of June 26, 1848, C. 70, 9 Stat. 237, required all drugs, medicines, medicinal preparations, and chemical preparations used as medicine to be examined and appraised in reference to their quality, purity, and fitness for medical purposes before being released from Customs custody. Under section 3 of that Act, the examiner was required to notify the importer of any adulteration or unfitness. Under section 4, the importer had a right to call for a reexamination to show that the examiner's return was erroneous. If there was no request for reexamination or if the report of the reexamination supported the examiner's finding, that decision to exclude became final.

The Act of June 26, 1848 was codified into Rev. Stat., secs. 2933-2937. An illustration of this law's operation is in T.D. 18223 (Bd. Gen. App. 1897). Article 325 of the Customs Regulations of 1857 required the appraiser to make a special report to the collector if the appraiser found any article in the package that was prohibited by law from entry. Article 349 of those Regulations provided that if no appeal was taken by the importer the appraisement was final and

conclusive. See also Articles 1241 and 1249 of the Customs Regulations of 1899.

The change from that law to the current law had its genesis in a report to Congress by the Tariff Commission which suggested certain changes to the Customs administrative laws. Report of the U.S. Tariff Commission Upon the Revision of the Customs Administrative Laws (1918). At pages 116 through 119, the Commission suggested a proposed section 102 to replace the provisions in Rev. Stat. sections 2912, 2914, 2915, 2916, 2933, 2935, 2936, 2937, 2938, 2939, and 2942. The pertinent portion of suggested section 102 provided:

> No imported merchandise required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall be delivered from Customs custody, except as otherwise provided in this act, until the same has been inspected, examined or appraised and is reported by the appraiser to have been truly and correctly invoiced and found to comply with the requirements of the statutes of the United States.

Suggested section 103 proposed to make the decision of the appraiser final on all parties unless a written appeal for reappraisement was made within 30 days by the collector or within 10 days after notice by the importer. All appeals were to be sent to the Board of General Appraisers for a hearing. The proposed section provided for further judicial proceedings. No action having been taken on the 1918 report, the procedure was brought again to the attention of Congress during the 1921 tariff hearings. Hearings on General Tariff Revision before the Committee on Ways and Means, 66th Cong. 4163–4181 (February 15, 1921).

The language suggested by the Tariff Commission was set forth as section 507 of H.R. 7456, 67th Cong., 1st Sess. The Senate and House conferees on the bill made various clerical changes, including renumbering the section from 505 to 499. Conference Report, H. Rept. 1223, 67th Cong., 2d Sess., 52, 53 (1922) and Conference Report, H. Rept. 1207, 67th Cong., 2d Sess., 155 (1922). As section 499, the relevant text of H.R. 7456, 67th Cong., 2d Sess. provided:

> Sec. 499. *Examination of Merchandise.* Imported merchandise required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall not be delivered from Customs custody, except as otherwise provided in this Act, until it has been inspected, examined, or appraised and is reported by the appraiser to have been truly and correctly invoiced and found to comply with the requirements of the law of the United States.

That language was enacted in law as section 499 of the Tariff Act of 1922 (Act of September 21, 1922, 42 Stat. 965). The language was repeated as section 499 of the Tariff Act of 1930 (Act of June 17, 1930, 46 Stat. 728). The Customs Administrative Act of 1938 (Act of June 25, 1938, 52 Stat. 1084) struck out the words "except as otherwise provided in this Act" and substituted the words "except under

such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce." The change in language was initiated by the Customs Service and was explained by Mr. Clinton M. Hester, Assistant General Counsel, Treasury Department, at the Hearings before the Committee on Ways and Means on H.R. 6738, 75th Cong., 1st Sess., 39, 85, and 86 (May 24, 1937):

> In the 1922 Tariff Act there was a provision, section 486, which authorized the immediate release from Customs custody of the portions of shipments not required for examination.
> In the 1930 Act this special provision was repealed.
> The purpose of this proposed amendment is to reinstate that special provision of the act of 1922, and thus provide expressly for requiring a bond to assure compliance with all laws and regulations applicable to the goods released before examination of the retained packages.

An analysis of the proposed Customs Administration Bill that appears to have been prepared by the Customs Service more completely explained the change in the following manner:

> *Section 13.* Section 499 of the Tariff Act of 1930 (U.S.C. 1934 ed., title 19, sec. 1499) prohibits the release of any merchandise required to be inspected, examined, or appraised until it has been inspected, examined, or appraised "except as otherwise provided in this Act." The phrase "except as otherwise provided in this Act" has reference to section 633 of the Act (U.S.C. 1934 ed., title 19, sec. 1623). Section 436 of the Tariff Act of 1922 (42 Stat. 962) which was repealed by the Act of 1930, specifically authorized the release of imported merchandise under bond conditioned upon compliance with all laws and regulations applicable to the importation of merchandise. Section 623 of the Act of 1930, which was intended to supersede section 436 of the Act of 1922, authorizes the Secretary, among other things, to exact such bonds as he may deem necessary under certain conditions, but this authority is limited by its terms to bonds for the *protection of revenue* and to assure compliance with the *customs* laws and regulations. In view of this limitation the Secretary's authority in some cases to release merchandise under bond when no customs question is involved is questionable.
> It is thereof believed to be desirable that the Secretary have express statutory authority to release merchandise not required for inspection, examination, or appraisement upon the filing of a bond to assure compliance with all laws and regulations governing the admission of the merchandise into the commerce of the United States. The proposed amendment is designed to accomplish this purpose.

The language was incorporated into section 13 of H.R. 8099, 75th Cong., 1st Sess. H. Rept. 1429, 75th Cong., 1st Sess., 1, 4 (1937). Sec-

tion 13 of that bill was redesignated as section 14 but the language was not changed. S. Rept. 1465, 75th Cong., 3d Sess., 9 (1938) and H.R. 8099, 75th Cong., 3d Sess.

Under Treasury Department Order No. 165-17, T.D. 56464 (1965), the office of appraiser of merchandise was abolished. Section 301 of the Customs Court Act of 1970 (Act of June 2, 1970, Pub. L. 91-271, 84 Stat. 289) in recognition of that change, amended section 499 of the Tariff Act of 1930, as amended, by changing the word "appraiser" to "appropriate Customs officer." The statutory change was viewed as implementing the authority granted to the Secretary of the Treasury under Reorganization Plans No. 1 and No. 26 to delegate performance and responsibility for any of the functions within the Customs Service. H. Rept. 91-1067, 91st Cong., (1970), reprinted in 1970 U.S. Code Congressional and Administrative News 3188, 3210 and 3218. Clearly, the change made to section 499 of the 1930 Tariff Act by the Customs Court Act of 1970 was not a change in the scope of the appraisement function. 1970 U.S. Code Congressional and Administrative News 3211.

The language of section 499 makes the determination of admissibility a part of the appraisement function. The Customs Regulations show that the issue of admissibility was to be settled as part of the appraisement function.

Article 453 of the Customs Regulations of 1884 required the appraiser to report the existence of any merchandise in an importation that was prohibited from entry. The same requirement was set by article 833 of the 1890 Customs Regulations, article 1249 of the 1899 Customs Regulations, article 867 of the 1908 Customs Regulations, article 583 of the 1915 Customs Regulations, article 701 of the 1923 Customs Regulations, article 774(d) of the 1931 Customs Regulations, article 772(d) of the 1937 Customs Regulations, and 19 CFR 12.4 (1938 ed.) (2 F.R. 1446ff). In the Customs Regulations of 1943 (8 F.R. 8099 ff), section 8.22 provided for the designation of merchandise to be examined pursuant to section 499, Tariff Act of 1930, as amended. As noted above, that statute required merchandise to be inspected, examined, or appraised, and reported by the appraiser to have been found to comply with the requirements of the laws of the United States.

Until the Customs Court Act of 1970, an importer had the ability to challenge the appraiser's findings before liquidation and unless the appraisement was held to be valid, any liquidation based on an invalid appraisement was itself held to be null and void. *James S. Kean* v. *U.S.*, 20 CCPA 388, T.D. 46186 (1932), *Pistorino and Co., Inc.* v. *U.S.* 2 Cust. Ct. 222, CD 127 (1939), reh. den. 2 Cust. Ct. 684 (1939) *New York Merchandise Co.* v. *U.S.*, 15 Cust. Ct. 72, CD 945 (1947). The case of *U.S.* v. *A.N. Deringer, Inc.*, 66 CCPA 50, CAD 1220 (1979) shows that appraisement must precede liquidation and include a decision on admissibility even after the changes made by the 1970 Act. In that case food was imported from Canada which

required labels under the food and drug laws. In one of the entries, the importer was notified of the labeling nonconformity and of the detention to await a hearing. The importer did not appear at the hearing and a formal notice of refusal was issued. Customs, on one of the entries involved in the case, liquidated the entry before the formal notice of refusal was issued. The Court found the liquidation to be premature. 66 CCPA 50 at 55. However, the importer failed to protest the liquidation timely. The court held that the failure to protest timely meant that the importer's complaint against the illegal liquidation was properly dismissed on the ground of lack of jurisdiction. 66 CCPA 50 at 56. It seems obvious from the discussion that the court did not believe that an entry could be liquidated legally until after a decision was made on the admissibility of the merchandise in the entry. The case is particularly enlightening because it involved an entry that was made after the Customs Court Act of 1970 was enacted which had eliminated the separate appraisement challenge procedure in the interest of streamlining administrative and judicial review of protests. The stated purpose of that Act was to develop a single, continuous procedure for deciding all issues in any entry of merchandise and not to change the scope of the appraisement function. H. Rept. 91-267, 91st Cong. (1970) reprinted in 1970 U.S. Code Congressional and Administrative News 3194, 3196, 3210, and 3211. It is equally clear that Congress recognized that a final appraisement had been a condition precedent to a legal liquidation, and the change simply did away with the interlocutory right to contest the appraisement before the liquidation. 1970 U.S. Code Congressional and Administrative News 3210.

Another illustration of the principle that the decision on admissibility was part of the appraisement function is in the case of *U.S.* v. *W.X. Huber,* 41 CCPA 69, CAD 531 (1953). Article 315 of the Customs Regulations of 1937, which applied to the entry, provided that if the collector determined from the appraiser's report or otherwise that an importation of merchandise was not entitled to admission into United States commerce, the collector was to promptly demand return of the merchandise. The Article also provided that all demands for redelivery were to be made within 20 days after the appraiser's report. The bond given by the importer repeated those provisions. Two shipments of merchandise were entered; one shipment was entered on June 19, 1940, and the other shipment was entered on August 13, 1940. On July 9, 1940, and August 21, 1940, the appraiser notified the collector that appraisement was being withheld because of a value investigation. The Government argued that the appraiser's report referred to in the regulations and the bond was the report of the appraiser when he completed his appraisement of the merchandise. The importer argued that the earlier tentative report of the appraiser was the report which started the running of the 20-day period for Customs to demand redelivery. The lower court, in *W.X. Huber* v. *U.S.,* 29 Cust. Ct. 92,

CD 1451 (1952), agreed with the importer and the United States appealed. The appellate court reversed, holding that only a final report of the appraiser had any legal significance. See 41 CCPA 69 at pages 72 and 73. It is clear that the final decision with respect to the appraisement function included the final decision on admissibility and that decision had to be made before there could be a valid, legal liquidation.

From 1848, when Congress enacted the Act of June 26, 1848, which expressly provided that drugs, medicines, and related articles were, before leaving the Custom-house, to be examined and appraised, as well in reference to their quality, purity, and fitness for medical purposes, as to their value and identity specified in their invoice, to the present enactment of 19 U.S.C. 1499 which requires all imported merchandise to be inspected, examined or appraised, and found to comply with the requirements of the laws of the United States, it is clear that Congress intended the determination of admissibility to take place as a part of appraisement and to be done before liquidation. In short it seems obvious that the word "appraise" meant to judge and analyze the worth, significance or status of the imported merchandise rather than in the narrow sense of determining only the worth of the imported goods. *Websters Third New International Dictionary (unabridged)*, G and C Merriam Company, 1968.

The next point is the binding effect of a liquidation if the Customs Service discovers after the expiration of the time for protest that the merchandise should not have been allowed admission into U.S. commerce. Assuming there is no fact which would support a finding of probable cause to suspect fraud in the entry which would trigger 19 U.S.C. 1521 and that no protest was filed on any ground so as to justify a reliquidation, the plain words of the statute, 19 U.S.C. 1514, would bind the Government to the liquidation.

The court cases offer further confirmation that a mistake in the liquidation process can be corrected only by one of the statutory methods set forth in 19 U.S.C. 1514. Consequently, once the protest period expires without a protest being filed, the courts will not consider the legality of the liquidation. A good example of the judicial position on this point is the case of *John S. Phipps* v. *U.S.*, 22 CCPA 595, T.D. 47601 (1935). In that case, an importer entered on June 21, 1930, a necklace valued at $29,100. While at the appraiser's stores, the necklace was manipulated by removing the precious stones. Duty was assessed for the separated precious stones and mountings at $2,116 on August 28, 1930. On that same date the duty was paid. Although the court did not find any liquidation stamp on the entry documents for that date, the court did find that the entry papers were stamped as paid. The court found that the entry apparently was liquidated on August 28, 1930, although it noted that the entry papers contained a liquidation stamp dated July 27, 1931, and for purposes of the decision it treated that date

as the liquidation date. 22 CCPA 595 at 597. The court found that the Customs Service reappraised the entry on September 29, 1930, and on September 30, 1930, made a demand on the importer for $818 as additional duty based on the ground that the appraiser had no authority to permit the manipulation of the necklace under 19 U.S.C. 1562 while it was in the appraiser's stores. When the importer refused to pay the additional duty that was demanded, the then Acting Commissioner of Customs entered the dispute. On February 28, 1933, that official directed the collector to cancel the liquidation of the entry and send a notice of appraisement to the importer. The lower court held that the so-called second appraisement, the purported cancellation of the liquidation, and the last notice of appraisement were null and void because no action was taken by the Government within the then existing 60-day period on expiration of which the liquidation became final even though that liquidation may have been based on an illegal act. 22 CCPA 595 at 601. The appellate court affirmed the lower court quoting 19 U.S.C. 1514 and stating:

> We confess our astonishment at the action of the Acting Commissioner of Customs in February, 1933, directing the collector at New York to cancel his liquidation of July 27, 1931, and ordering the collector to issue the notice of appraisement here involved, dated May 8, 1933. This order of the Acting Commissioner of Customs was clearly in violation of law.

At page 602 of the decision, the court said:

> * * * the liquidation of July 27, 1931, had become final *and was not open to question after the expiration of 60 days* from the date thereof. (Emphasis supplied.)

To the same effect was an earlier decision of the court in *Gallagher and Asher* v. *U.S.*, 21 CCPA 313, T.D. 46832 (1933). In that case a notice of appraisement, which was required to be sent to the importer to make the appraisement final, was not sent. The Customs Service liquidated the entry without sending that statutorily required notice. However, the importer failed to protest the liquidation within the protest period. The Government contended that the failure to protest timely even on the liquidation's legality barred further inquiry into that liquidation. The trial and appellate courts agreed with the Government.

In the case of *McKesson Wholesale Drug Co.* v. *U.S.*, T.D. 46955 (Cust. Ct. 1934) the facts involved a reliquidation after the time period on the original liquidation, expired. However, the concept of finality remains the same. On the original liquidation, the collector assessed a certain amount as duty. The then existing 60-day protest period expired without any protest being filed. Thereafter, the collector reliquidated the entry at a higher rate of duty and demanded the excess from the importer. The importer contended that once the protest period expired, the collector was without authority to

open the entry. The court agreed. Other cases that reach this same conclusion are *Gulbenkian* v. *U.S.*, 186 F. 133, 135, T.D. 31732 (2nd Cir. 1911); *U.S.* v. *Mexican International R. Co.*, 151 F. 545, 547, T.D. 28182 (5th Cir. 1907), and cases cited therein; *Hambro Automotive Corp.* v. *U.S.* 66 CCPA 113, 117, CAD 1231 (1979); *Saji and Kariya Co. et al.* v. *U.S.*, 9 Ct. Cust. Apps 78, 82–84, T.D. 37945 (1919), and *Alberta Gas Chemicals, Inc.* v. *U.S.*, 515 F. Supp. 780, 785, 1 CIT 312 (1981). In this latter case the court considered the general rule governing the effect of time periods. If it expressly required an Agency to act within a time period and specified a consequence for a failure to act, it was considered to be mandatory. It seems clear that the statutory scheme set up under 19 U.S.C. 1514 is precisely that type of statutory time limit. A failure to demand redelivery or a failure to exclude prior to liquidation would bind the Government to those failures once the liquidations became final.

In other cases, the question of admissibility turned on the classification of the imported articles. In each of these cases, the courts held that because admissibility had to be determined before liquidation, an importer had the right to protest twice: at the time the decision to exclude was made and at the time the entry was liquidated. *U.S.* v. *A.N. Deringer, Inc.*, 66 CCPA 50, CAD 1220 (1979); *Schenley Distillers, Inc.* v. *U.S.*, 65 Cust. Ct. 651, 653, CD 4152 (1970); *Border Brokerage Co.* v. *U.S.*, 43 Cust. Ct. 226, 230, CD 2131 (1959) rev'd. on other grounds 48 CCPA 10, CAD 754 (1960); *A. N. Deringer, Inc.* v. *U.S.*, 37 Cust. Ct. 166, 168, CD 1818 (1956), and *Alberta Gas Chemicals, Inc.* v. *U.S.* 84 Cust. Ct. 217, 225, C.R.D. 80–1 (1980). These cases simply would not support a view that admissibility could be decided after the entry was liquidated. The question of admissibility is subsumed within the liquidation.

A corollary issue is the effect of the change made by Act of October 3, 1978, Pub. L. 95–410, 92 Stat. 902, to 19 U.S.C. 1504. Under 19 U.S.C. 1504, an entry shall be deemed liquidated within 1 year from the date of entry unless a proper extension is made. The statute requires notice of suspension to be given to the importer and the importer's surety. This provision has been considered by the Court of International Trade. In the case of *Pagoda Trading Co.* v. *U.S.*, CIT Slip. Op. 85–87 (August 27, 1985) (Appeal docketed) the court held that because the Government failed to give proper notice the entry was liquidated by operation of law. The Government contended that there was actual notice which rendered the failure to give formal notice harmless. Regardless of the outcome of that case, it seems obvious that a liquidation by operation of law under 19 U.S.C. 1504 will become final unless timely protested. That is, it will be binding on all parties once the protest period expires unless 19 U.S.C. 1521 comes into play.

The final point is the effect of 19 U.S.C. 1521 on a liquidation that becomes final by operation of 19 U.S.C. 1514. That is, should

the liquidation be treated as tentative until the 2-year period under 19 U.S.C. 1521 expires since there is always a possibility that a Customs officer may have probable cause to suspect fraud in an entry and thereby reliquidate that entry? In C.S.D. 80–138, the Customs Service held that liquidation of an entry constituted waiver of a demand for the production of a missing document. The decision also held that bond liability ended when the 2-year period of 19 U.S.C. 1521 ended. An argument might be made that because the bond obligation could be asserted within that 2-year period, a reliquidation under 19 U.S.C. 1521 was not needed in order to assert a demand for redelivery after the liquidation. In short, that analysis would treat the liquidation as something less than final. The courts have taken a different view. In the case of *Bertrose Co.* v. *U.S.*, 12 Ct. Cust. Appls. 19, T.D. 39893 (1923) the court held that a reliquidation under section 21 of the Act of June 22, 1874 (18 Stat. 190), a predecessor of 19 U.S.C. 1521, was an abandonment of all prior liquidations. As an abandonment, the court in effect would treat those prior liquidations as never having been made. There had to be a reliquidation and that reliquidation had to be based on an allegation of fraud. Unless those two criteria were met, the liquidation was final. See also *U.S.* v. *Parkhurst and Co. et. al.*, 12 Ct. Cust. Appls. 370, T.D. 40522 (1924) with regard to the finality of a liquidation on the Government and the effect of a reliquidation. The court in *McKesson Wholesale Drug Co.* v. *U.S.*, T.D. 46955 (Cust. Ct. 1934) considered the effect of section 521 of the Tariff Act of 1922, the immediate predecessor of 19 U.S.C. 1521. In that case the court held that in order to disregard the finality of a decision made under 19 U.S.C. 1514, there had to be a reliquidation and that reliquidation had to be based on the ground of fraud. In the case of *John S. Phipps* v. *U.S.*, 22 CCPA 595, 602 T.D. 47601 (1935), the court held that 19 U.S.C. 1521 does not hold a liquidated entry "open"; the court decided that the statute applies only if the entry is reliquidated because the collector finds probable cause to believe there is fraud in the case. Where there is no charge of fraud and no evidence of fraud, the statute does not apply. The case of *Sweet Briar, Inc.* v. *U.S.*, 73 Cust. Ct. 93, CD 4558 (1974) holds that there must be a finding of probable cause to believe fraud exists and that the court will examine the basis of that finding. In *Guy B. Barham Co., etc.* v. *U.S.*, 35 CCPA 138, CAD 385 (1947), the collector attempted to reliquidate an entry of tobacco four months after the original liquidation because the collector was unaware, at the time of liquidation, that the entry exceeded the relevant quota for tobacco. The court ruled at page 140 that a stipulation that "no fraud was disclosed or has ever been suspected" rendered 19 U.S.C. 1521 inapplicable. The court held that the attempted reliquidation was void ab initio. See also *A.N. Deringer, Inc.* v. *U.S.*, 59 Cust. Ct. 148, CD 3101 (1967), which held that there is no presumption of correctness to a reliquidation under 19 U.S.C. 1521 and that the Govern-

ment must show the existence of probable cause to suspect fraud in order for the reliquidation to be valid. The concept that a valid reliquidation renders the original liquidation void can be seen in the cases of *U.S.* v. *New Drinks, Ltd,* 14 Ct. Cust. Appls. 16, T.D. 41530 (1926) and *Miyako Hotel Co.* v. *U.S.,* Abs. 29188 (Cust. Ct. 1934). In both cases, the importers protested the original liquidation and those protests were accepted by the Customs Service. In both cases the reliquidations went beyond the matter protested and the importers protested the reliquidations. The importers argued that the Customs Service was limited to the matters protested in the original liquidations. The courts disagreed with those arguments. The courts ruled that a protest suspends the statute of limitations and that any matter involving the same merchandise may be considered in the reliquidation. In short, it is as though the original liquidations did not exist for the Government or the importer. See also *U.S.* v. *Fensterer,* 12 Ct. Cust. Appls. 410, 413, T.D. 40586 (1924) which held that an importer who did not protest the original liquidation could protest a reliquidation because a reliquidation is regarded as an abandonment of all prior liquidations.

To summarize, the decision as to whether an article is admissible must be made before liquidation of the entry in which the article was imported. After liquidation upon expiration of the protest period further consideration of the matter is barred unless there is a valid reliquidation under 19 U.S.C. 1521 or other law. The mere possibility of a reliquidation under 19 U.S.C. 1521 or any other law does not have any effect on the finality of a liquidation. Once the protest period expires, the liquidation binds all parties, and it is too late to consider the issue of admissibility under the Customs laws even if there is evidence to show that the merchandise should not have been admitted.

The second issue concerns the interpretation of the sentence "It is understood that any demand for redelivery will be made no later than 30 days after the date that the merchandise was released or 30 days after the end of the conditional release period (whichever is later)" in section 113.62(d) of the Customs Regulations. This provision is part of the bond obligations of an importer and the importer's surety.

Section 141.113(f) of the Customs Regulations provides that a demand for redelivery shall not be made after the liquidation of the entry becomes final. Section 141.0a of the Customs Regulations provides that unless the context requires otherwise or a different definition is prescribed the following terms shall have the meanings indicated when used in connection with the entry of merchandise. Paragraph (i) of section 141.0a states that released conditionally means any release from Customs Custody before liquidation.

In view of the above discussion on the finality of liquidation, the provision of 19 CFR 141.113(f), that a Customs officer shall not demand redelivery of any merchandise in an entry on which liqui-

dation has become final, is an acknowledgement that issues with respect to an entry on which there has been a finalized liquidation simply are not within the power of the Customs Service to act upon, absent facts to show fraud in the entry. The language in 19 CFR 141.0a(i) does not purport to affect the meaning of bond language which is set forth in another Part of the Customs Regulations. In any event, the provision in 19 CFR 141.0a(i) merely states a general truism; that is liquidation of an entry, when that liquidation becomes final, closes all issues on that entry, absent fraud, for the Government and the importer.

If the bond language read "It is understood that any demand for redelivery will be made no later than 30 days after the date that the merchandise was released" there could be no doubt as to the extent of the period for the Customs Service to demand redelivery. Is it possible that the term "conditional release period" in the additional phrase "or 30 days after the end of the conditional release period" refers to the liquidation? If the provisions in 19 CFR 141.0a(i) and 141.113(d) were intended to control the last phrase of the bond language in issue, the terms "end of the conditional release period" can only refer to the liquidation of the entry. Since the bond language contains the parenthetical "whichever is later", such an interpretation would make the entire first clause meaningless because a period that ended 30 days after liquidation would always be subsequent to a period that ended 30 days after release.

Another problem caused by this interpretation is that it expressly allows a redelivery demand to be sent 30 days after the end of the conditional release period, or in other words, after liquidation. A decision on the entry that is made after the liquidation occurs contradicts the concept of finality that is inherent in a liquidation of an entry. There is no legal significance to a tentative liquidation. Either the liquidation embodies a final decision on all aspects of an entry by the appropriate Customs officer against which a protest may be filed or it is not a liquidation within the meaning of 19 U.S.C. 1500 and 1514. See *U.S.* v. *Nils A. Boe,* 64 CCPA 11, 17, CAD 1177 (1976); *U.S.* v. *Franklin Sugar Refining Co.,* 137 F. 677, T.D. 26316 (E.D.Pa. 1905); and *Wesendonck Lorenz Co.* v. *U.S.,* T.D. 18634 (Bd. Gen. App. 1897).

Assuming that a proper interpretation of the bond language would give meaning to both parts of the phrase in issue, the question is whether another time limit exists in the Regulations. An example of such a provision is 19 CFR 12.80(e)(2). Under that provision, unless a district director receives notification of approval from the Administrator, National Highway Traffic Safety Administration, within 180 days after entry, the district director is supposed to demand the redelivery of any vehicle subject to the National Traffic and Motor Vehicle Safety Act of 1966, as amended. The provision was promulgated as T.D. 78–478. With respect to the redelivery issue the stated purpose was to provide more effective adminis-

tration and enforcement of the law. The Customs officials who submitted comments complained that the possibility of unlimited periods for decisions on admission had led to a backlog of open Customs entries. It is clear that by the use of the word "open" those commenting officials were referring to unliquidated entries. The establishment of a definite deadline in the provision was intended to curb that problem. That is, within a known period of time Customs officers could expect that the vehicle would be eligible for admission or it had to be excluded. Thereafter, the normal processing of the entry would not be subject to any further delay. The needs of the Administrator, National Highway Traffic Safety Administration, in examining the vehicle, the Customs Service in liquidating the entry and collecting any supplemental duties due, if any, and the importer in completing the importation were thought to have been met by the provision.

It seems obvious that the phrase "or 30 days after the end of the conditional release period" was intended to cover those definite dates as set forth in 19 CFR 12.80(e)(2) rather than the date of liquidation, when all conditional releases end. Only by such an interpretation does the first part of the phrase have any possibility of being employed with respect to an entry of merchandise.

Finally, the applicable rules of contract construction support the interpretation that the words "end of the conditional release period" refer to periods such as the 180-day period found in 19 CFR 12.80(e)(2) rather than to liquidation. One rule of construction is that all parts of a contract are to be given effect and an interpretation which gives a reasonable meaning to all provisions is preferred to one which leaves a portion of the contract useless or meaningless. 4 Williston, *A Treatise on the Law of Contracts.* section 619 (3rd. Ed. 1972) and Stearns, *The Law of Suretyship,* section 2.4 (5th. Ed. 1951). If the words "the end of the conditional release period" refer to the liquidation of the entry, the first part of that provision, "no later than 30 days after the date that the merchandise was released" becomes useless and meaningless as a limitation. If the words "end of the conditional release period" is interpreted to refer to the 180-day period in 19 CFR 12.80(e)(2) and similar periods, both parts of the bond provision have meaning.

A Customs bond is to be interpreted in accordance with the Customs laws and regulations. 4 Williston, *A Treatise on the Law of Contracts,* section 625 (3rd. Ed. 1972); *U.S.* v. *De Visser,* F. 642, 648 (S.D. N.Y. 1882); *U.S.* v. *Dieckerhoff,* 202 U.S. 303, 309–310 (1905); *Simmons* v. *U.S.,* 120 F. Supp. 641, 646 (M.D. Pa. 1954); and *U.S.* v. *Gissel,* 353 F. Supp. 768, T.D. 83–86 (1973), aff'd. 493 F. 2d. 27 (5th. Cir. 1974), cert. den. 419 U.S. 1012. If the words "the end of the conditional release period" are interpreted to mean liquidation then the statutory scheme for processing an entry of merchandise set by 19 U.S.C. 1499, 1500, and 1514 will be frustrated. The statutory procedure insures that all imported goods will be examined, appraised,

classified, duties fixed on them, and the entry which contained those goods liquidated, in that order, and that that liquidation will be a final decision. See H. Rept. 91-267, reprinted in 1970 U.S. Code Congressional and Administrative News 3194, 3196, 3210, and 3211. If any decision to demand redelivery or to exclude merchandise can be made up to 30 days after the so-called liquidation, that liquidation cannot be characterized as a final decision. An interpretation which leads to those results cannot be described as being in accordance with the Customs laws and regulations. On the other hand, an interpretation that the conditional release period refers to a period such as that set forth in 19 CFR 12.80(e)(2) does not conflict with the concept of finality in a liquidation or the concept that appraisement includes a decision on admissibility and becomes part of the liquidation decision and can be viewed as being in accordance with the Customs laws and regulations.

Holdings: 1. Unless a specific prior period is otherwise provided, liquidation of an entry comprises the final determination on the admission of merchandise into the United States.

2. The words "end of the conditional release period" in 19 CFR 113.62(d) refers to time limits such as the 180-day period in 19 CFR 12.80(e)(2) and does not refer to the liquidation of the entry.

(C.S.D. 86-22)

This ruling holds, for purposes of proper tariff classification, that articles of clothing which are accompanied by tie belts are classifiable as entireties if of the same color, pattern and fabric.

May 28, 1986
Refer to CLA-2:CO:R:CV:G
077545 PR

This ruling concerns the tariff status of a certain woman's garment and tie belt.

Issue: There are three issues that are presented by the submitted sample: (1) whether the garment is classifiable under the ornamented apparel provisions in the tariff schedules because of rows of stitching found in various locations; (2) whether the tie-belt is classifiable as an entirety with the garment or is classifiable separately; and (3) whether the garment is classifiable as a shirt or as a jacket.

Facts: The submitted sample is a martial arts style woman's upper body garment. It is made from a lightweight woven cotton fabric. While the garment resembles part of a martial arts uniform, it is much too light and flimsy to be worn as such. A 2 inch by 84 inch belt of the same fabric as the garment will be imported with the garment. The belt is intended to be tied around the waist of the wearer. It has 4 rows of stitching which are essentially the

same color as the fabric from which the belt is made. The garment is approximately hip length and has a full front opening which is secured at approximately waist level by two fabric ties located on the inside of the garment. It has ¾ length sleeves, shoulder pads, and side slits. The placket and sleeve cuffs each have four rows of noncontrasting stitches similar to that on the belt. There are no labels in the sample garment or belt. Since we are advised by the inquirer that it is a woman's garment, we will proceed on that assumption.

Law and Analysis: In order for a feature on a garment to cause that garment to be classifiable as ornamented for tariff purposes, that feature must be one which is listed in Headnote 3, Schedule 3, Tariff Schedules of the United States Annotated (TSUSA), and be determined to be primarily decorative in nature. Stitching, such as found on the belt, placket, and cuffs, is within the purview of Headnote 3. However, it appears that on the subject garment and belt, the decorative effect of the stitching is minimal and the functional value of that stitching in adding a desired degree of stiffening to those areas outweighs any decorative aspect of the stitching. Accordingly, the garment and belt are not ornamented for tariff purposes.

Headnote 3 to Part 6, Schedule 3, TSUSA, provides that, except for certain classes of apparel sets, each garment is to be separately classified even if two or more garments are imported together and designed to be sold together at retail. One of the exceptions to this rule is for judo, karate, and other oriental martial arts uniforms. In a ruling of February 12, 1986, file 077496, Customs held that belts were intended to be included within the coverage of that headnote. Accordingly, substantial belts were stated to be classifiable separately, except if those belts fell within the purview of one of the named exceptions.

In this instance, while martial arts uniforms are excepted from the purview of the headnote, the subject garment is not a martial arts uniform. At best, it may be argued that the submitted sample is part of a martial arts uniform, not the uniform itself. However, as stated above, this office believes that the garment is much too light to be used in the martial arts.

The question then arises whether the instant belt is within the class of articles covered by Headnote 3, *supra*. In order to decide the issue, Customs has reexamined its ruling of February 12, 1986, and has concluded that it requires clarification. Section (a) of Headnote 3 provides:

> Except as provided in (b) of this headnote, each garment is to be separately classified under the appropriate tariff item, even if two or more garments are imported together and designed to be sold together at retail.

Our February 12 ruling did not fully consider whether articles (other than string ties) which act as belts and consist only of the

identical fabric (including color and pattern) as the accompanying apparel item constitute a "garment" within the purview of Headnote 3(a) when they do not have a buckle, clasp, or special attachment for closure purposes. Generally, such articles are insignificant in relation to the dress, pants, coat, etc., with which they are intended to be worn, are of little value, are not useable on other apparel items, are not sold separately, and, although technically within the definition of a "belt," do not reasonably fall within the class of articles covered by Headnote 3(a). Accordingly, such "belts" will continue to be classified with the apparel items they accompany.

The remaining question to be resolved is whether the subject garment is a shirt or a jacket. Although lightweight, the subject garment does not appear to be the type of garment that would be worn in place of a shirt. Rather, considering the nature of the front opening and the garment as a whole, the subject merchandise will normally be worn over a shirt or a blouse, in the manner of a jacket. The garment is, therefore, classifiable as a coat or jacket for tariff purposes.

Holding: The sample jacket and belt is classifiable as an entirety under the provisions for other women's or girls' wearing apparel, of cotton, not knit and not ornamented, coats, in either item 384.3500, TSUSA, if valued not over four dollars each, or in item 384.3777, TSUSA, if valued over four dollars each. In either event, the textile and apparel category applicable to the instant garment is 335.

We have been advised by the Committee for the Implementation of Textile Agreements that the June 10, 1986, effective date of our ruling of February 12 will not provide importers and foreign governments, with whom the United States has entered into bilateral textile agreements, sufficient time to adjust to that ruling. Accordingly, pursuant to section 177.9(d), Customs Regulations (19 CFR 177.9(d)), our ruling of February 12, 1986, file 077496, is hereby modified to reflect the principles set out above and that an importer of merchandise which is affected by that ruling may, for merchandise entered, or withdrawn from warehouse, on or before August 31, 1986, continue to enter such merchandise as entireties. After that date, all merchandise affected by either the February 12, 1986, ruling or this ruling will be classified in accordance with the principles set out above.

(C.S.D. 86-23)

Pursuant to 17 U.S.C. 602, this ruling holds that U.S. Customs officers shall detain merchandise suspected or found to be infringing upon a U.S. Customs recorded copyright even though the same merchandise has been the subject of a Copyright Office certificate of registration. In such circumstances, Customs officers are to be governed by 19 CFR 133.43.

July 10, 1986
Refer to CPR-3 CO:R:E:E
729677 A

The following policy ruling on procedures for dealing with competing copyright registrations is published for general guidance of Customs and the public; any previous rulings to the contrary are not to be relied upon.

Issue: What is the position of the Customs Service in protecting a registered and recorded copyright when a questioned article is itself covered by a certificate of registration issued by the Copyright Office?

Facts: Customs is experiencing an increasing number of claims from importers of seized or detained articles that those articles should be released merely because they, themselves, are covered by a Copyright Office certificate of registration. Some certificates have been obtained prior to importation and some only after Customs has seized or detained the goods. On the other side, copyright owners have complained that the law neither requires nor sanctions release under these circumstances, and to do so makes a mockery of effective enforcement against piratical copies.

Law and Analysis: Section 602 of the Copyright Act (17 U.S.C. 602) prohibits the importation of articles which are infringing copies of U.S. copyrights recorded with Customs. Section 410(c) of that Act provides that in any judicial proceedings a certificate of registration issued by the Copyright Office shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate; the evidentiary weight of the certificate shall be within the discretion of the court. The implementing procedures for obtaining Customs protection and processing violations of section 602 are found in Part 133 of the Customs Regulations (Title 19, Code of Federal Regulations Subparts D, E and F).

In the past, the defense of competing certificates of registration was infrequently raised but it was accepted in a number of cases on an *ad hoc* basis. In some instances, the certificate was acquired prior to importation, and in others, it appeared reasonably obtained by a reputable firm. Also, Customs was careful not to appear to encroach on the courts' functions of passing on a certificate's validity under section 410(c), since the registrant vouches for the independence and originality of a copyright when he signs the certificate.

Recent representations and occurrences strongly suggest that the competing registration defense is about to become widespread, if acceptable to Customs. An underlying problem is that it is extremely easy to register a claim to copyright since the Copyright Office is merely an office of record and will register documents if "fair on their face," similar to a registry of deeds.

Review establishes that a Copyright Office certificate of registration is significant mainly for shifting the burden of proof as to the facts stated in the certificate from the plaintiff to the defendant in a proceeding involving copyright infringement. *Wihtol* v. *Wells*, 231 F. 2d 550, 553 (7th Cir. 1956). In cases where Customs would otherwise have taken action against the imported goods, it does not seem legally required or desirable enforcement practice to release the goods on the sole basis that they are also the subject of a certificate evidencing copyright. A recent order in the case of *New Bright Industrial Co., Ltd. and New Bright Industries, Inc.* v. *Cheng Ching Toy Co. Ltd., et al.*, 85 Civ. 3695, Bramwell, J. (U.S.D.C. E.D.N.Y. January 8, 1986), would seem to support this position as an administrative practice since the Judge in a copyright infringement suit (involving robot toys) directed that the Customs Service should enforce its regulations concerning the seizure and detention of suspected piratical copies "* * * as though (the defendant) did not possess a copyright registration."

A recently distributed internal Service communication advised all Customs officers that a competing certificate would not be accepted as conclusive proof of original authorship when obtained after the importation of goods suspected or determined to be infringing copyrights previously recorded with Customs. Although a copyright registration certificate acquired prior to importation is arguably somewhat more persuasive of originality than one obtained only after Customs has seized or detained imported goods, it is similarly subject to question and may be disregarded when other evidence indicates piratical copying.

It is highly unlikely that Customs will detain legitimately copyrighted goods, but if that should occur, a detention procedure would promptly result in clearance because the Customs copyright recordant would confirm that the importation was not infringing.

Holding: When evidence clearly indicates piratical copying or reason to suspect piratical copying of a copyright recorded with Customs, and the imported article itself is the subject of a copyright registration certificate (whether obtained before or after importation), Customs officers shall detain the merchandise and proceed under section 133.43 of the Customs Regulations (19 CFR 133.43).

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 141

Proposed Customs Regulations Amendment Concerning Special Summary Steel Invoices

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by adding several articles to the list of steel products subject to the requirements of the Special Summary Steel Invoice (SSSI). The U.S. Trade Representative has negotiated Voluntary Restraint Agreements (VRA) with several countries. These VRA's dictate that basic steel products from these countries cannot be entered into the U.S. for consumption without an export license. Therefore, the Department of Commerce has requested that Customs add fabricated structurals, wire rope, wire strand, and rigid conduit to the list of articles subject to the requirements of the SSSI to facilitate the collection of statistical data necessary for monitoring compliance with the VRAs.

The document invites written comments on the proposal for consideration before final regulations are prepared.

DATE: Comments must be received on or before October 6, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Robert Bujnicki, Commercial Compliance Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8121).

SUPPLEMENTARY INFORMATION:

Background

Section 141.86, Customs Regulations (19 CFR 141.86), sets forth the general information required by the Tariff Act of 1930, as

amended (19 U.S.C. 1202 *et seq.*), to be on each invoice of imported merchandise. In addition to this information, § 141.89, Customs Regulations (19 CFR 141.89), lists certain classes of merchandise where additional invoice information is required. One such class of merchandise is certain steel products imported in shipments with an aggregate purchase price of $10,000 or over, or if from a contiguous country, $5,000 or over, listed in § 141.89(b)(2).

The extra information required concerning steel products is provided by completing the Special Summary Steel Invoice (SSSI) (Customs Form 5520). The SSSI must be submitted to Customs in duplicate at the time of filing the entry summary for each shipment of steel determined by the district director to be subject to § 141.89(b). The information which must be supplied on a SSSI, such as date of the sales agreement and price data, is used to administer and enforce antidumping laws (see 19 U.S.C. 1671 *et seq.*), as well as compliance with Voluntary Restraint Agreements (VRA).

The U.S. Trade Representative has negotiated VRAs with Australia, Finland, South Africa, Spain, Brazil, and Mexico. The agreements dictate that basic steel products from these countries cannot be entered into the U.S. for consumption unless accompanied by a valid export certificate. Therefore, the International Trade Administration of the Department of Commerce has requested that Customs extend SSSI coverage to include fabricated structurals, wire rope, wire strand, and rigid conduit. Therefore, Customs now proposes to add these 4 articles to the other 32 articles of steel listed in § 141.89(b)(2) that require a SSSI for shipments with an aggregate purchase price of $10,000 or over, or if from a contiguous country, $5,000 or over. The necessity for filing a SSSI is determined by what article of steel is being shipped and what its purchase price is; the country where the shipment originated is not a factor. Currently, Customs must provide copies of actual invoices to Commerce to account for these products, a task requiring additional work for Customs import specialists. The addition of these steel commodities to the list of articles subject to the requirements of the SSSI would greatly ease the process of collecting the necessary statistical information.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the

hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 141

Customs duties and inspections, Imports.

Proposed Amendment to the Regulations

It is proposed to amend Part 141, Customs Regulations (19 CFR Part 141), as set forth below.

PART 141—ENTRY OF MERCHANDISE

1. The general authority citation for Part 141 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624. Subpart G also issued under 19 U.S.C. 1505.

§ 141.89 also issued under 19 U.S.C. 1202 (Gen. Hdnote 11), 1481.

2. It is proposed to amend § 141.89(b)(2) by adding the following commodities in proper numerical order to the list of articles of steel subject to special invoice requirements:

(38) Fabricated structurals.
(43) Wire rope.
(44) Wire strand.
(51) Rigid conduit.

(NOTE: Although not in sequence with existing numbers in § 141.89(b)(2), the numbers listed are those assigned to these articles by the American Iron and Steel Institute).

WILLIAM ROSENBLATT,
Acting Commissioner of Customs.

Approved: July 10, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 7, 1986 (51 FR 28390)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
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Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-72)

PISTACHIO GROUP OF THE ASSOCIATION OF FOOD INDUSTRIES, INC., ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND CALIFORNIA PISTACHIO COMMISSION, ET AL., DEFENDANT-INTERVENORS

Court No. 86-04-00475

Before DICARLO, *Judge.*

Plaintiff brings an action challenging a final countervailing duty order under 19 U.S.C. § 1516a(a)(2)(A) (Supp. II 1984). Defendant and defendant-intervenor move to dismiss the action for lack of jurisdiction on the ground that plaintiff failed to file the complaint within thirty days after the summons was filed. Plaintiff opposes the motion and moves for leave to file the complaint out of time pursuant to Rule 6(b) of the Rules of the Court.

Held: The failure to file a complaint within the time specified in 19 U.S.C. § 1516a (1982 & Supp. II 1984) is not a jurisdictional defect in an action under 28 U.S.C. § 2636(c) (Supp. II 1984). The Court has discretion in determining whether to allow such a complaint to be filed out of time under Rule 6(b) of the Rules of this Court. In this case, where the summons was timely filed, the Court in its discretion holds that the two day delay in filing the complaint due to inadvertent docketing by counsel constitutes excusable neglect since no prejudice resulted to the opposing parties.

[Defendant and defendant-intervenors' motion to dismiss for lack of jurisdiction is denied. Plaintiffs' motion to file the complaint out of time is granted. Defendant's motion to stay the filing of the administrative record is granted.]

(Decided July 17, 1986)

Harris & Berg (*Herbert E. Harris II* and *Cheryl Ellsworth*) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M Cohen,* Director, Department of Justice, Commercial Litigation Branch (*Platte B. Moring III*) for defendant.

Fried, Frank Harris, Shriver & Jacobson (*David E. Birenbaum*) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* On March 11, 1986, Commerce published its *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; In-Shell Pistachios From Iran,* 51 Fed. Reg. 8344. On April 7, 1986, within thirty days after the publication of the countervailing duty order, plaintiffs filed a summons contesting the final determination pursuant to 19 U.S.C. § 1516a(a)(2)(A)(II)

(Supp. II 1982). On May 9, 1986, thirty-two days after the filing of the summons, plaintiffs filed their complaint.

On June 6, 1986, defendant moved to dismiss the action for lack of jurisdiction on the ground that plaintiffs failed to file the complaint within thirty days after the summons was filed, and moved to stay the filing of the administrative record until forty-five days after disposition of the motion to dismiss. On June 11, 1986, plaintiffs moved for an extension of time within which to file the complaint.

The questions presented are (1) whether the Court has jurisdiction under 28 U.S.C. § 2636(c) (Supp. II 1984) in an action brought under 19 U.S.C. § 1561a(a)(2)(II) in which the summons is timely filed but the complaint is not filed within thirty days after the filing of summons, and (2) if so, whether plaintiff should be granted leave to file its complaint out of time under Rule 6(b) of the Rules of this Court. The Court holds that this action is not barred by plaintiff's failure to file its complaint within thirty days after the filing of the summons and that plaintiff is granted leave to file its complaint.

The time within which this action must be commenced is controlled by 28 U.S.C. § 2636(c). *See Bethlehem Steel Corp.* v. *United States*, 742 F.2d 1405, 1412 (Fed. Cir. 1984). Plaintiff asserts that the question whether a timely complaint is a jurisdictional prerequisite was answered in *Jernberg Forgings Co.* v. *United States*, 7 CIT 62 (1984), *vacated on other grounds*, Slip Op. 84-116 (October 15, 1984), wherein an untimely complaint was held not to bar jurisdiction. Although the Court reaches the same result as in *Jernberg*, that case is not dispositive of the jurisdictional question since that case involved language of section 2636(c) which has been changed by the Trade and Tariff Act of 1984, Pub. L. 98-573, 98th Cong. 2d Sess. (1984). *See NEC Corp.* v. *United States*, 9 CIT ——, Slip Op. 85-116 (November 19, 1985), appeal pending, (Fed. Cir. Nos. 86-912, 86-922).

Section 2636(c), as amended states:

> A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a] is barred unless *commenced in accordance with the rules of the Court of International Trade within the time specified in such section.* [Emphasis added.]

28 U.S.C. § 2636(c) (Supp. II 1984).

The question whether the action is barred depends upon whether the action was commenced in accordance with the Rules of this Court within the time specified in 19 U.S.C. § 1516a.

The commencement of actions is governed by Rule 3 of the Rules of this Court which states in pertinent part:

> A civil action is commenced by filing concurrently with the clerk of the court a summons and complaint except that *the*

following civil actions are commenced by filing a summons only:

* * * * * * *

(2) an action described in 28 U.S.C. § 1581(c) to contest a determination listed in section 516A(a)(2) of the Tariff Act of 1930. [Emphasis added.]

Since an action to contest a determination listed in section 1516a(a)(2) is commenced under the Rules of this Court "by filing a summons only," the Court has jurisdiction over any such action in which the summons is filed within the time specified in section 1516a. Section 1516a states in pertinent part:

Within thirty days after—
(i) the date of publication in the Federal Register of—

* * * * * * *

(II) an antidumping or countervailing duty order * * *

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint * * *.

Since plaintiff filed a summons within thirty days after the publication of the countervailing duty order, this action was "commenced in accordance with the rules of the Court of International Trade within the time specified in [section 1516a]," 28 U.S.C. § 2636(c), and accordingly the Court has jurisdiction.

Defendant erroneously argues that when Congress amended section 2636(c) it intended to make the filing of a complaint within thirty days after the filing of a summons a jurisdictional prerequisite. Defendant's interpretation begins with a deletion of the reference in section 2636(c) to commencement in accordance with the Court's rules. It then reads the section to mean that commencement can only be accomplished by fulfilling both the summons and complaint procedures set forth in section 1516a, irrespective of the manner in which commencement is defined in the Rules of this Court. Defendant further argues that in *Bethlehem Steel Corp.* v. *United States*, 742 F.2d 1405 (Fed. Cir. 1984), "the appellate court concluded that the time limits specified in section 1516a, *not* section 2636(c), controlled." Brief for Defendant at 5.

Like *Jernberg, supra, Bethlehem Steel* was a case involving the law as it existed prior to the Trade and Tariff Act of 1984, Pub. L. 98-573, 98th Cong. 2d Sess. (1984). The *Bethlehem Steel* Court held that an action challenging a negative aspect of an affirmative determination by the Department of Commerce was properly brought within thirty days after the publication of the final countervailing duty order rather than within thirty days after the earlier final affirmative countervailing duty determination.

In discussing the relationship between sections 1516a and the former version of section 2636(c), the *Bethlehem Steel* Court found those provisions to be *"in pari materia"* and without conflict. 742 F.2d at 1412. While the Court found congressional intent that the prior version of section 2636(c) "should 'substantially restate * * * the law set forth in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a], as added by the Trade Agreements Act of 1979,'" *id.*, *citing* H.R. Rep. No. 1235, 96th Cong. 2d Sess. 56, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3767, there is nothing in *Bethlehem Steel* which indicates that the time provisions set forth in section 1516a are controlling of the Court's jurisdiction except insofar as that section is incorporated by reference in 28 U.S.C. § 2636(c). *See Bethlehem Steel*, 742 F.2d at 1412, *quoting* S. Rep. No. 466, 96th Cong., 2d Sess. 17 (1979).

Although the language of section 2636 has been changed, the legislative history is silent as to the reasons for the amendments to sections 1516a and 2636(c). The Court will not infer from the change in section 2636(c) that Congress intended *sub silentio* to strip the Court of its discretion to allow late filings of complaints under Rule 6(b), overrule *Jernberg Forgings* by making the filing of a timely complaint as well as the filing of a timely summons a jurisdictional prerequisite, and supersede Rule 3(b) of the Rules of this Court, which defines the manner in which an action under section 1516a(a)(2) is commenced.

Section 2636(c) was a technical change necessitated by a simultaneous substantive amendment to section 1516a. Section 1516a(a)(2)(A)(ii) states that an action contesting a Commerce determination concerning whether a particular type of merchandise is within the class of merchandise described in an existing finding of dumping or antidumping or countervailing duty order must be commenced within thirty days after "the date of *mailing* of a determination." 19 U.S.C. § 1516a(a)(2)(A)(ii) (Supp. II 1984) (emphasis added). Since the new version of section 1516a contains this provision, reflecting a time period begun by an event other than *publication* of a determination in the Federal Register, section 2636(c) could not possibly have been left in its previous form, under which actions contesting all determinations listed in section 1516a were required to be commenced "within thirty days after the date of the *publication* of such determination in the Federal Register." 28 U.S.C. § 2636(c) (1982) (emphasis added), current version at 28 U.S.C. § 2636(c) (Supp. II 1984).

The Court must now decide whether plaintiff should be granted leave to file its complaint out of time. The rules governing plaintiff's motion are set forth in Rule 6(b) of the Rules of this Court, which states in pertinent part:

> (1) When by these rules or by a notice given thereunder or by order of the court, an act is required or allowed to be done

> at or within a specified time, the court may upon motion, for good cause shown, order the period extended;
>
> * * * * * * *
>
> (2) * * * The motion shall be filed prior to the expiration of the period allowed for the performance of the act to which the motion relates (including any previous extension of time); except, when for good cause shown, the delay in filing was the result of excusable neglect or circumstances beyond the control of the party.

Plaintiffs argue that their reason for missing the filing deadline and their conduct after realizing their error justify the Court's exercise of discretion in allowing the complaint to be filed out of time based upon excusable neglect:

> By inadvertence, the time for filing the complaint was incorrectly and inadvertently docketed, adding a five-day mailing period to the normal 30 day period. Thus, the complaint was not filed within the 30 day period normally allowed by statute under 19 U.S.C. § 1516a(a)(2)(ii). Rather, it was filed on May 9, 1986, 32 days after the filing of the summons.

Brief for Plaintiffs at 1-2. Plaintiffs further contend that they quickly sought to correct the error, no prejudice resulted to any opposing party and the denial of their motion, balanced against the concerns of the other parties, would exact far too great a penalty for the two day delay. They say that their error is similar to that involved in *Jernberg, supra,* in which the complaint was not timely filed because it was mailed without proper postage.

The error in this case is different from that in *Jernberg,* where plaintiffs attempt to file occurred within the proper filing deadline. However, the Court in its discretion holds that relief under Rule 6(b) is warranted since dismissal is a penalty too severe where no prejudice was occasioned by the two day filing delay.

The cases cited in opposition to plaintiffs' motion are inapposite. Those authorities involve situations where the court did not have discretion to enlarge the applicable filing period, or cases such as *Wei* v. *Hawaii,* 763 F.2d 370 (9th Cir. 1985), where the court, in its discretion, determined not to grant leave to file the complaint out of time. In that case plaintiff's counsel did not even docket the applicable 120 day limit, and timely service was not affected because the plaintiff wished to add additional causes of action to his complaint prior to service, but delayed in amending the complaint. The Court finds that its decision is contrary to no precedent of this Court nor of any raised by the opponents of plaintiffs' motion.

Conclusion

The Court holds that the failure to file a complaint within the time specified in 19 U.S.C. § 1516a(a)(2)(A) does not constitute a jurisdictional defect under 28 U.S.C. § 2636(c) and that the Court has

discretion in determining whether to allow such a complaint to be filed out of time under Rule 6(b) of the Rules of this Court. In this case, where the summons was timely filed, the Court, in its discretion, holds that the two day delay in filing the complaint due to inadvertent docketing by counsel constitutes excusable neglect since no prejudice resulted to the opposing parties.

Defendant and defendant-intervenors' motion to dismiss for lack of jurisdiction is denied. Plaintiffs' motion to file the complaint out of time is granted. Defendant's motion to stay the filing of the administrative record is granted. The administrative record shall be filed not later than 45 days from the date of this opinion. So ordered.

(Slip Op. 86-73)

NORTH AMERICAN FOREIGN TRADING CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80-10-01631

Before DICARLO, *Judge.*

Plaintiff's solid state electronic clocks from Taiwan were classified and duties assessed under items 715.15, 716.15, and 720.34, Tariff Schedules of the United States (TSUS). Defendant admits that the classification is erroneous under *United States* v. *Texas Instruments, Inc.*, 69 CCPA 136, 673 F.2d 1375 (1982), and says the merchandise is properly classified as electrical articles, not specially provided for, under item 688.36, TSUS, at a rate of 5.5% ad valorem, the rate under 688.40, TSUS in 1979. Item 688.40 was superseded by, *inter alia*, item 688.45 in 1980, and item 684.45 was retroactively replaced for all unliquidated entries by, *inter alia*, item 688.36 in 1982 by Executive Order 12371.

Plaintiff argues that its merchandise is entitled to enter duty-free under the Generalized System of Preferences (GSP) since merchandise from Taiwan classifiable under item 688.40 is entitled to GSP status. Plaintiff claims (1) Executive Order 12,371 does not cover its merchandise, (2) the President cannot retroactively change the rate of duty for its merchandise, and (3) the President did not observe procedural requirements for withdrawing GSP status.

The Court holds that Executive Order 12371 does cover plaintiff's merchandise, and does not retroactively impose duty since the merchandise had not been finally liquidated. Since Congress gave the President discretion to determine whether merchandise was ineligible for GSP treatment, and the President stated in the Executive Order that the clocks had never been eligible for GSP treatment, the President did not withdraw GSP status from the clocks and was not required to observe the procedural requirements for withdrawing GSP status.

[Defendant's motion for summary judgment is granted.]

(Decided July 17, 1986)

Fitch, King & Caffentzis, (James A. Caffentzis) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Susan Handler-Menahem*) for defendant.

Memorandum Opinion and Order

DiCarlo, *Judge:* In 1979 solid state electric clocks imported from Taiwan with movements measuring less than 1.77 inches in width were classified under items 715.15, 716.15, and 720.34, Tariff Schedules of the United States (TSUS). Item 715.15, TSUS, covered watches and clocks with watch or clock movements measuring less than 1.77 inches in width. Under item 715.15, TSUS, which carried no duty, movements were assessed under item 716.15, TSUS, and cases under item 720.34, TSUS.

In 1982 our appellate court held that since solid state electronic *watches* did not have movements, they could not be classified under item 715.15, but were classifiable under item 688.45, TSUS, as "electrical articles, not specially provided for" (electrical articles, nspf). *United States* v. *Texas Instruments, Inc.,* 69 CCPA 136, 673 F.2d 1375 (1982).

In this action, plaintiff's solid state electronic *clocks* from Taiwan were classified and duties assessed under item 715.15, 716.15, and 720.34, (TSUS). Defendant admits that the classification is erroneous under *Texas Instruments.* Defendant says the merchandise is properly classified under item 688.36, TSUS, at a rate of 5.5% ad valorem, the rate under item 688.40, TSUS, in 1979. Effective March 30, 1980, item 688.40 was superseded by item 688.45 and 688.44 (covering electrical articles using pre-programmed digital integrated circuits to produce sounds). Executive Order 12204, 45 Fed. Reg. 20740 (1980). In 1982, item 684.45 was retroactively replaced for all unliquidated entries by item 688.36 (covering "Solid-state electronic watches and clocks and solid-state electronic watch or clock modules") and 688.43 ("other") by Executive Order 12371. 47 Fed. Reg. 30449 (1982).

Plaintiff challenges the validity of Executive Order 12371 as applied to its merchandise and asserts that its merchandise should be reliquidated under item A688.40, TSUS, duty-free under the GSP, since merchandise from Taiwan entering under item 688.40, TSUS, in 1979 was entitled to GSP treatment. The "A" prefix denotes duty-free treatment under the GSP.

Plaintiff moves, and defendant cross-moves, for summary judgment. The parties agree there are no genuine issues of material fact precluding summary judgment.

The questions presented are (1) whether Executive Order 12371 covers plaintiff's merchandise, and (2) whether the President retroactively changed the rate of duty for plaintiff's merchandise (3) without observing procedural requirements for withdrawing GSP status. The Court holds that Executive Order 12371 validly applies to plaintiff's merchandise, and that the merchandise is properly classified under item 688.36, TSUS, at a rate of 5.5% ad valorem.

Following the *Texas Instruments* decision the President on July 12, 1982 issued Executive Order 12371 to "clarify that certain import sensitive articles are, and since the enactment of the Trade

Act of 1974 have been, precluded from eligibility for duty-free treatment pursuant to section 503(c)(i) [sic] of the Trade Act [19 U.S.C. § 2463(c)(1)]." 47 Fed. Reg. 30449.

The validity of Executive Order 12371 was upheld in *North American Foreign Trading Corp.* v. *United States,* 8 CIT 359 (1984), *reh'g den.,* 9 CIT ——, Slip Op. 85-24 (March 1, 1985), *aff'd,* No. 85-2271 (Fed. Cir. Feb. 10, 1986) (*North American I*), an action involving solid state electronic digital watches imported from Hong Kong. The Court of International Trade [CIT], held that Congress prohibited granting GSP status to watches, citing section 503(c)(i)(B) of the Trade Act of 1974, 19 U.S.C. § 2463(c)(1)(B) (1982). Affirming, the Court of Appeals for the Federal Circuit held that "the watches were not eligible for the benefits of the [GSP] at the time of their importation, in accordance with 19 U.S.C. sec. 2463(c)(1) (B) and (C)." Slip Op. at 2. Section 2463(c) provides as follows:

> (c) Articles which may not be designated as eligible articles
>
> (1) The President may not designate any article as an eligible article under subsection (a) of this section if such article is within one of the following categories of import-sensitive articles—
>
> (A) textile and apparel articles which are subject to textile agreements,
>
> (B) watches,
>
> (C) import-sensitive electronic articles,
>
> (D) import-sensitive steel articles,
>
> (E) footwear articles specified in item 700.05 through 700.27, 700.29 through 700.53, 700.55.23 through 700.55.75, and 700.60 through 700.80 of the Tariff Schedules of the United States,
>
> (F) import-sensitive semimanufactured and manufactured glass products, and
>
> (G) any other articles which the President determines to be import-sensitive in the context of the Generalized System of Preferences.

Since plaintiff's watches were excluded from GSP status in *North American I,* the watches did not obtain such status when their tariff classification was changed and since the President did not withdraw duty-free treatment from plaintiff's merchandise, the President was not required to follow the statutorily mandated procedure in withdrawing such status established by section 504(a) of the Trade Act of 1974, 19 U.S.C. § 2464(a) (1982).

Plaintiff first argues that Executive Order 12371 does not, by its terms, encompass merchandise entered before 1980. Plaintiff notes that (1) Annex II to Executive Order 12371, establishing staged reductions in rates of duties for affected items, amends Annex III to Presidential Proclamation 4707 which was effective January 1, 1980, and (2) the table in Annex II displaying rates of duty under Executive Order 12371 does not include a rate of duty for articles

entered before January 1, 1980. Plaintiff argues that if the President meant to refer to merchandise entered prior to 1980, he had to refer to such merchandise in Annex II.

The Court disagrees. Executive Order 12371 by its terms affects "all articles previously entered for which liquidation as not been made final" as of the day following the date of the order, July 13, 1982. Since plaintiff's action challenging the denial of its protest was pending before the Court at that time, liquidation of its entries had not yet become final, and its merchandise is within the scope of the Executive Order. Annex II does not limit the scope of Executive Order 12371, but rather establishes staged reductions in rates of duties for the newly created tariff items.

Plaintiff further argues that Executive Order 12371 does not affect the GSP status of merchandise within item 688.40, under which plaintiff seeks classification, on the ground that the order does not specifically mention the GSP status of merchandise classifiable under that item. Section 3 of Executive Order 12371, provides:

> Annex III of Executive Order No. 11888 of November 24, 1975, as amended, listing articles that are eligible for benefits of the GSP when imported from all designated beneficiary developing countries except those specified in General Headnote 3(c)(iii) of the TSUS, is amended by deleting TSUS item 688.45 therefrom and inserting in lieu thereof TSUS item 688.43.

In 1982, item 688.40, TSUS, was not on the relevant GSP list, Annex III of Executive Order No. 11888, as amended, having been replaced by items 688.44 and 688.45 in 1980. Since the President stated that Executive Order 12371 affects all articles for which liquidation had not been made final, the reference in Executive Order 12371 to item 688.45 is properly read to cover the predecessor provision.

Second, plaintiff argues that if the President did retroactively withdraw GSP status from articles classifiable under item 688.40, TSUS, the President has no authority to retroactively deny duty-free treatment. But, as the Circuit Court of Appeals for the Federal Circuit stated in *North American I*:

> This is not a case of retroactive imposition of duty, because the goods in question had not been finally liquidated. Executive Order 12371 by its terms applied only to [merchandise] that had not been liquidated prior to the Order. 47 Fed. Reg. 30449, 30450 (1982). No vested right to a particular classification or rate of duty or preference is acquired at the time of importation. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 318 (1932); *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 580 (CCPA 1975).

Slip Op. at 1-2. Plaintiff cannot complain if its protest extended the finality of the liquidation to allow the President to correct an

unanticipated effect of a change in the classification of its merchandise.

Finally, plaintiff argues that since the President did not follow the statutorily mandated procedure for withdrawing GSP status, set forth in 19 U.S.C. § 2461, any withdrawal of GSP treatment for articles classifiable under item 688.40, TSUS, is *ultra vires* and void. Again, the Court disagrees.

The Court finds no indication that Congress intended to include the clocks in this case in the reference to "watches" in section 2463(c)(1)(B). But the Court holds that the President could find that the clocks were prohibited by Congress from designation for GSP treatment as "import sensitive electronic articles" under section 2463(c)(1)(C) or "other articles which the President determines to be import-sensitive in the context of the Generalized System of Preferences" under section 2463(c)(1)(G).

Nothing in the statute or legislative history defines the term "import-sensitive" in subsections 2463(c)(1) (C), (D), (F), or (G). Nor is there any provision providing for procedures to be followed in determining whether merchandise is "import-sensitive" within those subsections. Since subsection 2463(c)(1)(G) clearly states that the President may determine that articles are "import-sensitive", the Court concludes that Congress gave the President discretion to determine whether merchandise is "import-sensitive" under the statute and therefore prohibited from designation for GSP treatment.

Plaintiff concedes that "Congress has given the President the power to exercise his judgment in designating articles as eligible for GSP benefits * * * in determining whether the designated article is import-sensitive," but argues that "the question of 'import-sensitivity' is to be determined in accordance with the statutory provisions governing GSP designation of articles." Plaintiff's Second Supplemental Brief at 2-3. While the statute clearly establishes procedures the President is to follow for designating articles as eligible for GSP treatment, section 2463(a), there is no similar provision with respect to those articles which may not be designated as eligible. The Court will not infer such a provision.

The Court holds that Congress granted the President authority to issue Executive Order 12371, and that the Executive Order served as the President described, "to clarify" that the merchandise had been considered "import-sensitive" since the enactment of the Trade Act of 1974 and therefore was ineligible for duty-free treatment under the GSP. Since the merchandise was ineligible for GSP treatment, the President did not withdraw GSP status from the clocks and was not required to observe the procedural requirements for withdrawing GSP status.

Plaintiff's motion for summary judgment is denied; defendant's motion for summary judgment is granted. Judgment will be entered accordingly. So ordered.

(Slip Op. 86-74)

PHILIPP BROTHERS, INC., OSAKA TITANIUM CO., LTD., AND TOHO TITANIUM CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND RMI CO. AND TITANIUM METALS CORP. OF AMERICA, INTERVENOR-DEFENDANTS

Plaintiffs challenge an International Trade Commission determination that a United States industry was threatened with material injury by imports of titanium sponge from Japan. Plaintiffs argue that the Commission's finding that a domestic industry was threatened with material injury and that the threat was by reason of imports are not supported by substantial evidence or otherwise in accordance with law.

The Court holds that the Commission's finding that the domestic titanium sponge industry was threatened with material injury is supported by evidence of lost sales and profits, and that the Commission's finding that Japanese imports caused the threat of material injury is supported by evidence of Japanese producers' increased capacity, incentive to export to the United States, and aggressive pricing tactics.

[Plaintiffs' motion for judgment on the agency record is denied. The action is dismissed.]

(Decided July 17, 1986)

Busby, Rehm and Leonard, P.C. (David Busby, Will E. Leonard, Munford Page Hall, II, Ruth Bale Lippincott); Graham & James (Denis H. Oyakawa, Patrick Fields, Yoshihiro Saito) and *Wender, Murase & White (Matthew J. Marks, Greyson Bryan, Roger Selfe)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile*, Assistant General Counsel, United States International Trade Commission *(Stephen A. McLaughlin)* for defendant.

Wilmer, Cutler & Pickering (A. Douglas Melamed, John D. Greenwald, Richard K. Lahne); John F. Hornbostel, Jr., RMI Company, for intervenor.

Pillsbury, Madison & Sutro (Donald E. deKieffer, Francis J. Sailor) for Titanium Metals Corp. of America, intervenor.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs challenge a determination of the United States International Trade Commission (Commission) that an industry in the United States is threatened with material injury by reason of imports of titanium sponge from Japan. *Titanium Sponge from Japan and the United Kingdom*, Inv. No. 731-TA-161 (Final), U.S.I.T.C. Pub. No. 1600 (*Report*). The Court holds that the Commission's determination is supported by substantial evidence and in accordance with law.

I. BACKGROUND

In November, 1983 intervenor RMI Company petitioned the International Trade Administration, Department of Commerce (Commerce) on behalf of the domestic titanium sponge industry alleging that imports of titanium sponge from Japan were, or were likely to be, sold in the United States at less than fair value, that these imports were materially injuring, or threatening to injure, an industry in the United States, and that an antidumping duty should be imposed under 19 U.S.C. § 1673 (1982).

Commerce initiated an investigation and found weighted-average dumping margins of 15.09% for plaintiff Osaka Titanium Co. and 34.25% for plaintiff Toho Titanium Co. Notice of its final affirmative determination was published on October 1, 1984. 49 Fed. Reg. 38,687 (1984).

On October 29, 1984, the Commission determined unanimously that an industry in the United States was not materially injured by reason of imports of titanium sponge from Japan and determined by a vote of 3-2 that an industry in the United States was threatened with material injury by reason of imports of titanium sponge from Japan. An antidumping duty order was published in the Federal Register on November 30, 1984. 49 Fed. Reg. 47,053 (1984).

II. Judicial Review

The Commission's determination must be sustained unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Plaintiffs emphasize that the Commission did not find material injury by reason of imports and determined a threat of material injury by a vote of three to two. "This, therefore, is as weak a final affirmative determination as the Commission can produce—a three to two division of Commissioners and a foggy forecast of the future as the basis of the three-person majority's determination." Plaintiffs' Brief at 2. The size of the Commission majority is, however, irrelevant. The Court may consider only whether the determination of the Commission is unsupported by substantial evidence or otherwise not in accordance with law.

This Court recently considered the scope of "substantial evidence" review.

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938), quoted in *Matsushita Electric Industrial Co. Ltd.* v. *United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). It is "enough [evidence] to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury," *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939), and "something less than the weight of the evidence * * * [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966). *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951); *Matsushita Electric Industrial Co. Ltd.* v. *United States*, 750 F.2d 927, 936 (Fed. Cir. 1984) (substantial evidence a "limited standard of review").

Carlisle Tire & Rubber Co. v. *United States*, 9 CIT ——, 622 F. Supp. 1071, 1074 (1985).

The standard of judicial review of the Commission's interpretation of the statutes it administers was recently summarized by our appellate court:

> A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450–51 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 85 (1964). Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable". *Federal Election Committee* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *see Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984). The agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding. *Chevron, U.S.A. Inc.* v. *National Resources Defense Council*, 467 U.S. 837, 843 n.11, 104 S.Ct. 2778, 2782 n.11 (1984); *see Consumer Products Division, SCM Corp.* v. *Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

American Lamb Co. v. *United States*, No. 86–560 (Fed. Cir. Feb 28, 1986), Slip Op. at 13.

III. Discussion

The Commission made its determination pursuant to 19 U.S.C. §1673d(b)(1)(A)(ii) (1982), which provides that the Commission "shall make a final determination of whether an industry in the United States is threatened with material injury * * * by reason of imports." The parties agree that the Commission may make an affirmative finding only when it finds both (1) threat of material injury and (2) that the threat of material injury is caused by imports. *See American Spring Wire Corp.* v. *United States*, 8 CIT 20, 22, 590 F.Supp. 1273, 1276 (1984) *aff'd sub. nom. Armco, Inc.* v. *United States*, 760 F.2d 249 (Fed. Cir. 1985).

"Material injury" is defined by statute as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. §1677(7)(A) (1982). Congress has directed the Commission to consider "all relevant economic factors which have a bearing on the state of the industry," 19 U.S.C. §1677(7)(C)(iii), including, but not limited to:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices, and
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

Id; see H.R. Rep. 317, 96th Cong., lst Sess. 46 (1979); S.Rep. 249, 96th Cong., lst Sess. 88, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 474.

The Commission has latitude in weighing economic factors it considers relevant to its determination of threat of material injury, but the determination "must be based upon information showing that the threat is real and injury is imminent, not a mere supposition or conjecture." S. Rep. No. 249, 96th Cong. lst Sess. 88–89 (1979); H.R. Rep. No. 317, 96th Cong., lst Sess. 47048 (1979). Cf. Trade and Tariff Act of 1984, Pub. L. 98–573, § 626, codified at 19 U.S.C. § 1677(7)(F)(ii) (Supp. II 1984), (applicable to petitions filed after October 20, 1984; the petition in this case was filed November 28, 1983).

A. Threat of Material Injury

Plaintiffs first argue that there is not substantial evidence in the record to support the Commission's finding that the threat to the domestic titanium sponge industry was real and imminent.

The record indicates that titanium sponge is an intermediate product; it is used to make titanium ingot, which is used to make a variety of titanium mill products, between 60 and 80% of which are used, in the United States, in the aerospace industry. During the period of the Commission investigation, January 1981 to June 1984, there were four domestic companies producing titanium sponge. Three of the four, including intervenors RMI and Titanium Metals, Inc. were integrated producers—they also produced titanium ingot and mill products. There were also four ingot producers that did not produce titanium sponge. The three integrated sponge producers account for all but 5 to 10.5% of the domestic consumption of sponge. The nonintegrated ingot producers buy their sponge from the lone nonintegrated sponge producer, International Titanium, Inc. (ITI), or from importers.

The Commission majority noted that the

> titanium sponge industry is a highly volatile industry that has yet to fully mature. It has been plagued by a recurring pattern of sharp supply and demand shifts and has had to rely on demand projections (for both military and commercial markets) which have tended to be unreliable because of changes in a complex mosaic of factors, including the speculative nature of aerospace and defense demand.

Report at 8.

The last boom period in the industry was 1979–81, during a rapid increase in demand for commercial aircraft; there was a significant slump in 1982–83; and the domestic industry improved in January–June 1984. Plaintiffs do not dispute the Commission's findings that apparent domestic consumption of titanium sponge fell from 68 million pounds in 1981 to 31.4 million pounds in 1983, before rising to 30.9 million pounds in January–June 1984; domestic production

fell from 55.7 million pounds in 1981 to 28.4 million pounds in 1983, before increasing to 22.4 million pounds in January–June 1984; domestic capacity utilization went from 92.4 percent in 1981 to 45.1 percent in 1983 to 71.7 percent in January–June 1984. Employment and wages in the titanium sponge industry also declined from 1981 before rising in 1984. Capital expenditures declined dramatically in January–June 1984.

The Commission said that there was real and imminent threat of material injury despite the 1984 recovery because (1) prices and unit values remained in decline for sponge delivered in the first half of 1984, (2) future domestic sales to the National Defense Stockpile (stockpile) were threatened, and (3) the lone domestic nonintegrated sponge producer, ITI, was discouraged from making capital investment. The Commission found that future increases in imports would cause material injury in lost sales and further depression of prices.

Plaintiffs do not dispute, and the record evidence supports, the Commission's finding that prices and unit values continued to decline for sponge delivered in the first half of 1984. The price in 1984 was less than half the 1981 price. Plaintiffs do dispute that the record supports the Commission's finding that future stockpile purchases were imminent. In September, 1983 plaintiff Philipp Brothers, Inc. (Phibro) won a General Services Administration (GSA) contract to supply 6 million pounds of sponge, out of 9 million pounds bought, for the stockpile. With this contract, plaintiffs' share of the United States market went from 6.2 percent in 1983 to 24.4 percent in the first half of 1984. Plaintiffs note that the 1983 stockpile purchase was the first in 20 years and argue that the record does not contain substantial evidence to support the Commission's finding that future stockpile purchases were imminent.

The record indicates that (1) the Federal Emergency Management Agency (FEMA), which manages the stockpile, stated in May, 1980, that the agency's goal was to procure 195,000 tons (390 million pounds) (2) GSA had 32,331 tons (64,662 million pounds) of sponge in the stockpile as of August 2, 1983, and (3) both FEMA and GSA have emphasized the high priority of titanium sponge in the overall stockpile requirements. At the urging of plaintiffs, the Commission sought to verify the likelihood of additional procurement of sponge for the stockpile. The record contains a letter from FEMA stating that it anticipated that significant purchases of sponge for the stockpile would be made in fiscal years 1985 and 1986. This is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Federal Trade Commission* v. *Indiana Federation of Dentists,* 54 U.S.L.W. 4531, 4533 (U.S. June 2, 1986) quoting *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951). The Court holds that the Commission's finding that titanium sponge purchases by the GSA were imminent is supported by substantial evidence on the record.

Plaintiffs also contest the Commission's finding of a real threat of material injury to ITI, the only domestic nonintegrated producer of titanium sponge. ITI was established to supply sponge to nonintegrated mill product manufacturers and therefore most directly competes with imports. Plaintiffs first argue that ITI is only "technically nonintegrated," because its "parent," Wyman-Gordon Company, is a "reliable customer" for its sponge. Plaintiffs' Brief at 52. The record supports the Commission's findings that Wyman-Gordon is in the position of an independent purchaser, negotiating its contracts with ITI on an arms-length basis. Moreover, Wyman-Gordon does not purchase all of ITI's production. ITI's sales to other melters have been a substantial proportion of its production.

Plaintiffs also argue that ITI's difficulties were caused by high start-up costs and insufficient certification to provide titanium sponge for all military and aerospace end uses. However, record evidence indicates that ITI lost sales and revenues to imports and that its inability to maintain a positive cash flow from operations impaired its ability to raise capital necessary for expansion in highly capital intensive sponge production facilities. Granting the agency's interpretation of both the evidence and the statute "substantial weight," *see American Lamb Co.* v. *United States*, No. 86-560 (Fed. Cir. Feb. 28, 1986), Slip Op. at 13, the Court holds that the Commission's finding of a real threat of material injury to ITI is supported by substantial evidence or otherwise in accordance with law.

Plaintiffs argue that the domestic titanium sponge industry was recovering at the end of the investigation period, in June 1984 and that the record does not support the Commission's finding that there was a real and imminent threat to the domestic sponge industry. Plaintiffs point to evidence in the record that in June 1984 the domestic industry was operating at over 80% capacity, with RMI "reportedly operating at full capacity," *Report* at 21-22 (Views of Commissioner Stern), prices were moving up for contracts entered into in the first half of 1984, and employment and wages were improving.

Plaintiffs' interpretation of the record evidence is plausible, but "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966). The Court holds that the Commission's determination that there was real and imminent threat of material injury because prices remained in decline for sponge delivered in the first half of 1984, future domestic sales to the stockpile were threatened, and ITI was discouraged from making capital investment is supported by substantial evidence in the record as a whole or otherwise in accordance with law.

B. Causation

Plaintiffs also argue that the Commission's determination that the threat to the domestic titanium sponge industry is caused by Japanese imports is not supported by substantial evidence or otherwise in accordance with law.

The Commission found that the Japanese intended to increase imports because (1) they have substantially increased capacity while production and plant utilization have fallen, (2) their unused capacity and volume-related efficiencies give them incentive to increase imports to the United States, the world's largest titanium sponge market, and (3) they have sought to increase their penetration in the United States market by aggressive pricing practices.

Plaintiffs do not dispute the Commission findings that Japanese capacity increased from 62 million pounds in 1981 to 40.6 million pounds in January–June 1984 while production fell from 55 million pounds in 1981 to 23.3 million pounds in 1983, before rising slightly to 14.7 million pounds in January–June 1984. Unlike the domestic industry, however, Japanese producers increased capacity over that period so that capacity utilization fell from 88.7% in 1981 to 29.3% in 1983, but rose only to 36.2% in January–June 1984.

Plaintiffs say that capacity alone is insufficient to prove intent to increase imports, citing *American Spring Wire Corp.* v. *United States*, 8 CIT 20, 28, 590 F. Supp. 1275, 1280 (1984) *aff'd sub. nom., Armco, Inc.* v. *United States*, 760 F.2d 249 (Fed. Cir. 1985). Plaintiffs say the increase in Japanese capacity was in response to increased world demand, noting that the record indicates that Japanese imports to the European Communities increased by more than 50% in 1984.

Although "[t]he mere fact of increased capacity does not *ipso facto* imply increased exports to the United States," *American Spring Wire*, 8 CIT at 28, 590 F. Supp. at 1280, capacity may be considered by the Commission. *See Rhone Poulenc, S.A.* v. *United States*, 8 CIT 47, 592 F. Supp. 1318 (1984); *Alberta Gas Chemicals, Inc.* v. *United States*, 1 CIT 312, 515 F. Supp. 780 (1981). In *Rhone Poulenc* the Court affirmed a Commission finding of threat of material injury where, as in this case, the Commission looked at excess foreign capacity and pricing practices.

The record contains several instances of lost revenue to domestic producers caused by lower price quotes from Japanese importers. In response to these lower price quotes domestic producers lowered their prices to meet competition from imports and obtain or keep contracts. The most significant of these events involved a large, long-term contract RMI won with Martin-Marietta Aluminum, Inc. in May 1983. In October 1983 Phibro made three unsolicited offers to Martin-Marietta at prices substantially lower than the contract price. The contract contained a "meet competition" clause, so RMI was faced with the choice of either meeting Phibro's price or relinquishing the contract.

Although Phibro withdrew its offers immediately after RMI filed its antidumping petition in November 1983, Martin-Marietta subsequently told RMI of its "desire to pursue discussions for [RMI] to remain competitive," and these discussions resulted in a reduction of RMI's prices for January–June 1984. The Commission majority recognized this loss of revenue and viewed Phibro's behavior as evidence of aggressive pricing to increase market share. *Report* at 12. Plaintiffs argue that the episode does not evidence aggressive behavior because the offer was withdrawn. The offer was withdrawn, however, only after RMI filed its antidumping petition. The Commission may disregard or give little weight to tactical maneuvering after the filing of an antidumping petition. *See, e.g., Rhone Poulenc*, 8 CIT at 53, 592 F. Supp. at 1324-25. Plaintiffs also attempt to minimize the incident by asserting that RMI lost relatively little revenue, dismissing RMI's price reduction as insignificant. However, the Commission did not focus so much on the amount of the lost revenues as on the evidence of aggressive Japanese producer pricing presented by this incident.

Plaintiffs further argue that injury to domestic industry is merely speculative, as in *Alberta Gas Chemicals, Inc.* v. *United States*, 1 CIT 312, 515 F. Supp. 780 (1981), where the Court reversed an affirmative Commission finding of threat of material injury. Plaintiffs argue that further Japanese penetration in the domestic market and future stockpile purchases are similarly speculative. In *Alberta Gas* the foreign producer was producing at 100% capacity and nearly all production was committed under existing contracts. The Court held that plans by the foreign industry to increase capacity were indefinite. 1 CIT at 323-24, 515 F. Supp. at 790-91. In this case, excess capacity exists and, as the Court has held, the Commission's finding of future stockpile purchases is supported by substantial evidence.

Plaintiffs and the two dissenting members of the Commission attribute depressed sponge prices to low demand for mill products, not pressure from dumped Japanese sponge. When demand for mill products is low, the integrated producers have excess sponge, which they must sell on the commercial market. Plaintiffs argue that the record indicates that the Japanese sponge industry also experienced difficulties in 1981–83, during which time production, exports to the United States, and prices all fell. Plaintiffs say they merely respond to low domestic prices caused by the integrated domestic producers.

This view is plausible, and the Court might find it compelling if it were to consider the evidenciary record *de novo*. But the Court's review is at an end if the agency's interpretation is reasonable. *American Lamb, supra*. The Court holds that the Commission could reasonably find that Japanese imports caused threat of material injury by their increased capacity, incentive to increase imports to the United States, and aggressive pricing tactics.

IV. Conclusion

The Court holds that the Commission's determination is supported by substantial evidence and otherwise in accordance with law. Plaintiffs' motion for judgment on the agency record is denied. The action is dismissed. Judgment will be entered accordingly.

So ordered.

(Slip Op. 86–75)

HERA SHIPPING, INC., PLAINTIFF *v.* HARRY CARNES, ET AL., DEFENDANTS

Court No. 86–5–00577

Before WATSON, *Judge.*

Memorandum Opinion and Order

Increase in Amount of Bond

The District Director of Customs in Miami is found to have lawfully increased plaintiff's bond based on a reasonable belief that plaintiff's conduct was endangering the revenue of the United States. An informational deficiency in the letter giving notice of the increase is found to have been cured by information supplied in the government's motion.

[Defendants' motion for summary judgment granted.]

(Dated July 28, 1986)

Law Offices of Max P. Engel for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, and *Susan Handler-Menahem,* Civil Division, Department of Justice, Commercial Litigation Branch for defendants.

WATSON, *Judge:* Plaintiff, a bonded international carrier, brought this action to enjoin the District Director of Customs in Miami, Florida from increasing its bond from $50,000 and $1,300,000 and to ask the court to declare that plaintiff be provided with a full administrative hearing on whether its bond should be increased. The government has moved to dismiss the action, and in the alternative, for summary judgment.

Plaintiff complained that the District Director's letter of May 5, 1986 did not give the 30-day notice required by the Customs Regulations and that plaintiff was not given due process of law, namely, an administrative hearing at which reasonable cause would be shown for increasing its bond.

The issue of notice became moot when the effective date of the increase was changed from May 15, 1986 to June 4, 1986.

The issue of due process might have had some limited measure of validity if the government had refused to go beyond the terse statement to plaintiff in its letter of May 5 that it had reviewed the bond and "find the amount to be insufficient in view of the actual liabilities incurred by your firm."

However, the informational defects of the letter of May 5 were remedied by the information supplied in the government's motions. To the extent that the lack of information in the letter deprived plaintiff of due process, that was cured here and there is no need for the court to require any additional steps. *Cf. Jennings* v. *Mahoney,* 404 U.S. 25 (1971).

Accompanying the answer and the government's motion to dismiss, or for summary judgment, is the affidavit of the District Director of Customs Service in Miami, Florida.

This establishes that the District Director, based on information provided by inspectors and special agents of the Customs Service, and, in particular, on a copy of an extensive affidavit in support of a search warrant executed by a special agent, had reason to believe that plaintiff was systematically directing bonded merchandise, notably liquor, into the commerce of the United States without filing entries or paying duties or taxes.

District Directors are fully authorized by law and regulation to require bonds and to require changes in them, all in the interest of protecting the revenue of the United States. The authority flows from 19 U.S.C. § 1623 which in relevant part reads as follows:

19 U.S.C. § 1623:

> (a) In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.
>
> (b) Whenever a bond is required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, the Secretary of the Treasury may—
>
> (1) Except as otherwise specifically provided by law, prescribe the conditions and form of such bond, and fix the amount of penalty thereof, * * *.

The statutory authority is exercised in a number of regulations setting guidelines for determining the amount of a bond, the grounds for requiring additional security, and the conditions of bonds for international carriers (the class to which plaintiff belongs). These regulations read as follows:

19 C.F.R. § 113.13(b): Guidelines for determining amount of bond:

> In determining whether the amount of a bond is sufficient, the district director or regional commissioner in the case of a bond relating to repayment of erroneous drawback payment (see § 113.11) should at least consider:
>
> (1) The prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments;

(2) The prior record of the principal in complying with Customs demands for delivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations;

(3) The value and nature of the merchandise involved in the transaction(s) to be secured;

(4) The degree and type of supervision that Customs will exercise over the transaction(s);

(5) The prior record of the principal in honoring bond commitments, including the payment of liquidated damages; and

(6) Any additional information contained in any application for a bond.

19 C.F.R. § 113.13(d): Additional security

Notwithstanding the provisions of this section or any other provision of this chapter, if a district director or regional commissioner believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs law or regulations, he shall require additional security.

19 C.F.R. § 113.64: International carrier bond conditions

A bond for international carriers shall contain the conditions listed in this section and may be either a single entry or continuous bond.

(a) If any vessel, vehicle, or aircraft, or any master, owner, or person in charge of a vessel, vehicle or aircraft incurs a penalty, duty, tax or other charge provided by law or regulation the obligors agree to pay the sum upon demand by Customs.

(b) The principal agrees to comply with all laws and Customs Regulations applicable to unlading, safekeeping, and disposition of merchandise, supplies, crew purchases, and other articles on board the vehicle, vessel, or aircraft; and to redeliver the foregoing to Customs upon demand as provided by Customs Regulations. If principal defaults, obligors agree to pay liquidated damages equal to the value of the merchandise involved in the default or three times the value of the merchandise involved in the default if the merchandise is restricted merchandise or alcoholic beverages, or such other amount as may be authorized by law or regulation. It is understood and agreed that the amount to be collected under this condition shall be based upon the quantity and value of the merchandise as determined by Customs. Value as used in these provisions means value as determined under 19 U.S.C. 1401a.

(c) If the principal's vessel, vehicle, or aircraft is granted clearance without filing a complete outward manifest and all required export documents, the principal agrees to file timely the required manifest and all required export documents. If the principal defaults, the obligors (principal and

surety) agree to pay liquidated damages of $50 per day for the first 3 days, and $100 per day thereafter, up to $1,000 in total.

(d) The obligors agree to exonerate the United States and its officers from any risk, loss, or expense arising out of entry or clearance of the carrier, or handling of the articles on board.

On the side of the government's exercise of its power without a prior hearing are a number of important considerations.

The grant of authority for requiring bonds and setting their amount is strongly stated and comprehensive. The use of bonds, rather than a strict requirement of payment for each transaction, involves an element of trust in the conduct of the bonded party. The modification of terms of the bond is, in the abstract at least, merely the enlargement of something that is already in place. It does not have the character of a completely new intrusion into the sphere of a party's activity.

It does not seem reasonable that a party's right to keep doing business at a certain cost of guaranteeing the performance of its duties is paramount to the government's right to protect the revenue in a case where there is reason to doubt the performance of those duties.

In short, the business person's right to have a bond remain unchanged is not the sort of property right which is of such fundamental importance that it must remain in place, unmolested, until good cause to change it is developed in a hearing.

Obviously, the power to set bonds can be abused to put people out of business without reasonable justification. But that extreme possibility is guarded against by the requirement that the notice provide sufficient information as to the basis for the change to allow it to be challenged in court. The mere existence of that extreme possibility does not justify the full panoply of due process in advance of every modification of bond terms.

While comparisons of various "rights" are difficult the court is of the opinion that the interest of plaintiff in the amount of a bond does not appear to be as significant in the scale of values as the interests for which full due process rights have been found. *Goldberg* v. *Kelly*, 397 U.S. 255 (1970) (entitlement to welfare payments); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951) (designation of organizations as Communist).

The situation is analogous to that in *Gallagher & Ascher Co.* v. *Simon*, 687 F.2d 1067 (7th cir. 1982), not in the sense that plaintiff has the sort of property right that customs brokers were found to have in the term special permits under which they operated, but rather in that a lesser measure of due process satisfies the balance of interests involved.

In addition, a comparison with the situation recently addressed by this court in *American Customs Brokers Co.* v. *United States*

Customs Service, 10 CIT ——, slip op. 86-56 (May 27, 1986), highlights the deficiencies in plaintiff's case. In that case the court preliminarily enjoined the government from revoking a customhouse broker's "immediate delivery privilege," on the ground that the government had not complied with statutory requirements for giving written notice and for giving the affected party an opportunity to demonstrate or achieve compliance. Moreover, the government failed to show that the conduct which led to the revocation had caused any harm to the government or the public. (The conduct was the listing of erroneous social security or tax identification numbers on the entry papers of automobiles entered under bond pending installation of emission controls and safety equipment.)

In short, the *American Customs Brokers* case involved a more portentous step taken by the government (revocation), done with a lower level of notice and for questionable reasons. Here, the step taken of increasing the bond has been proportionate to the conduct being regulated and the original notice deficiency has been cured.

It must be emphasized that a party is not entirely helpless when its bond is increased. The question of whether the increase was based on a reasonable belief as to the existence of the necessary justifying conditions will always be open, as will the reasonableness of the increase in relation to the objectives sought to be secured.

Here the first question has already been answered in the affirmative. On the reasonableness of the increase the court also finds in the affirmative. The uncontroverted affidavit of the District Director shows that, under the circumstances of this case, it was not unreasonable to estimate that a single day's activity of plaintiff could justify the assessment of up to $20,000 in liquidated damages. Nor was it unreasonable to treat the activities of plaintiff as a continuing practice. In short, to protect the revenue against ongoing activity of this sort it was not unreasonable to require a bond of $1,300,000.

In sum, the lack of merit to plaintiff's claim of deprivation of due process precludes injunctive or declaratory relief.

Plaintiff's failure to respond to the defendants' motion to dismiss or for summary judgment warrants finding that the increase in the amount of the bond was based on a reasonable belief as to the existence of the necessary justifying conditions and the court so finds.

Accordingly, the government's motion for summary judgment is hereby granted.

(Slip Op. 86-76)

W.Y. MOBERLY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-9-01259

Before DICARLO, *Judge*.

[Plaintiff's motion for rehearing is denied.]

(Decided July 30, 1986)

Ross & Hardies (Joseph S. Kaplan, John B. Pellegrini, and *Eric S. Palles)*, for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*John J. Mahon*), for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff has moved pursuant to Rule 59 of the Rules of this Court for a rehearing of the Court's decision in *W.Y. Moberly, Inc.* v. *United States,* 10 CIT——, Slip Op. 86-57 (May 28, 1986).

Plaintiff contends (1) that the Court misconstrued the scope of General Interpretive Rule 10(ij), Tariff Schedules of the United States (TSUS), and its relevance to the classification issue before the court; and (2) the Court failed to recognize that the *Nomenclature For The Classification of Goods in Customs Tariffs* (1955) ("*Brussels Nomenclature*") contains provisions which parallel Rule 10(ij) with respect to the merchandise in this action. The motion is denied.

A motion for rehearing is addressed to the sound discretion of the court. *Reynolds Trading Corp.* v. *United States,* 61 CCPA 57, 59, C.A.D. 1120, 496 F.2d 1228, 1230 (1974); *Commonwealth Oil Refining Co.* v. *United States,* 60 CCPA 162, 166, C.A.D. 1105, 480 F.2d 1352 (1973). "In general, 'a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding'," *The United States* v. *Gold Mountain Coffee, Ltd.,* 8 CIT 336, 601 F. Supp. 212, 214 (quoting *Nahrgang Co.* v. *United States,* 6 CIT 211 (1983)); *W.J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358; C.R.D. 72-5 (1972). "In ruling on a petition for rehearing, a court's previous decision will not be disturbed unless it is 'manifestly erroneous'." *Gold Mountain Coffee,* 8 CIT at 337, 601 F. Supp. at 214, citing *Quigley & Manard, Inc.* v. *United States,* 61 CCPA 64, 496 F.2d 1214 (1974).

Plaintiff first argues that the Court erred in applying General Rule 10(ij) to the merchandise. General Rule 10(ij) provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." Plaintiff says a provision for parts cannot be a "specific provision" within General Rule 10(ij). Plaintiff also says the longstanding tenet of customs law that a part of a part is more specifically provided for as a part of the part rather than as part of the whole does not derive from General Rule 10(ij), but from the rule of relative specificity codified at General Interpretative Rule 10(c).

Both of plaintiff's interpretations of General Rule 10(ij) were specifically rejected in *C.F. Liebert* v. *United States,* 60 Cust. Ct. 677, 685-86, C.D. 3499, 287 F. Supp. 1008, 1014-1015 (1968):

> Plaintiff also claims that General Interpretative Rule (ij) * * * does not apply to competition between parts of one article and parts of another * * *.
>
> In our view, it is much more logical to hold that since clutches which are parts of winches are classifiable under the specific provision for "clutches" rather than as parts of winches, clutch parts are classifiable under the provision for parts of clutches rather than as parts of winches. Such parts do not become parts of winches until they are first parts of clutches. Where a particular part of an article is provided for specially, *eo nomine,* and must be classified under that provision regardless of whether it is a part of a whole, a part of that particular part is more specifically provided for as a part of the part than as a part of the whole.

See Foster Wheeler Corp. v. *United States,* 61 Cust. Ct. 166, 178, C.D. 3556, 290 F. Supp. 375, 384 (1968) and *Korody-Colyer Corp.* v. *United States,* 66 Cust. Ct. 337, 339, C.D. 4212 (1971) (applying General Rule 10(ij) to a parts provision). Plaintiff cites no case to support its position except *Arthur J. Humphreys* v. *United States,* 59 Cust. Ct. 231, C.D. 3128, 272 F. Supp 951, *aff'd,* 56 CCPA 67, C.A.D. 956, 407 F.2d 417 (1969). Plaintiff's interpretation of that case was rejected in Slip Op. 86-57 at 9-10.

Plaintiff also contends that the Court erred in stating that the Brussels Nomenclature "provides no guidance in this case" because the Brussels Nomenclature "contains no instruction similar to General Interpretive Rule 10(ij) with respect to classification of parts." Slip Op. 86-57 at 6. Plaintiff points to notes which precede relevant sections of the Explanatory Notes to the Brussels Nomenclature to argue the relevance of the Brussels Nomenclature to this case. Section Note 1(g) which precedes Section XVI of the Explanatory Notes (vol. 3, page 1153) states that that section which contains a provision analogous to the TSUS provision for "boring machinery" claimed by plaintiff, does not cover "[p]arts of general use, as defined in Note 2 to Section XV." Section Note 2 to Section XV (vol. 3, page 979) does not include the merchandise in its definition of "parts of general use". General Note II to Section XVI (vol. 3, page 1156) states:

> In general, parts which are recognisable as specialised to or mainly for use with particular machines or apparatus (including those of heading 84.59 or heading 85.22), or with a group of machines or apparatus falling in the same heading, are classified under the same heading as those machines or apparatus * * *
>
> * * * * * * *

> The above rules do not apply to parts which in themselves constitute an article covered by a heading of this Section (other than headings 84.65 and 85.28); these are in all cases classified in their own appropriate heading even if specially designed to work as part of a larger machine.

Plaintiff concedes that these section notes are not of general application. Plaintiff does not offer these notes as interpretive aids to General Rule 10(ij), and the Court finds that they are not sufficiently similar to the language or application of that provision to serve that purpose. *Cf. Toyota Motor Sales, U.S.A., Inc.* v. *United States*, 7 CIT 178, 185, 585 F. Supp. 649, 655 (1984) *aff'd* 753 F.2d 1061 (Fed. Cir. 1985).

While the second paragraph quoted above from General Note 2 to Section XVI is similar to General Interpretative Rule 10(ij), the first paragraph quoted above is not. The lengthy list of applications and exceptions to these provisions further distinguish them from Rule 10(ij). The Court finds General Rule 10(ij) has been interpreted to apply to provisions which include parts. Resort to the Brussels to create an ambiguity is inappropriate. *F.W. Smidth & Co.* v. *United States*, 56 CCPA 77, 84, C.A.D. 958 (1969).

Plaintiff's motion for rehearing is denied. So ordered.

(Slip Op. 86-77)

OLIVETTI CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-7-00988

Before CARMAN, *Judge*.

OPINION AND ORDER

[Judgment for defendant.]

(Decided July 30, 1986)

Sharretts, Paley, Carter & Blauvelt (Peter J. Baskin and *Ned H. Marshak* at trial and on the brief) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Barbara Epstein* and *Veronica A. Perry* at trial and on the brief) for the defendant.

CARMAN, *Judge:* This case involves the proper tariff classification of plaintiff's electronic typewriters known as the ET 201 and ET 221, imported from Italy during 1979 and 1980. The United States Customs Service (Customs) classified the typewriters under item 676.07, Tariff Schedules of the United States (TSUS), as other typewriters not incorporating a calculating mechanism. Plaintiff claims that they should instead be classified under item 676.05, TSUS, as non-automatic typewriters with hand-operated keyboard, not incorporating a calculating mechanism.

The relevant tariff provisions follow:

SCHEDULE 6, PART 4, SUBPART G

	Typewriters not incorporating a calculating mechanism:	
[claimed under] 676.05	Non-automatic with hand-operated keyboard	Free
[classified under] 676.07	Other	4.7% or 5.1% *ad val.*, depending upon date of entry

The Court concludes that plaintiff has failed to overcome the presumption that Customs correctly classified the ET 201 and ET 221 as other typewriters under item 676.07, TSUS. *See* 28 U.S.C. § 2639 (1982) (presumption of correctness).

DISCUSSION

The imported articles are the ET 201 and ET 221 electronic typewriters, samples of which were introduced into evidence at the trial. The ET 201 and ET 221 are substantially similar in all respects except that the ET 221 has a 15-character display. Neither party argued that the presence of the display was material to the Court's determination. For convenience and brevity, both parties in their briefs referred to both models as the ET 221. The Court will do the same, with the understanding that when the ET 221 is mentioned, both the ET 201 and ET 221 are meant.

The ET 221 contains an internally housed electronic microchip which gives it a memory capable of storing 1000 characters: 170 characters are devoted to storing format commands such as margins and tabs and the remaining 830 characters can be used to store either page formats [1] or text. By depressing two keys, the operator recalls text stored in the memory, which the ET 221 then types without further operation of the keyboard. The memory is non-volatile, that is it remains intact even when the typewriter is turned off. The operator can make corrections and changes to the text while keying it, but once text is entered in the memory the operator cannot delete or rearrange it. The operator can, however, add text to the end of the stored material.

Material can be stored in the memory in a maximum of ten different segments, each activated by the two-key code, or the entire memory can be used for one text segment. Plaintiff advertises this

[1] Page formats position paper in the typewriter so that the operator can type variable information on a preprinted form.

feature as useful for repetitively typing small blocks of text such as dates, addresses, and signature blocks. *See* Defendant's Exhibit C at 3R. The memory could also be used to store a short form letter that did not exceed 830 characters.

The issue addressed at trial was whether the ET 221 is an "automatic typewriter" as that term was understood when the relevant tariff provisions were enacted in 1963. The term automatic typewriter is no longer in commercial or common usage, Record 167, 294, and the inquiry must therefore focus on the scope and meaning of the term in the early 1960's. If the ET 221 is an automatic typewriter, then it cannot be classified as a non-automatic typewriter under item 676.05, but falls instead within the basket provision for other typewriters, item 676.07.

The automatic typewriters that existed when Congress created the basket provision stored text using a punched paper tape. They had some editing capabilities and virtually unlimited storage capacity. Plaintiff's position is that the successors to these paper tape machines were typing machines using magnetic storage media, which ultimately evolved into word processors. The ET 221 is not the successor to these early typing machines, plaintiff maintains, but rather to the early standard manual and electric office typewriters. More specifically, it is plaintiff's position that the ET 221 resembles standard typewriters and does not resemble automatic typewriters. Defendant for its part contends that because the ET 221 is capable of reproducing typewritten text without the hand operation of the keyboard, it is an automatic typewriter as that term was meant by Congress.

In determining the correct classification of the ET 221, the Court is guided by certain well-established principles. The first is that "[t]ariff terms are written for the future as well as the present," *United States* v. *Standard Surplus Sales, Inc.*, 69 CCPA 34, 38, 667 F.2d 1011, 1014 (1981), and therefore encompass articles that were unknown to commerce at the time of enactment. The second is that a subsequently created article fits within the tariff provision so long as "the article possesses an essential resemblance to the ones named in the statute in those particulars which the statute established as the criteria of the classification." *Smillie & Co.* v. *United States*, 12 Ct. Cust. Appls. 365, 367, T.D. 40520 (1924). The inquiry here must therefore be whether the ET 221 bears an essential resemblance to the automatic typewriters Congress sought to provide for in the basket provision, item 676.07.

To determine the scope of the respective tariff provisions the Court may examine the *Tariff Classification Study Explanatory Notes and Background Materials*, Schedule 6, Part 4 (1960) (TCS) [2] which states at page 273:

[2] The TCS is generally regarded as an authoritative source for determining legislative intent. *See Nippon Kogaku (USA), Inc.* v. *United States*, 69 CCPA 89, 93, 673 F.2d 380 (1982).

> Items 676.05 and 676.07 provide for typewriters not incorporating a calculating mechanism. No rate changes are involved. The provision in item 676.05 covers the typewriters presently free of duty under paragraph 1791. Such typewriters may be of the electric or nonelectric types but do not include typewriters which produce typewritten material by means of precut stencils, or otherwise, without the hand operation of the keyboard.

Congress thus described automatic typewriters as machines that could produce text without the operator actually striking the corresponding keys on a keyboard, regardless of the means. This ability is the particular that Congress established as the essential criterion of the classification.

The Court concludes that because the ET 221 is capable of producing typewritten text from memory without the hand operation of the keyboard, *see* Pretrial Order, Schedule C, Stipulated Fact 11, it bears an essential resemblance to the automatic typewriters item 676.07 was designed to cover.[3] Although this is the essential criterion for classification in item 676.07, the Court further finds that the ET 221 resembles automatic typewriters in other important respects such as limited editing ability and use in performing repetitive typing tasks.

Both automatic typewriters and the ET 221 have a limited editing capability. The automatic typewriters that existed in 1963 stored text on a paper tape. As the typist keyed the text the typewriter punched holes into the paper tape. Mistakes could be corrected by striking out portions of the tape, but the only way to insert a correction or new material was to physically cut out the section of tape representing the page where the correction was desired and splice in a new section. Record 246–47. In addition, the automatic typewriters could be stopped and the typist could manually type insert material. The editing ability of these machines was clearly limited and the process cumbersome.

The ET 221 also has limited editing capabilities. The operator can make any additions, deletions, or changes in the text after it is keyed but before it is placed in the memory. This is in some respects similar to the operator's ability with an automatic typewriter to strike out mistakes that were immediately discovered. Also like the automatic typewriter, the ET 221 can stop at a given point in the text, because of the segmentation of the memory, after which the operator can type variable information and can then recall another memory segment if desired. The only limitation of the ET 221 not found in automatic typewriters is that once text is stored in a memory segment the operator cannot delete a portion of it without disturbing the surrounding text (as a portion of text

[3] The Court is also unpersuaded by plaintiff's argument based upon the evolution of automatic typewriters into today's word processors. There is an entirely separate tariff classification for word processors and neither party suggested that the ET 221 belonged in it. Moreover, the appropriate focus of the inquiry is not the evolution of automatic typewriters but their essential characteristics and whether the ET 221 resembles them in those essentials.

in a paper tape can be struck out) or insert new material (as a new page or pages can be spliced into a paper tape). To the extent that editing ability is a criterion of classification under item 676.07, this limitation is not significant enough to remove the ET 221 from its coverage.

Another similarity between the ET 221 and automatic typewriters is the kind of -tasks they perform. Both machines are used for repetitive typing tasks, thereby making the operator more efficient. At trial plaintiff made much of the fact that automatic typewriters were used for repetitively typing lengthy documents, while the memory of the ET 221 is useful only for typing short items such as signature blocks or short paragaphs. The essence of the use of the memory in both machines, however, is to repetitively reproduce typed material without the operator being required to type it.[4] The memory of the ET 221 can also be used to store page formats, which position paper on the carriage to allow the operator to fill in blanks on preprinted forms. Automatic typewriters had the same ability and were also used for this task. Record 236-37. As with automatic typewriters, the ET 221 makes office workers more efficient, freeing them for other tasks.

Automatic typewriters were capable of repetitively typing long documents because their storage medium was external and their storage capacity was virtually limitless. The ET 221 cannot reproduce lengthy documents because its memory has a total limit of 830 characters. It is not necessary, however, that a product be capable of performing the same range of functions before it can be said to bear an essential resemblance to an earlier product. Courts generally apply the maxim that tariff provisions are made for the future when improved products are developed that have expanded capacities, *see e.g., Polaroid Corp.* v. *United States*, 66 Cust. Ct. 116, C.D. 4179 (1971) (film with developing chemicals still classifiable as unexposed film), but it is equally applicable when the new products have diminished capacities. The essence of an automatic typewriter is its ability to type text without an operator striking the corresponding keys. The ET 221 has this ability, although the amount of text it can type is less than automatic typewriters of the 1960's could type.

This ability to reproduce text without the operator typing it is also what distinguishes the ET 221 from other electronic typewriters with automatic features that Customs has classified as non-automatic under item 676.05. *See* Record 120-21. These other typewriters have automatic features such as margins, tabbing, and centering, but cannot automatically type text without hand operation of the keyboard. The *Tariff Classification Study* identifies automat-

[4] At trial plaintiff attempted to show that the memory of the ET 221 is one of many convenient automatic features and that the ET 221's ability to perform repetitive typing tasks is not a significant selling point. Evidence at trial, however, showed that the memory of the ET 221 is a significant feature: The ET 221 is priced significantly higher than the ET 121, which has some automatic functions such as margins and tabbing, but cannot automatically type text. Record 37-39, Plaintiff's Exhibit 18.

ic typewriters as those that "produce typewritten material" automatically. Customs has drawn a distinction between typewriters that cannot automatically type words on the page and those that can, without regard to other automatic functions. This distinction is reasonable; Customs' classification of these other typewriters as non-automatic does not compel the conclusion that the ET 221 should also be classified as non-automatic.

Finally, the presence of a hand operated keyboard on the ET 221 does not remove it from the classification for automatic typewriters or place it within the classification for "non-automatic with hand operated keyboard" typewriters. The early paper tape automatic typewriters also contained a hand operated keyboard and could function as standard typewriters. Record 99. Moreover, although non-automatic standard typewriters have hand operated keyboards, the ET 221 is distinguishable from typewriters in this classification because of its ability to type text without hand operation of the keyboard. This automatic ability is not merely an improvement upon standard typewriters such as would allow the ET 221 to be included in item 676.05 as an improved version of the standard typewriter. *Compare, e.g., Astra Trading Corp.* v. *United States*, 56 Cust. Ct. 555, C.D. 2703 (1966) (screwdriver with light is improved version of screwdriver). Typewriters with an automatic ability were expressly excluded from item 676.05, TSUS. *See Tariff Classification Study*, Schedule 6, Part 4, at 273. An *eo nomine* designation includes all forms of an article only when there are no limitations or a demonstrated contrary legislative intent. *Nootka Packing Co.* v. *United States*, 22 CCPA 464, 470, T.D. 47464 (1935).

Plaintiff has failed to overcome the presumption that Customs' classification of the ET 221 as an automatic typewriter is correct. The Court therefore finds that the ET 221 is correctly classified under item 676.07, TSUS.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/113	DiCarlo, J. July 8, 1986	Izod Outerwear	83-11-01666, *etc*	Item 379.96 $0.20 per lb. plus 25.8% or $0.16 per lb. plus 24%	Item 376.56 15% or 12.1%	Izod Outerwear v. U.S., S.O. 85-72 (1985)	New York Men's 100% nylon jackets, style no. 8932
C86/114	Newman, S.J. July 8, 1986	Bourns Inc.	80-1-00146	Item 686.10 6% with no allowance made under item 807.00 for the cost or value of subject metal contacts	Item 807.00 with allowance for cost or value of said metal and ceramic contacts, whose cost or value is also set out on schedule "A" attached to decision and judgment	Sigma Instrument, Inc. v. U.S., 5 CIT 90, *aff'd* 724 F.2d 930 (1983)	San Diego Relays which incorporate metal and ceramic contacts of U.S. origin
C86/115	Newmn, S.J. July 8, 1986	Import Leather, Inc.	80-10-01840	Item 121.59 5%, 2% or 1%	Item A121.65 Free of duty pursuant to GSP	Leather's Best, Inc. v. U.S., 4 CIT 152, *aff'd*, 708 F.2d 715 (1983)	Boston Leather
C86/116	Newman, S.J. July 8, 1986	Import Leather, Inc.	80-10-01843	Item 121.59 Free of duty pursuant to GSP	Item A121.65 Free of duty pursuant to GSP	Leather's Best, Inc. v. U.S., 4 CIT 152, *aff'd*, 708 F.2d 715 (1983)	Boston Leather

C86/117	Newman, S.J. July 8, 1986	Import Leather, Inc.	81-1-00099	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty pursuant to GSP	Leather's Best, Inc. v. U.S., 4 CIT 152, *aff'd* 708 F.2d 715 (1983)	Boston Leather
C86/118	Newman, S.J. July 8, 1986	Bourns Magnetics Division	81-4-00391	Item 686.10 6% with no allowance made under item 807.00 for cost or value of subject metal contacts	Item 807.00 with allowance for cost or value of said metal and ceremic contacts, whose cost or value is also set out on schedule "A" attached to decision and judgment	Sigma Instrument, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Relays which incorporate metal and ceramic contacts of U.S. origin
C86/119	Newman, S.J. July 8, 1986	Import Leather Inc.	81-5-00513	Item 121.59 5%, 2%, or 1%	Item A121.65, Free of duty pursuant to GSP	Leather's Best, Inc. v. U.S., 4 CIT 152, *aff'd*, 724 F.2d 930 (1983)	Boston Leather
C86/120	Newman, S.J. July 8, 1986	Import Leather Inc.	81-8-01095	Item 121.59 5%, 2%, or 1%	Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 4 CIT 152, *aff'd*, 724 F.2d 930 (1983)	Boston Leather
C86/121	Newman, S.J. July 8, 1986	Alfa-Laval Inc.	83-10-01425	Item 661.35 4%	Item 870.40 Free of duty	Agreed statement of facts	Buffalo Bulk milk coolers or farm tanks
C86/122	Newman, S.J. July 8, 1986	Sigma Instrument, Inc.	84-11-01606	Item 685.90 7.7% with no allowance made under item 807.00 for cost or value of subject metal terminal pins	Item 807.00 with allowance for cost or value of said metal terminal pins, whose cost or value is also set out on schedule "A" attached to decision and judgment	Sigma Instrument, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Relays which incorporate metal and ceramic ontacts of U.S. origin

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/123	Rao, J. July 16, 1986	Novatronics of Canada, Ltd.	81-5-00529	Item 682.25 12.5%	Item 682.30 6%	Agreed statement of facts	Buffalo Motors
C86/124	Rao, J. July 16, 1986	Novatronics of Canada, Ltd.	85-5-00717	Item 682.25 8.8%	Item 682.30 4.9%	Agreed statement of facts	Buffalo Niagara Falls Motors
C86/125	Rao, J. July 16, 1986	Novatronics of Canada, Ltd.	85-5-00718	Item 682.25 8.8%	Item 682.30 4.9%	Agreed statement of facts	Buffalo Niagara Falls Motors
C86/126	Rao, J. July 17, 1986	Bulova Watch Co.	84-8-01110	Item 716.2940.25 76¢ each	Item 716.1840 44¢ each	Agreed statement of facts	New York Watch parts
C86/127	Rao, J. July 17, 1986	E.C. McAfee	85-4-00485, etc.	Item 657.20 7.1% or 6.7%	Item 870.60 Free of duty	Agreed statement of facts	Buffalo Scrap aluminum grindings
C86/128	Rao, J. July 17, 1986	E.C. McAfee	86-1-00012, etc.	Item 657.20 7.1% or 6.7%	Item 870.60 Free of duty	Agreed statement of facts	Buffalo Scrap aluminum grindings
C86/129	DiCarlo, J. July 21, 1986	House of Nations, Ltd.	85-11-01636	Schedule S, part 6, subpart F, TSUS	Item 376.56 16.5%	Izod Outerwear, Div. of General Mills, Inc. v. U.S., S.O. 85-72	New York Wearing apparel
C86/130	Rao, J. July 24, 1986	J.K. Smit & Sons Diamond Products, Ltd.	84-10-01410	Item 649.43 11.1%	Item 649.43 4.4% or 4.2%	Agreed statement of facts	Seattle Coring Bits, Core Bits, and Casing Shoes
C86/131	Rao, J. July 24, 1986	J.K. Smit & Sons Diamond Products, Ltd.	85-1-00048	Item 649.43 11.1%	Item 649.49 4.4% or 4.2%	Agreed statement of facts	Seattle Coring Bits
C86/132	Rao, J. July 24, 1986	McClary, Swift & Co.	84-10-01409	Item 649.43 11.1%	Item 649.49 4.4% or 4.2%	Agreed statement of facts	Seattle Core Bits and casing shoes
C86/133	Restani, J. July 24, 1986	Sumitomo Corp.	83-1-00051, etc	Item 610.43 11% or 10.2%	Item 610.40 4% plus 0.1¢ per lb. or 4.1%	Algoma Tube Corp. v. U.S., S.O. 85-89	Houston Seamless steel casing
C86/134	Rao, J. July 29, 1986	Polaroid Corp.	83-11-01662	Item 722.18 6.5%	Item 802.30 Free of duty	Agreed statement of facts	Boston Various photographic equipment

C86/135	Rao, J July 30, 1986	Bourns Trimpot Products Division		84-7-01024	Item 686.10 6.0% with no allowance under item 807.00 for cost or value of subject metal terminal pins	Item 807.00 with allowance for cost or value of said metal terminal pins of U.S. origin	Sigma Instrument, Inc., v. U.S., 5 CIT 90, *aff'd.* 724 F.2d 930 (1983)		San Diego Metal terminal pins
C86/136	Rao, J July 30, 1986	J.C. Penney Purchasing Corp		83-9-01368	Item 737.95 13.6% for vehicle and transmitter	Item 737.15 13.9% for vehicle Item A685.60 Free of duty for tranamitter	Agreed statement of facts		San Francisco Radio remote control vehicles

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/203	Newman, S.J. July 8, 1986	Beer Precast Concrete, Ltd.	79-9-01403, etc.	Export value	Equal to $339.93/ton, net, packed	Agreed statement of facts	Buffalo Prefabricated concrete construction materials
V86/204	Rao, J. July 11, 1986	Texas Instruments Inc.	83-11-01595, etc.	Constructed value	57.192% of entered value	Agreed statement of facts	Houston Semiconductor devices
V86/205	Rao, J. July 11, 1986	Mitsubishi International	82-1-00120, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Miami Footwear
V86/206	Rao, J. July 17, 1986	Libco	85-5-00666	American selling price	American selling prices for the Brooks brand "Kid Supreme" in effect on the applicable dates of exportation	Agreed statement of facts	Newark Addias brand athletic footwear
V86/207	Watson, J. July 22, 1986	Continental Merchandise Co.	R61/17934	Export value	Appraised values shown on entry papers less amounts listed on invoices as "design charges" or by words of similar description which were included in said appraised values	Panation Trade Co. v. U.S. A.R.D. 181	New York Cigarette lighters
V86/208	Watson, J. July 22, 1986	Eli E. Albert Inc.	R60/3348	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety

V86/209	Watson, J. July 22, 1986	Eli E. Albert Inc.	R60/3721, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/210	Watson, J. July 22, 1986	Export Electronics	R65/14681	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/211	Watson, J. July 22, 1986	Hazan Mercantile Co.	R63/12089, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/212	Watson, J. July 22, 1986	Sanyo Electric Inc.	R66/9507	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; an entirety
V86/213	DiCarlo, J. July 24, 1986	Mitsubishi International Corp.	82-11-01594, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	New York Footwear
V86/214	DiCarlo, J. July 24, 1986	Mitsubishi International Corp.	82-12-01740, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Charleston; Honolulu; Portland; Atlanta Footwear
V86/215	Rao, J. July 25, 1986	TVW Paper Machines, Inc.	84-9-01330	Transaction value	Entered value	Agreed statement of facts	Baltimore Not stated
V86/216	Rao, J. July 30, 1986	S. Shamash & Sons, Inc.	2990021, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety

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U.S. Customs Service
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U.S. Customs Service

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U.S. Customs Service

Treasury Decision

(T.D. 86-149)

Recordation of Trade Name: "THE BALTIMORE LUGGAGE COMPANY"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On June 2, 1986, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "THE BALTIMORE LUGGAGE COMPANY" was published in the Federal Register (51 FR 19809). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than August 1, 1986. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "THE BALTIMORE LUGGAGE COMPANY" is recorded as the trade name used by The Baltimore Luggage Company, a corporation organized under the laws of the State of Rhode Island, located at 1919 Annapolis Road, Baltimore, Maryland 21230. The trade name is used in connection with the following merchandise manufactured in Taiwan: vinyl luggage; nylon luggage; vinyl attaches; leather attaches; jute luggage; attaches; and luggage carts.

DATE: August 15, 1986.

FOR FURTHER INFORMATION CONTACT: Beatrice E. Moore, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-5765).

Dated: August 11, 1986.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register August 15, 1986 (51 FR 29358)]

U.S. Customs Service

General Notice

Removal of Prohibition on Importation of Tuna and Tuna Products From Mexico

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of removal of prohibition.

SUMMARY: This notice is to advise that under the Fishery Conservation and Management Act of 1976 ("the Act)", the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs has notified the Secretary of the Treasury that the reasons for the imposition of a prohibition on the importation of tuna and tuna products from Mexico no longer prevail. Accordingly, the prohibition against the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Mexico is removed.

EFFECTIVE DATE: August 13, 1986.

FURTHER INFORMATION CONTACT: Harrison C. Feese, Commercial Compliance Division (202-566-5307).

SUPPLEMENTARY INFORMATION:

Background

Section 205(a)(4)(C) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801, *et seq.*), provides that the Secretary of State shall certify to the Secretary of the Treasury any determination that a fishing vessel of the U.S., while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the U.S., has been seized by a foreign nation as a consequence of a claim of jurisdiction not recognized by the U.S. The responsibility for this certification was delegated to the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs by Department of State Delegation of Authority No. 138 of April 29, 1977.

Pursuant to § 205(b) of the Act, upon receiving the certification, the Secretary of the Treasury is required to take such action as may be necessary and appropriate to prohibit the importation of all fish and fish products from the fishery involved.

Section 205(c) of the Act provides that if the Secretary of State finds that the reasons for the import prohibition no longer prevail, the Secretary of State shall notify the Secretary of the Treasury, who shall promptly remove the import prohibition.

On July 15, 1980, a notice was published in the Federal Register (45 FR 47562) advising that under § 205(a)(4)(C) of the Act, on July 11, 1980, the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs certified to the Secretary of the Treasury that a U.S. fishing vessel, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the U.S., was seized by Mexico as a consequence of a claim of jurisdiction which is not recognized by the U.S. Under the authority of § 205 (b) and (c) of the Act, on July 11, 1980, the Secretary of the Treasury determined that the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Mexico was prohibited until the Department of State notified the Secretary of the Treasury that the reasons for this prohibition no longer prevailed.

On July 14, 1986, the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs informed the Secretary of the Treasury that the reasons for the imposition of the import prohibition on tuna and tuna products from Mexico no longer prevail. Accordingly, the prohibition against the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Mexico is removed.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

Dated: August 7, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register August 14, 1986 (51 FR 29183)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-749)

SUNBURST FARMS, INC., APPELLANT *v.* UNITED STATES, APPELLEE

Thomas A. Rothwell, Jr. and *Joseph A. Vicario, Jr.*, Heron, Burchette Ruckert & Rothwell, of Washington, D.C., argued for appellant. With them on the brief were *Alfred G. Scholle* and *Christine C. Ryan.*

Veronica A. Perry, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With her on the brief were *Richard K. Willard*, Assistant Attorney General, *David Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.

Chief Judge RE.

(Appeal No. 86-749)

SUNBURST FARMS, INC., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided August 8, 1986)

Before NIES, *Circuit Judge*, MILLER, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

NIES, *Circuit Judge*.

Sunburst Farms, Inc. appeals from the final judgment of the United States Court of International Trade, reported at 620 F. Supp. 735 (1985), which dismissed Sunburst Farm's challenge to the Customs Service's imposition of duties on cut flowers, item 192-21, TSUS, imported from Colombia. We affirm.

OPINION

Upon consideration of each of Sunburst Farm's arguments to the contrary, we conclude that the instant case is controlled by this court's holding in *Florsheim Shoe Co.* v. *United States*, 744 F.2d 787 (Fed. Cir. 1984). Accordingly, we affirm on the basis of Chief Judge Re's opinion.

AFFIRMED

(Appeal No. 85-2806)

REPRESENTATIVE STEWART B. MCKINNEY, ET AL., APPELLANTS *v.* U.S. DEPARTMENT OF THE TREASURY; JOHN M. WALKER, JR., ASSISTANT SECRETARY OF THE TREASURY (ENFORCEMENT AND OPERATIONS); U.S. CUSTOMS SERVICE; AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, APPELLEES

Paul D. Kamenar, Washington Legal Foundation, of Washington, D.C., argued for appellants. With him on the brief was *Daniel J. Popeo*.

David M. Cohen, Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellees. With him on the brief were *Richard K. Willard*, Assistant Attorney General and *Velta A. Melnbrencis*. *Terry Thiele*, Attorney-Advisor, Office of General Counsel, Department of the Treasury, of counsel.

Appealed from U.S. Court of International Trade.

Judge *DiCarlo*.

(Appeal No. 85-2806)

REPRESENTATIVE STEWART B. MCKINNEY, ET AL.,* APPELLANTS *v.* U.S. DEPARTMENT OF THE TREASURY; JOHN M. WALKER, JR., ASSISTANT SECRETARY OF THE TREASURY (ENFORCEMENT AND OPERATIONS); U.S. CUSTOMS SERVICE; AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, APPELLEES

(Decided August 8, 1986)

Before BISSELL and ARCHER, *Circuit Judges*, and RE, *Chief Judge*.**

ARCHER, *Circuit Judge*.

Appellants appeal from the judgment entered in *Representative Stewart B. McKinney, et al.* v. *United States Department of the Treasury, et al.*, No. 85-73 (Ct. Int'l Trade July 23, 1985),[1] wherein Judge Dominick L. DiCarlo of the Court of International Trade dismissed appellants' complaint for lack of standing and mootness. We affirm on the basis of lack of standing.

BACKGROUND

Section 307 of the Tariff Act of 1930, as amended,[2] provides that:

---

* Appellants are individually listed in the Appendix.

** The Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

[1] 19 Cust. B. & Dec. No. 33, at 57 (August 14, 1985).

[2] 19 U.S.C. § 1307 (1982).

> All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. The provisions of this section relating to goods, wares, articles, and merchandise mined, produced, or manufactured by forced labor or/and indentured labor, shall take effect on January 1, 1932; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.
>
> "Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.

The United States Department of State, in February 1983, furnished the Congress with a report entitled "Report on Forced Labor in the U.S.S.R." Accompanying this report was a letter of the Undersecretary of State for Political Affairs which stated that forced labor [3] was used to produce large amounts of primary and manufactured Soviet goods for both domestic and export markets.[4]

In September 1983, the Commissioner of Customs sought approval from the Secretary of the Treasury to publish [5] in the Federal Register his findings that certain products from the U.S.S.R. may have been produced by forced labor, which would have the effect of prohibiting the entry of such products into the United States. *See* 19 CFR 12.42(g). In May 1984, the Secretary of the Treasury notified the Commissioner that such a determination was not warranted at that time, but should be deferred pending a study by the International Trade Commission.[6]

---

[3] For purposes of the opinion no distinction is drawn between convict labor, forced labor, or indentured labor, herein referred to as "forced labor." The amended complaint generally uses the term "slave labor."

[4] This report and the accompanying letters are reprinted in *Forced Labor in the Soviet Union: Hearing Before the Subcommittee on Human Rights and International Organizations of the House of Representatives Committee on Foreign Affairs and the Commission on Security and Cooperation in Europe*, 98th Cong., 1st Sess. 96–125 (Comm. Print 1983).

[5] The proposed publication was entitled "Withholding of Release of Merchandise from Soviet Union Which May be Produced by Convict, Forced, or Indentured Labor." The Commissioner sought to publish these findings as provided by 19 CFR § 12.42(f). Although not explicitly found by the court the Commissioner of Customs appears to have made the necessary condition-precedent findings under 19 CFR § 12.42(e) that "merchandise within the purview of section 307 is being, or is likely to be, imported" from the U.S.S.R. The court opinion indicates only that the Commissioner, citing the State Department report, *see* supra note 4, and congressional and public concern, sought approval from the Secretary of the Treasury to publish a finding pursuant to § 12.42(f). *McKinney*, No. 85-73, slip op. at 5[illegible].

[6] Memorandum of May 16, 1984, from Donald T. Regan, Secretary of the Treasury, to William Von Raab, Commissioner of Customs, stated in pertinent part that:

> I have decided that no determination of any kind is warranted at this time. As you are aware, the Senate Finance Committee has directed the International Trade Commission to review this matter in depth. I think it necessary, given the current paucity of reliable information, to withhold any determination until we have the benefit of the International Trade Commission's study.

Thereafter in May 1984, eighty-four members of Congress and several associations petitioned the United States Customs Service[7] to bar importation of goods produced in the U.S.S.R. wholly or in part by forced labor.[8] The Assistant Secretary for Enforcement and Operations of the Treasury subsequently notified these petitioners that the Department of the Treasury the Treasury would not act on their petition until such time as additional evidence became available.

In January 1985, the Secretary of Treasury, on the available evidence,[9] determined that there was no reasonable basis upon which to establish a nexus between Soviet forced labor practices and specific imports from the U.S.S.R. or to bar importation of any goods produced in the U.S.S.R. In doing so, the Secretary declined to adopt the Commissioner's proposed findings of late 1983.[10]

Appellants filed the present action on September 26, 1984 seeking declaratory and injunctive relief and filed an amended complaint on February 20, 1985. They alleged that the denial of their May 1984 petition constituted a final agency action, 5 U.S.C. §704 (1982), which was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. §706(2)(A), (D) (1982). The appellants further alleged that agency action on their petition was unlawfully withheld or unreasonably delayed. 5 U.S.C. §706(1).

The court concluded that, with the exception of the congressional appellants in their capacities as workers and producers, none of the appellants possessed standing.[11] No. 85-73, slip op. at 64-71.

The court also concluded that the action must be dismissed as moot. *Id.* at 72-73. It determined that the decision by the Secretary of the Treasury in 1985 superseded the 1983 findings of the Commissioner of Customs, and that the relief sought by appellants—a declaration that the Commissioner made findings pursuant to 37 C.F.R. §12.42(e), a mandatory injunction implementing these findings in accordance with §12.42(e), and a determination that the

---

[7] It appears, on the basis of the May 23, 1984, letter from congressional petitioners to the Commissioner of Customs, that their action was initiated based upon the belief that the Commissioner had already made the necessary finding under 19 CFR §12.42(e). *See supra* note 5 and accompanying text.

[8] Based upon information (which may come from a Customs official, from any person, or otherwise be available, 19 CFR §12.42 (a), (b), and (e)), which reasonably, but not conclusively, indicates that goods within the purview of § 307 are being, or are likely to be imported, the Commissioner may make a finding to such effect. 19 CFR §12.42(e). If the Commissioner makes such a finding, §12.42(e) directs him to promptly advise district directors of the Customs Service, who shall withhold release of such goods until further advised by the Commissioner as to their disposition. Since the Commissioner appears to have made a *sua sponte* finding pursuant to §12.42(e) with respect to certain U.S.S.R. imports, *see supra* note 5 and accompanying text, these petitioners were requesting the Commissioner to carry out his further duty as set forth in §12.42(e).

[9] This evidence included the ITC report issued in December 1984, *see supra* note 6, entitled *International Practices and Agreements Concerning Compulsory Labor and U.S. Imports of Goods Manufactured by Convict, Forced, or Indentured Labor*, Inv. No. 332-178, Public. No. 1630, and an informational letter from William J. Casey, Director of the CIA, to Donald T. Regan, Secretary of the Treasury.

[10] Memorandum of January 28, 1985, from John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations, to William von Raab, Commissioner, U.S. Customs Service. See also Letter of February 28, 1985 from John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations, to The Honorable Stewart McKinney.

[11] It has been clarified on brief that the congressional appellants do not claim standing as "workers and producers."

Commissioner improperly denied the appellant's May 1984 petition—was mooted by the Secretary's decision.

On appeal it is argued that all of the appellants in the capacities now asserted have standing, *viz.*, that, either directly or as a representative of their members or constituency, all have suffered injury. As consumers, the injury is that they do not wish to purchase these illegal products and subsidize Soviet human rights violations. They also claim injury "as stockholders in U.S. companies which compete with the illegal imports, as members of the International Longshoremen's Association which are forced to handle these products; as public interest organizations which have a specialized interest in this area; and as Congressmen who are affected by the defendants' actions in their personal, representative and legislative capacities." Appellants also argue that the court committed error in holding that the present case is moot.

OPINION

I

Fundamentally, the question of standing involves the determination of whether a particular litigant is entitled to invoke the jurisdiction of a federal court to decide the merits of a dispute or of particular issues. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). The focus is on the qualifications and status of the party seeking to bring his complaint before a federal court and not on the issues he wishes to have resolved. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

When the standing of a litigant is placed in issue, the court must undertake a two-step analysis which involves both the constitutional limitations and the prudential limitations that circumscribe standing. *Warth*, 422 U.S. at 498. As a threshold matter the court must ensure that the litigant satisfies the requirements of Article III of the Constitution. *Simon*, 426 U.S. at 39. Once the court determines that the litigant satisfies the constitutional aspects, it must consider whether any prudential limitations restrain the court from exercising its judicial power. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979).

Article III confines the role of the federal courts to adjudication of actual "cases" and "controversies." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 151 (1970). Standing, in the constitutional dimension, is one of the doctrines that clusters about Article III,[12] to define further the case-or-controversy requirement that limits the federal judicial power in our system of government. *Allen*, 468 U.S. at 750. Those who do not possess Article III standing may not litigate in the courts of the United States. *Valley*

[12] Others include mootness, ripeness, political question and the like.

Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475–76 (1982).

The principal limitation imposed by Article III is that a litigant seeking to invoke the court's authority must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors*, 441 U.S. at 98; *see also Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Warth*, 422 U.S. at 501. In addition, Article III requires the litigant to establish that there is a causal connection between the litigant's injury and the putatively illegal conduct of the defendant, and that this injury is likely to be redressed should the court grant the relief requested. *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472; *Simon*, 426 U.S. at 38, 41–42.

The nature of the actual or threatened injury that must be established by the litigant has been described by the Supreme Court variously as: a "judicially cognizable" injury, *Allen*, 468 U.S. at 754; a "personal" injury, *Valley Forge*, 454 U.S. at 485, a "distinct and palpable" injury, *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 342 (1977); *Warth*, 422 U.S. at 501; a "particular concrete" injury, *United States* v. *Richardson*, 418 U.S. 166, 177 (1974); a "concrete" injury, *Schlesinger* v. *Reservist Committee to Stop the War*, 418 U.S. 208, 220 (1974); or a "specific present objective harm or a threat of specific future harm." *Laird* v. *Tatum*, 408 U.S. 1, 14 (1972). The Court has held that the actual or threatened injury may be either economic or non-economic in nature. *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972).

But the Court has cautioned that "abstract," "conjectural," or "hypothetical" injury is insufficient to meet the Article III requirement for injury. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101–02 (1983); *see also Allen*, 468 U.S. at 751. The mere assertion of a right to have the Government act in accordance with the law is not sufficient, in and of itself, to satisfy the injury requirement. *Allen*, 468 U.S. at 754. Nor is an interest in a problem, no matter how long-standing the interest or how qualified the litigant in matters relating to the problem, sufficient to satisfy the injury requirement. *Sierra Club*, 405 U.S. at 739.

The Supreme Court has also recognized that an organization may have standing to assert the claims of its members, even where the organization itself has not suffered an injury from the putatively unlawful action. *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 342 (1977).[13] But this doctrine does not viti-

[13] Associational standing requires that the organization show that:
(1) its members would otherwise have standing to sue in their own right;
(2) the interests it seeks to protect are germane to the organization's purpose; and
(3) neither the claims asserted nor the relief requested requires the participation of the individual members in the lawsuit.
432 U.S. at 343.

Continued

ate the injury requirement imposed by Article III, for the organization derives its standing in part by showing that its members have incurred an actual or threatened injury. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Brock*, 54 U.S.L.W. 4764, 4766 (S. Ct. June 25, 1986); *Valley Forge*, 454 U.S. at 476 n.14, *see supra* note 13.

In addition to the constitutional requirements, the Supreme Court has articulated several prudential limitations that may be relevant in addressing the issue of standing. A litigant must generally assert his own legal rights or interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Warth*, 422 U.S. at 499. A litigant must assert an injury peculiar to himself or to a distinct group of which he is a part, rather than an interest shared in substantially equal measure by all or a large part of the populace. *Gladstone, Realtors*, 441 U.S. at 100. And, the litigant's complaint must fall within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service*, 397 U.S. at 153. *See Valley Forge*, 454 U.S. at 474–75.

II

Appellants have variously alleged standing as consumers, workers and producers, shareholders, handlers, public interest organizations, and legislators who are adversely affected by the importation of Soviet goods in contravention of § 307. We consider below each of these classes of appellants and their particular claims of injury as suggested by the Supreme Court in *Allen:*

> Typically * * * the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

468 U.S. at 752.

A. Consumers

Congressional appellants, in their personal capacities[14] as consumers, have alleged that they are adversely affected by the pur-

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These principles were recently reaffirmed by the Supreme Court in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Brock*, 54 U.S.L.W. 4764, 4769 (S. Ct. June 25, 1986).

[14] The congressional appellants also contend that, in their representative capacities, they may assert the legal rights or interests of their constituents as consumers. The only precedent cited in support of this proposition is the concurrence of Senior Circuit Judge Fahy in *Kennedy* v. *Sampson*, 511 F.2d 430, 446 (D.C. Cir. 1974). But the majority of the panel in *Kennedy* concluded that Senator Kennedy had standing to maintain his suit in his capacity as an individual United States Senator who had voted in favor of a bill, i.e., standing in his legislative capacity. *Id.* at 433. In his concurrence, Judge Fahy offered the following comments:

> As a United States Senator he represents a sovereign State whose people have a deep interest in the Act and look to their Senators to protect that interest; and he, as Senator, [t seems to me, has a legal] right not only to seek judicial protection of those interests, * * *.

Id. at 446. The congressional appellants rely upon these statements for the broad proposition that congressmen have standing to assert the legal rights or interests of their constituents in their representative capacities. We disagree. Since the issue in Kennedy was whether the Family Practice of Medicine Act had been enacted as law, Judge Fahy's comments can be construed as implying standing to a legislator in his representative capacity only when the case or controversy involves a legislative function or procedure.

chase of, or risk of purchasing, Soviet goods produced by forced labor.[15] The congressional appellants appear to be asserting an alleged Article III injury which they believe reflects both economic injury[16] and non-economic ethical injury.[17] We address both aspects of such alleged injury.

For the purpose of this analysis, it is assumed that the economic detriment alleged is sufficient to satisfy the injury requirement imposed by Article III. We conclude, however, that this court should refrain from exercising jurisdiction over appellants' complaint as it relates to their status as consumers because of the "zone of interests" prudential limitation.

Section 307 was enacted by Congress to *protect* domestic producers, production, and workers from the unfair competition which would result from the importation of foreign products produced by forced labor. No stated or implied intention is evident in the statute or its legislative history to protect the consuming public from the importation of goods produced by forced labor. Although § 307 also *regulates* the importation of products produced by forced labor, it does so in a manner that will afford domestic consumers a supply of such products through importation when there is insufficient domestic production to satisfy consumer demand. Thus, § 307 only affords consumers a legal right or interest to have access to such products by relaxation of the import ban when they are in short supply domestically. This legal interest, however, is not implicated or asserted by any of the appellants claiming consumer status.

The plain language of § 307, accordingly, will not support an interpretation that it was enacted to afford consumers a legal right or interest in preventing, for economic, moral, or ethical reasons, the importation of foreign goods produced by forced labor.[18] Had Congress intended such protection to flow from § 307, it would likely have imposed an absolute bar, i.e., precluding importation of foreign products found to have been produced by forced labor under all conditions, rather than a conditional exclusion to be lifted in the event of unfulfilled domestic demand. *See McKinney*, No. 85-73, slip op. at 64-65. The nature and character of the legis-

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[15] The Washington Legal Foundation (WLF), on behalf of itself, its members and supporters, and Constance Caffey, a member and Executive Director of WLF, assert standing based upon their status as consumers. WLF may assert a claim to relief based upon its alleged rights as a consumer, but may not assert a claim to relief on the basis of third parties, i.e., its supporters. *Valley Forge*, 454 U.S. at 474; *Warth*, 422 U.S. at 499. In light of our conclusion on consumer standing, we need not address the question of whether WLF may assert the claims of its consumer members. *But see infra* Section B.

[16] The alleged economic injury as consumers appears to be that they are making expenditures for Soviet products which they do not wish to purchase, and that these expenditures subsidize the respective Soviet industries. It is doubtful that either should be classified as an economic injury for there is no suggestion that full economic value has not been obtained from the expenditure. Thus the stated injury seems to fall into the non-economic category. *See infra* note 17.

[17] The alleged non-economic ethical injury as consumers appears to lie in the trauma induced in appellants by the unwitting purchase of Soviet products produced in contravention of moral and legal principles held by such consumers.

[18] In statutory interpretation, the language of an enactment will be given its plain meaning unless this reading would lead to a result at variance with the policy of the legislation as a whole. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978).

lation does not support the contention that Congress intended to create a statutory privilege accruing to consumers in the avoidance of purchasing imported goods produced through human rights violations. *Stark* v. *Wickard*, 321 U.S. 288, 306 (1944). And though we assume there might be an economic injury [19] to consumers sufficient to meet the requirements of Article III, the economic claim asserted by appellants as consumers is not within the "zone of interests" protected or regulated by § 307. *Valley Forge*, 454 U.S. at 474–75.

As to the non-economic injury claimed by appellants as consumers, we do not agree with appellants' assertion that this is the kind of injury that satisfies the Article III requirement. The alleged non-economic injury is founded on the adverse psychological consequences arising from inadvertent support of immoral conduct with which appellants disagree. *Id.* at 485. The ethical injury asserted by appellants is the type of abstract injury, *Allen*, 468 U.S. at 755–56, which would transform the federal courts into nothing more than a vehicle for the vindication of value interests of concerned bystanders, *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973), and, as such, is not "an injury sufficient to confer standing under Art. III." *Valley Forge*, 454 U.S. at 485.

Even if this non-economic injury satisfied Article III, prudential limitations counsel against standing for appellants as consumers. In view of the above analysis of economic injury, it is even more unlikely that Congress intended § 307 to shield the psyche of domestic consumers against foreign products produced through human rights violations. Such a conclusion would be anomalous in the face of the exception provided by § 307 for short-supply importation of goods produced by forced labor. Appellants as consumers and their claimed non-economic injury are not within the "zone of interests" protected or regulated by § 307.

Moreover, appellants are also prudentially limited from asserting standing as injured consumers because their injury is not peculiar to a distinct group. *Gladstone, Realtors*, 441 U.S. at 100. Appellants have argued to the contrary, claiming that this non-economic injury is specific to them as a group, but other than a generalized, conclusory statement to this effect they have failed to present any persuasive reasons why they should be so considered. The moral and ethical interest in avoiding the purchase of or boycotting foreign goods produced by forced labor is shared by most, if not all, of the domestic populace. This is the type of wide public concern, amounting to a generalized grievance, which federal courts normally refrain from adjudicating. *Warth*, 422 U.S. at 499–500. Appellants' non-economic injury, therefore, cannot serve as a predicate for standing.

[19] *But see supra* note 16.

B. PRODUCERS

The WLF asserts standing on the basis of its members and supporters[20] who include "manufacturers or producers or workers employed by manufacturers or producers of products which are similar to and compete with goods or products being imported unlawfully from the Soviet Union." To rely on derivative or associational standing, the WLF must show that it meets the requirements for standing articulated by the Supreme Court in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). *See supra* note 13.

One of the *Hunt* requirements is that an organization must demonstrate that the interests it seeks to protect are germane to the organization's purpose. 432 U.S. at 343. The WLF, in the amended complaint, avers that it is a "nonprofit public interest law firm." The amended complaint does not indicate that a purpose of the WLF is to protect the economic interests of producers and workers generally or to protect its producer and worker members adversely affected by goods imported in contravention of § 307. *International Union*, 54 U.S.L.W. at 4767. The court concluded, *McKinney*, No. 85-73, slip op. at 69-70, and we agree, that the WLF has failed to demonstrate a nexus between its organizational purpose and the economic interests of the producers and workers it purportedly represents. *International Union*, 54 U.S.L.W. at 4767.

Additionally, WLF has failed to show that its producer and worker members have standing to sue in their own right.[21] *International Union*, 54 U.S.L.W. at 4766-67. A certain degree of specificity in delineating the injury, be it "judicially cognizable," *Allen*, 468 U.S. at 754, "distinct and palpable," *Hunt*, 432 U.S. at 342, or "concrete." *Schlesinger*, 418 U.S. at 220, is a prerequisite to Article III standing. WLF, in the amended complaint, has failed to allege sufficient facts to establish an economic injury in fact,[22] leading us to conclude that whatever injury producers and workers may have is, at best, conjectural or speculative. *City of Los Angeles*, 461 U.S. at 101-02. This is not sufficient to satisfy the injury requirement of Article III.

WLF admits in the amended complaint that Soviet forced labor products are "not readily identifiable," although it does mention four broad categories of such products, *viz.*, wood products, refined oil products, gold ore, and farm machinery.[23] The products set

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[20] *See supra* note 15. The congressional appellants similarly argue that they have a right to sue in their representative capacities on behalf of their constituents who are workers and producers. But, as discussed in note 14 *supra*, the congressional appellants, in their representative capacities, cannot assert a third party's legal right or interest in the enforcement or execution of § 307 inasmuch as this question does not involve a legislative function or procedure.

[21] *See Hunt*, 432 U.S. at 343 ("its members would otherwise have standing to sue in their own right").

[22] Valley Forge, 454 U.S. at 487 n. 23 ("Respondent is still obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury * * *.").

[23] These are the only Soviet products set forth in the amended complaint. The complaint, however, avers that such Soviet products "have been particularly identified by defendant," which we take to mean the § 12.42(e) findings by Commissioner von Raab. *See supra* note 5, *infra* note 25; *but see infra* note 26. For the purpose of analysis we will presume that all of the products identified in the Commissioner's § 12.42(e) findings are intended to be incorporated by reference in the amended complaint.

forth in the §12.42(e) findings of Commissioner of Customs von Raab[24] are likewise not sufficiently specific for the most part to clearly delimit Soviet-made products that would contravene §307.[25] Even if it is assumed that these products have been satisfactorily identified in the amended complaint,[26] standing for WLF on the basis of its member producers and workers would still have to be denied because the complaint has not "alleged facts sufficient to make out a case or controversy had the members themselves brought suit." *International Union*, 54 U.S.L.W. at 4766-67; *Warth*, 422 U.S. at 516. The amended complaint does not identify any individuals, industries, producers, or workers in competition with the Soviet products identified by Commissioner von Raab, nor does the complaint provide any information regarding the nature, circumstances, or basis of the injury.[27] Under such circumstances any alleged injury is wholly speculative and conjectural. *City of Los Angeles*, 461 U.S. at 101-02. In the absence of some reasonable delineation of the injury and that it was caused by identified Soviet goods, we hold that WLF may not claim standing based solely upon the allegation that some of its members may be producers or workers.

C. SHAREHOLDERS

Several of the appellants[28] assert standing on the basis of stock ownership in companies that manufacture or produce goods that compete with the Soviet products allegedly made with forced labor. They argue that an allegation of competitive injury to a corporation in which stock is owned is a sufficient basis for shareholders to have standing and, further, that the extent of the competitive injury need not be substantial.[29]

While allegations showing competitive injury may be appropriate to confer standing in appropriate circumstances, *see, e.g., Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), appellants have done nothing more than allege competitive injury in the abstract. Article III requires more specific allegations of competitive injury to satisfy

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[24] *See supra* note 5; *infra* note 25.

[25] Commissioner von Raab identified the Soviets goods as lumber, furniture, clock cases (wood), radio-tv cabinets, chess pieces (wood), wooden souvenirs, wooden crates, cardboard boxes, cathode ray tubes and components, resistors, camera lenses, glassware including chandeliers, auto parts, wheel rims, agricultural parts, gold ores, iron ore and manganese ore, bauxite, uranium ore, lignite coal, asbestos, crushed limestone, construction stone, gravel, ornamented coats (male and female, of various materials), non-ornamented coats, and gloves.

[26] This presumption is tenuous at best due to the gross generalizations in categorizing the Soviet goods. That a more precise particularization of goods alleged to be imported in contravention of §307 may be inherently more difficult in the case of a closed society such as the Soviet Union does not abrogate the requirement of Article III to allege a judicially cognizable injury. *Valley Forge*, 454 U.S. at 485. Moreover, the Secretary of the Treasury, in his memorandum of January 28, 1985, to Commissioner von Raab, superseded and, in essence, nullified the Commissioner's §2.42(e) findings by concluding that "the available evidence provides no reasonable basis in fact to establish a nexus between Soviet forced labor practices, and specific imports from the Soviet Union." *See McKinney*, No. 85-73, slip op. at 72 (the Secretary's final determination supersedes the Commissioner's 1983 findings, and renders moot all issues concerning these findings).

[27] Relevant information might include one or more of the following: (1) reduction in product pricing; (2) decline in domestic sales; (3) decline in domestic production; (4) drop in producers' share prices; (5) decline in the number of producers; (6) producer bankruptcies; (7) worker layoffs or cutback; or (8) reduction in workers' wages.

[28] Constance Claffey, the WLF, and several of the congressional appellants.

[29] In support of these propositions appellants have cited: *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Rental Housing Ass'n of Greater Lynn, Inc.* v. *Hills*, 548 F.2d 388 (1st Cir. 1977).

the case or controversy requirement.[30] *See City of Los Angeles*, 461 U.S. at 101–02. The facts set forth in the complaint must be sufficient for a court to determine, assuming all of the allegations to be true, that a party indeed has suffered, or is likely to suffer, an injury in fact. *Valley Forge*, 454 U.S. at 487 n.23. The amended complaint is grossly deficient in this respect. Appellants allege generally a drop in producers' share prices, *see supra* note 27, but the complaint fails to identify which companies or producers are affected, or to present any information showing a decline in price of shares, or to provide any other relevant information regarding the alleged injury. *See generally supra* notes 26–27 and accompanying text. Appellants' claim of shareholder injury is thus too conjectural and speculative to confer standing. *City of Los Angeles*, 461 U.S. at 101–02.

Moreover, a corporation is a legal entity capable of asserting its own legal rights and interests. There has been no demonstration by any of the appellants claiming shareholder status of need or reason for assisting a corporation or for pursuing remedies to which the corporation may be entitled. As a result, the appellants would be prudentially limited from asserting a claim for relief based upon the legal rights or interests of these third parties. *Valley Forge*, 454 U.S. at 474; *Warth*, 422 U.S. at 499.

D. International Longshoremen's Association

The International Longshoremen's Association, AFL–CIO, (ILA) has asserted standing for itself and through its members[31] on the basis of both economic and non-economic injuries. We have addressed the non-economic injury question, *see supra* Section A. Consumers, and the same reasoning applies with equal force to that type of injury claimed for ILA and its members. Accordingly, we conclude that the ILA does not possess standing on the basis of the alleged non-economic ethical injury, either in itself or derivatively through its members. *See McKinney*, No. 85–73, slip op. at 66.

The economic injury alleged by the ILA is based upon damages assessed, or which may be assessed, against ILA as a result of civil suits arising from the ILA's refusal to handle allegedly illegal Soviet imports. Even if sufficient to satisfy the injury requirement of Article III, the alleged economic injury is not fairly traceable to the challenged action of the Customs Service. *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472. The injury results not from the conduct of the Customs Service in permitting allegedly illegal Soviet imports, but rather from the independent decisionmaking

[30] The competitive injury alleged in the amended complaint is a form of economic injury.

[31] While a labor organization such as the ILA may assert derivative or associational standing based upon its members, the ILA must allege sufficient facts to show that "its members would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343. The amended complaint, however, avers that it is the ILA that is being subjected to civil suits for damages for refusing to unload Soviet ships. Since there is no allegation that ILA members are being named as defendants in these lawsuits, i.e., threatened with economic injury, the ILA must rely solely upon its own alleged economic injury as the basis for standing.

and action of third parties not before this court, i.e., the instigators of the law suits against the ILA. *Allen*, 468 U.S. at 757; *Simon*, 426 U.S. at 41-42. More importantly, ILA's refusal to handle Soviet cargo, believed to be the product of forced labor which might contravene § 307, is a volitional action that is carried out with full awareness of the potential of adverse consequences.

The court, citing to *International Longshoremen's Association, AFL-CIO* v. *Allied International, Inc.*, 456 U.S. 212 (1982), noted that the Supreme Court had determined that ILA's refusal to unload Soviet imports was a violation of the National Labor Relations Act. *McKinney*, No. 85-73, slip op. at 67. And ILA knew or should have been aware that damages would be inflicted on third parties as a result of its failure to honor its cargo handling commitments. Under these circumstances, no matter how laudatory ILA's motivation may have been in refusing to unload Soviet cargo, the fact that ILA voluntarily and knowingly violated the law and subjected itself to third party damage suits for breach of its obligation to handle cargo sunders the causal connection between its economic injury and the Government's allegedly illegal action. *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472.[32] Accordingly, ILA has failed to allege sufficient facts to show that it has suffered, or is likely to suffer, an injury in fact traceable to action of the Customs Service. *Valley Forge*, 454 U.S. at 487 n.23.[33]

E. Public Interest Organizations

The WLF, the Union Mutual Foundation (UMF), the Constitutional Institute of America (CIA), the Ukrainian Congress Committee of America, Inc. (UCCA), and the Ukrainian Student Association of Michnowsky (TUSM) argue that they are parties having such a personal stake in the outcome of the controversy to assure the concrete adverseness which sharpens the presentation of issues upon which a court so largely depends for illumination of the issues. *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968).

The WLF alleges[34] that, because of the refusal of the Customs Service to enforce § 307 with respect to Soviet forced-labor products, it is required to engage in extensive research and related activities, at its own expense, to obtain information needed to advise and inform its members and clients on the nature and extent of such products. The cases cited by the WLF[35] appear to support its

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[32] On appeal ILA has conceded that criminal prosecution of the ILA under 18 U.S.C. § 1761 (1982) for handling convict goods is remote. Accordingly, the injury from threat of criminal prosecution is clearly conjectural or speculative and insufficient to meet the injury requirement of Article III. *City of Los Angeles*, 461 U.S. at 101-02.

[33] The court correctly concluded that ILA does not have standing to assert the interests of non-ILA members. *See supra* note 15.

[34] The WLF's arguments that it has standing to sue as a consumer, shareholder, or in a representative capacity have been addressed *supra*.

[35] To support its argument that this type of direct economic detriment is a sufficient basis for standing, the WLF relies primarily on *Pacific Legal Foundation* v. *Goyan*, 664 F.2d 1221 (4th Cir. 1981). Reliance is also placed upon *Cervase* v. *Office of Federal Register*, 580 F.2d 1166 (3d Cir. 1978), *Scientists Institute for Public Information, Inc* v. *Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973), and *NORML* v. *United States*, 452 F. Supp. 1226 (D.D.C. 1978).

contention that this type of injury would satisfy Article III. Where the injury in fact is not obviously within the reach of the particular statutory provision upon which the litigant has founded his claim, *Allen*, 468 U.S. at 754 ("judicially cognizable" injury), the court must consider the prudential limitations on standing to determine whether the litigant should be allowed to maintain the action. *Valley Forge*, 454 U.S. at 463–64 n.4 (Brennan, J., dissenting); *see also Duke Power Co.*, 438 U.S. at 80–81.

We find no basis for concluding that the WLF's injury is obviously within the reach of § 307. The question, therefore, is whether this statutory provision, i.e., § 307,[36] can properly be understood as granting a person in the WLF's position a right to judicial relief. *Warth*, 422 U.S. at 500, that is, whether the WLF, as an organization, is within the "zone of interests" to be protected or regulated by the statute. *Data Processing Service*, 397 U.S. at 153. As our discussion *supra* makes evident, § 307 was enacted to protect producers and workers from economic competition from imported products produced by forced labor, and to regulate the importation of forced-labor products for the benefit of consumers when equivalent domestic products are in short supply. *See supra* Section A. Consumers, Section B. Producers. The WLF, as an organization, is not within either category to be protected or regulated by § 307. *Valley Forge*, 454 U.S. at 474–75. Even though the WLF may have suffered an injury in fact, this prudential limitation bars its claim as an organization to standing.

The UMF, in the amended complaint, avers that it undertakes "activities to protect and promote the welfare of the American worker," and objects to the importation of Soviet forced-labor products. Other than the terse objection to the importation of Soviet products allegedly produced by forced labor,[37] the UMF has singularly failed to set forth any allegation of injury, actual or threatened, as mandated by Article III. *Allen*, 468 U.S. at 751; *Gladstone, Realtors*, 441 U.S. at 98. Nor has the UMF alleged any facts, even remotely, showing the constitution of its membership, that its membership possesses any legal rights or interest which have been violated, or that it is a proper party to assert such legal rights or interests. Accordingly, there is no basis for this court to conduct a *Hunt* analysis. *See supra* note 13. The UMF has failed to allege facts sufficient to survive a motion to dismiss. *Simon*, 426 U.S. at 45 n.25.

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[36] Appellants have asserted that this cause of "action arises under 19 U.S.C. § 1307, and a right of judicial review is provided by * * * 5 U.S.C. § 702." Section 702 provides, in pertinent part, that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof * * *.

Thus, even though a right to review may be asserted under § 702, the standing question must focus on the scope of the legal rights or interests devolving from the relevant statute. *Cf. Data Processing Service*, 397 U.S. at 153.

[37] To the extent that this objection could be construed as asserting a basis for standing as a consumer, *Warth*, 422 U.S. at 501 (court must construe the complaint in favor of the complaining party), the consumer argument was examined and rejected in Section A. Consumers *supra*.

With respect to the CIA the amended complaint states only that it is a joint project of the WLF and the UMF through which these foundations petitioned the Customs Service to prohibit the importation of Soviet forced-labor products. No allegation of injury having been made, there is no predicate for standing for the CIA. *Valley Forge,* 454 U.S. at 472.

The amended complaint avers that the UCCA and the TUSM, and their members, object to and are adversely affected by the continued importation of Soviet forced-labor products as are the other appellants. The facts alleged in the complaint, taken as true for purposes of a standing analysis, must be sufficient to show that a party has suffered, or is likely to suffer, an injury in fact. *Valley Forge,* 454 U.S. at 487 n.23. The UCCA and the TUSM, however, have not alleged, with any degree of specificity, that as organizations they have been injured or threatened with injury. *Allen,* 468 U.S. at 751; *see also supra* note 36. Nor has either the UCCA or the TUSM alleged any facts which even remotely tend to show a derivative basis for standing. *Hunt,* 432 U.S. at 343. Neither the UCCA nor the TUSM pleadings are sufficient to survive a motion to dismiss. *Simon,* 426 U.S. at 45 n.25.

The amended complaint also alleges that the Ukrainian appellants "are particularly injured in that a large portion of the political prisoners in labor camps in the Soviet Union are from the Ukraine." Leaving aside the question of whether this alleged injury complies with the injury requirement of Article III, this alleged injury is not causally connected to any conduct, let alone putatively illegal conduct of the Customs Service. *Allen,* 468 U.S. at 751. The conduct of the Customs Service has nothing whatsoever to do with the alleged fact that Ukrainians are political prisoners in Soviet labor camps, which is the result solely of internal political and policy machinations of the Soviet government. Further, no conceivable relief granted by this court could possibly redress such an alleged injury, *Valley Forge,* 454 U.S. at 472, as rectification of such an alleged injury lies solely within the control of the Soviet government.

CONCLUSION

We have examined in some detail, as suggested by *Allen,* 468 U.S. at 752, the claims of the appellants that they have standing to maintain this action. In doing so, we are required to accept as true all material allegations of the complaint and to construe the complaint in favor of the complaining party. On the other hand, the complaining party must set forth the claims of injury and other constitutional and prudential requirements of standing with some specificity and concreteness. *See Warth,* 422 U.S. at 508–509.

For the reasons discussed, we find the appellants' amended complaint inadequate to show that appellants possess standing in any of the capacities that they have asserted or for any of the injuries

they have claimed. As appellants who are consumers, the economic injury asserted, which in truth may be nothing more than an ethical or moral injury, is not within the zone of interests covered by § 307 and the non-economic injury claimed is neither of a type that would satisfy Article III nor within the protection or regulation of the statute. As appellants who are shareholders, sufficient facts showing Article III injury have not been set forth and the prudential bar applies to the assertion of third party rights. WFL in its association or derivative status has failed to demonstrate the *Hunt* requirements of germaneness to the organization's purposes and judicially cognizable injury to members. Moreover, its direct injury is clearly not within the "zone of interests" of § 307. ILA does not allege facts sufficient to claim associational standing and, as an organization, any injury it suffers is due to the action of parties not before the court rather than from the putative illegal acts of the Customs Service. Finally, with respect to the other organizations, the amended complaint of the appellants is not sufficient to show Article III injury.

Having concluded that none of the appellants possesses standing, we need not, and do not, address the mootness issue.

Accordingly, we affirm the decision of the Court of International Trade on the basis that none of the appellants has standing, either directly or in any representative capacity, to maintain this action.

AFFIRMED

APPENDIX OF APPELLANTS

Representative Stewart B. McKinney
Representative Andrew Jacobs, Jr.
Representative Bob Livingston
Representative Thomas N. Kindness
Representative Philip M. Crane
Representative Robert A. Roe
Representative Eldon Rudd
Representative Daniel B. Crane
Representative James H. Scheuer
Representative Peter H. Kostmayer
Representative Norman D. Shumway
Representative Dan Burton
Representative Gerald B.H. Solomon
Representative Raymond J. McGrath
Representative Norman F. Lent
Representative Mickey Edwards
Representative Webb Franklin
Representative William F. Clinger, Jr.
Representative George C. Wortley
Representative William J. Hughes
Representative Antonio Borja Won Pat

Representative Dan R. Coats
Representative Edward J. Markey
Representative Larry E. Craig
Representative Thomas J. Bliley, Jr.
Representative Tom Lewis
Representative Manuel Lujan, Jr.
Representative Bill McCollum
Representative Robert E. Badham
Representative Wayne Dowdy
Representative Nancy L. Johnson
Representative Edward F. Feighan
Representative Tom Corcoran
Representative Mark Siljander
Senator Jesse A. Helms
Senator Steven D. Symms
Washington Legal Foundation
Union Mutual Foundation
Constitutional Institute of America
Ukrainian Congress Committee of America, Inc.
Ukrainian Student Association of Michnowsky (TUSM)
International Longshoremen's Association, AFL–CIO
Constance Claffey

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Treasury Decisions

(T.D. 86-151)

Reimbursable Service—Excess Cost of Preclearance Operation

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 23, 1986.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess cost for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning August 31, 1986.

Installation	Biweekly excess cost
Montreal, Canada	$18,208
Toronto, Canada	31,117
Kindley Field, Bermuda	10,755
Nassau, Bahama Islands	24,825
Vancouver, Canada	12,752
Winnipeg, Canada	2,759
Freeport, Bahama Islands	17,542
Calgary, Canada	7,774
Edmonton, Canada	4,739

D. LYNN GORDON,
Acting Comptroller.

[Published in the Federal Register, August 19, 1986 (51 FR 29626)]

(T.D. 86-152)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

July 4, 1986, Holiday.

Greece drachma:	
July 1, 1986	$0.007174
July 2, 1986	.007151
July 3, 1986	.007202
Israel shekel:	
July 1-3, 1986	N/A
South Korea won:	
July 1, 1986	.001126
July 2, 1986	.001126
July 3, 1986	.001126
Taiwan N.T. dollar:	
July 1, 1986	N/A
July 2, 1986	.026226
July 3, 1986	.026233

(LIQ-03-01 S:COM CIE)

Dated: July 4, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-153)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
July 7–8, 1986	$0.007202
July 9, 1986	.007161
July 10, 1986	.007181
July 11, 1986	.007158
Israel shekel:	
July 7–11, 1986	N/A
South Korea won:	
July 7, 1986	.001128
July 8, 1986	N/A
July 9, 1986	.001128
July 10, 1986	.001125
July 11, 1986	.001125
Taiwan N.T. dollar:	
July 7, 1986	.026233
July 8, 1986	.026233
July 9, 1986	.026233
July 10, 1986	.026233
July 11, 1986	.026233

(LIQ–03–01 S:COM CIE)

Dated: July 11, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–154)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
July 14, 1986	$0.007143
July 15, 1986	.007117
July 16, 1986	.007239
July 17, 1986	.007233
July 18, 1986	.007246

Israel shekel:	
July 14–18, 1986	N/A
South Korea won:	
July 14–15, 1986	.001124
July 16–18, 1986	.001125
Taiwan N.T. dollar:	
July 14–18, 1986	.026233

(LIQ-03-01 S:COM CIE)

Dated: July 18, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–155)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
July 21, 1986	$0.007289
July 22, 1986	.007286
July 23, 1986	.007252
July 24, 1986	.007273
July 25, 1986	.007199
Israel shekel:	
July 21–25, 1986	N/A
South Korea won:	
July 21, 1986	.001125
July 22–23, 1986	.001126
July 24–25, 1986	.001125
Taiwan N.T. dollar:	
July 21–25, 1986	.026233

(LIQ-03-01 S:COM CIE)

Dated: July 25, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-156)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
July 28, 1986	$0.007273
July 29, 1986	.007337
July 30, 1986	.007286
July 31, 1986	.007372
Israel shekel:	
July 28-31, 1986	N/A
South Korea won:	
July 28, 1986	.001124
July 29, 1986	.001125
July 30, 1986	.001124
July 31, 1986	.001125
Taiwan N.T. dollar:	
July 28, 1986	.026233
July 29, 1986	.026233
July 30, 1986	.026240
July 31, 1986	.026247

(LIQ-03-01 S:COM CIE)

Dated: July 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-157)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

China P.R. renminbi yuan:
July 7-11, 1986 ..... $0.269331

(LIQ-03-01 S:COM CIE)
Dated: July 11, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-158)

Foreign Currencies--Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

China P.R. renminbi yuan:
July 14-18, 1986 ..... $0.269331

(LIQ-03-01 S:COM CIE)
Dated: July 18, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-159)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
July 24, 1986	$0.61260
July 25, 1986	.60150
China P.R. renminbi yuan:	
July 21-25, 1986	.269331

(LIQ-03-01 S:COM CIE)

Dated: July 25, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-160)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
July 28, 1986	$0.61050
July 29, 1986	.60930
July 30, 1986	.61040
July 31, 1986	.59590
China P.R. renminbi yuan:	
July 28-31, 1986	.269331

Japan yen:	
July 31, 1986	.006500
Switzerland franc:	
July 31, 1986	.595948

(LIQ-03-01 S:COM CIE)
Dated: July 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 86–78)

CONCENTRIC PUMPS, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–10–01335

Before TSOUCALAS, *Judge.*

MEMORANDUM OPINION AND ORDER

[Defendant's motion to dismiss granted; action dismissed.]

(Decided August 1, 1986)

Stack and Filpi (Paul F. Stack), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice *(Judith M. Barzilay and Paula N. Rubin),* for the defendant.

TSOUCALAS, *Judge:* Plaintiff, Concentric Pumps, Ltd., brings this action challenging the refusal of the Customs Service to reliquidate 12 entries pertaining to oil and water pumps, and parts of fans. The Customs Service classified the merchandise under various items within Schedule 6, of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was liquidated at the *ad valorem* rate. Plaintiff contests this classification alleging that the merchandise contained American made parts and therefore, is entitled to be entered duty free under item 807.00, TSUS. This item exempts from duty certain American made components which are returned to the United States as parts of articles assembled abroad. Prior to the time of liquidation, plaintiff did not assert duty free status for the merchandise. Plaintiff contends that it was unaware of item 807.00, TSUS, and that § 520(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1), permits reliquidation of these goods to correct this alleged mistake of fact.

Defendant now moves to dismiss the action, pursuant to USCIT R. 12, for lack of jurisdiction and for failure to state a claim upon which relief may be granted. Defendant argues that § 520(c)(1) does not include within its parameters a failure to know the existence of the TSUS item. Since plaintiff has failed to state a claim upon which relief may be granted, the action must be dismissed.

BACKGROUND

Plaintiff, Concentric Pumps, Ltd., an English corporation, imported oil and water pumps, and parts of fans, which entered the country through the port of Chicago in 12 entries.[1] These entries were liquidated from October 29, 1982 through September 23, 1983. Subsequent to liquidation plaintiff requested that the goods be reliquidated pursuant to § 520(c)(1), claiming that at the time of importation, plaintiff was unaware of item 807.00, TSUS. Item 807.00, TSUS, allows duty free treatment for American made parts exported in assembly ready condition, which have not lost their physical identity and have not been advanced in value or improved in condition, when assembled abroad. These requests were denied by the District Director. Plaintiff then filed two protests [2] on January 4, 1984, concerning the 12 entries. These protests again alleged that the merchandise imported had assembled into it goods manufactured in the United States and exported to the United Kingdom for assembly. Plaintiff claimed that at the time of importation, plaintiff was unaware of item 807.00, TSUS, and consequently failed to notify its customs broker as to the incorporation of American manufactured parts into the imported merchandise. On April 23, 1984, the Customs Service denied these protests refusing to reliquidate the goods as "American goods returned." Plaintiff thereafter filed this action.

The question presented to the Court is whether plaintiff's lack of knowledge of item 807.00, TSUS, can be viewed as a mistake of fact which would permit reliquidation under § 520(c)(1).

The court holds that plaintiff's failure to know the existence of item 807.00 does not constitute a mistake of fact or other inadvertence remediable under § 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1). Therefore, the court grants defendant's motion and the action is dismissed for failure to state a claim upon which relief may be granted.

DISCUSSION

This Court must determine whether an importer's failure to claim duty free status due to its ignorance of a Tariff Schedule item constitutes a mistake of fact or inadvertence cognizable under

[1] See the following table:

Date of entry	Entry No.	Date of entry	Entry No.
9/24/82	716396	1/19/83	612320
10/19/82	611169	2/02/83	612378
11/16/82	611634	3/14/83	612964
12/08/82	611699	3/23/83	612579
12/27/82	611768	4/27/83	613220
1/19/83	612321	5/11/83	613245

[2] Protest No. 39014000010 and Protest No. 39014000011 each concerning six entries.

§ 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1) (1982).

Section 520(c) provides in pertinent part:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, * * * reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction; * * *

19 U.S.C. § 1520(c)(1) (1982).

Section 520(c)(1) was amended to include "mistake of fact, or other inadvertence" by the Customs Simplification Act of 1953, 67 Stat. 507, 519 § 20. The legislative history behind this amendment indicates that Congress intended to eliminate "certain unnecessary annoyances and inequities which plague both the Government and private parties" involved in importation. S. Rep. No. 632, 83d Cong., lst Sess. 1, *reprinted in* 1953 U.S. Code Cong. & Ad. News 2283. The amendment was designed to facilitate the administration of the customs law and eliminate certain inequities by reducing the excessive amount of time customs officers spent on dealing with complaints. Simplifying Customs Administration and Procedures: H.R. Rep. No. 1089, 82d Cong., lst Sess. 18 (1951).

In reviewing the statute and the legislative history behind the amendment to § 520(c)(1), there is nothing to suggest that Congress intended § 520(c)(1) to remedy an importer's mistaken or inadvertent lack of knowledge of the Tariff Schedule items.

Recent cases interpreting the parameters of § 520(c)(1) have established the limited remedial nature of § 520(c)(1). The limited redress of § 520(c)(1) is not directed at rectifying allegedly incorrect interpretations of law. *Computime, Inc.* v. *United States,* 9 CIT ——, Slip Op. 85-115, at 5 (Nov. 1, 1985); *see also, Hambro Automotive Corporation* v. *United States,* 66 CCPA 113, 120, C.A.D. 1231, 603 F.2d 850, 855 (1979). Determinations by the Customs Service that merchandise is covered by a certain provision of the TSUS are conclusions of law. *See, Mattel, Inc.* v. *United States,* 72 Cust. Ct. 257, 262, C.D. 4547, 377 F. Supp. 955, 960 (1974). Therefore, barring mistake of fact, an erroneous classification would render § 520(c)(1) inapplicable. *Id.* at 262, 377 F. Supp. at 960. In that event plaintiff would be limited to seeking relief under § 514 of the Tariff Act of 1930, 19 U.S.C. § 1514, which sets forth the appropriate procedure to protest a misinterpretation of the applicable law and an improper classification by the Customs Service.

This Court finds that plaintiff's claim cannot properly be classified as a mistake of fact which would allow plaintiff to avail itself of the application of § 520(c)(1).

It has been held that a "mistake of fact exists where a person understands the facts to be other than they are, whereas a mistake of law exists where a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts." *Hambro Automotive Corporation* v. *United States*, 66 CCPA 113, 118, C.A.D. 1231, 603 F.2d 850, 854 (1979) (citing 58 C.J.S. Mistake, § 832). It has been defined as a mistake which takes place when some fact which indeed exists, is unknown, or a fact which is thought to exist, in reality does not exist. *C.J. Tower & Sons of Buffalo, Inc.* v. *United States*, 68 Cust. Ct. 17, 22, C.D. 4327, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974).

C.J. Tower & Sons is a leading case on what constitutes a mistake of fact sufficient to bring to bear application of § 1520(c)(1). In *Tower*, neither the District Director of Customs nor the importer were aware that the merchandise in question was emergency war materials, entitled to duty free treatment under item 832.00, TSUS, until after the liquidation became final. The court held that such a lack of knowledge did not amount to an error in the construction of law but came within the statutory language "mistake of fact or other inadvertence." *C.J. Tower & Sons*, 68 Cust. Ct. at 22, 336 F. Supp. at 1399.

Plaintiff attempts to analogize its situation to the one presented in *Tower*. However, plaintiff's reliance on *Tower* is misplaced. In *Tower*, the importer and the Customs Service were both unaware of the nature of the goods prior to liquidation, and sometime thereafter. Based upon the facts known to both the Customs Service and the importer, the goods were subject to duty; the importer was unaware of the ultimate use of his goods and therefore, could not relate such information to the Customs Service.

This Court observes that the *Tower* court considered significant, the character of the merchandise imported, namely, for military department use. The court noted that the applicable free entry provision for governmental importations must be liberally construed particularly when the action is brought under § 1520, and if the mistake of fact is the underlying cause for failure to comply with the provision in question. *Id.* at 23, 336 F. Supp. at 1400.

In this action, plaintiff states that it was unaware, at the time of liquidation, that its goods contained American made parts. However, the protests filed by plaintiff and the allegations in its complaint are void of any reference to a mistake in the nature of the goods. The only inadvertence plaintiff addresses goes to its knowledge of the existence of the specific item in the Tariff Schedule. This mistake was not the kind contemplated by the court in *Tower*. Where the importer knew the nature of its goods, but was not

aware of a duty free item listed in the Tariff Schedule, no other conclusion can be drawn but that no mistake of fact was involved. If any error occurred, it "amounted to an error in the construction of law or to ignorance of the law." *PPG Industries, Inc.* v. *United States,* 7 CIT 118, 126 (1984). Similarly, in this situation plaintiff's mistake is not one of fact, but one of law.

Based on the facts before this Court, plaintiff's case is more analogous to the one presented in *Godchaux-Henderson Sugar Co., Inc.* v. *United States,* 85 Cust. Ct. 68, C.D. 4874, 496 F. Supp. 1326 (1980). There, the importer failed to file a consumption entry for its merchandise within the time limit prescribed by law to obtain duty free treatment. The court held that plaintiff's ignorance of the duty free status of its merchandise and of the deadline was not remediable under § 520(c)(1).

Plaintiff's claim, which it raises for the first time, as to its lack of knowledge of the American made parts contained in the pumps is not persuasive. Plaintiff admits that when it became aware that it had paid full duty on goods entitled to be entered duty free, the time for filing a protest pursuant to § 514 had expired. Therefore, plaintiff requested reliquidation of the entries pursuant to § 520(c). In conceding this fact, plaintiff realized that it was precluded from seeking relief under § 514 and therefore endeavored to rectify its mistake by availing itself of the remedy under § 520(c)(1). However, it has been held that "§ 1520(c)(1) cannot be used as 'an alternative to the normal liquidation-protest method of obtaining review,' but rather affords 'limited relief' where an unnoticed or unintentional error has been committed." *Computime, Inc.* v. *United States,* 9 CIT ——, Slip Op. 85-115, at 6 (Nov. 1, 1985) (quoting *C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 68 Cust. Ct. 17, 21, C.D. 4327, 336 F. Supp. 1395, 1398 (1972), *aff'd,* 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974)).

The Court stresses that § 520(c)(1) is not remedial for every conceivable form of mistake or inadvertence adverse to an importer, but rather the statute offers "limited relief in the situations defined therein." *Phillips Petroleum Co.* v. *United States,* 54 CCPA 7, 11, C.A.D. 893 (1966); *accord PPG Industries Inc.* v. *United States,* 7 CIT 118 (1984), and *C.J. Tower & Sons* v. *United States, supra.*

Conclusion

Plaintiff has failed to state a claim upon which relief may be granted. It has failed to allege sufficient facts which would indicate that a mistake of fact was committed as contemplated by 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1), and therefore the motion to dismiss must be granted. Accordingly, defendant's motion to dismiss is granted.

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(Slip Op. 86-79)

ALYESKA PIPELINE SERVICE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-09-01252

Before WATSON, *Judge.*

MEMORANDUM OPINION AND ORDER

Timeliness of Protest—Adequacy of Protest—Classification—Value Advance

After finding that the protests were timely due to the failure of the customshouse personnel to make the entry papers available for inspection, and further finding that the form of the protests was adequate to bring plaintiff's objections to the attention of the Customs Service, the court holds that the importations, consisting of various items of structural support for the Alaska pipeline, are properly classifiable as columns, girders or similar structural units. The court also finds that the value was improperly advanced on one of the entries.

[Judgment for plaintiff.]

(Decided August 1, 1986)

George R. Tuttle, P.C. (Stephen S. Spraitzar, Esq. of counsel) for plaintiff.
Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Florence M. Peterson,* attorney) for the defendant.

WATSON, *Judge:* This case arises from the importation during 1975 to 1977 of metal articles manufactured in Japan and used in the construction of the Trans-Alaska Pipeline System. These articles were part of a structure known as an anchor support module, which was specially designed to support a pipeline off the ground while allowing a degree of flexibility sufficient to prevent the stresses of seismic activity and thermal movement from causing damage to the pipeline.

The specific items imported were "framing", "saddle clamps", "sliding plates" and the nuts, bolts, and washers used to connect the framing to the clamps and to brackets which are not part of the items imported here.

The framing resembles a huge, square mattress frame, considerably reinforced across its center and on its diagonals in order to support (in its center) the sliding plate, the saddle clamp and the pipeline. The sliding plate looks like a truncated, hollow column set on a flat rectangular plate sitting in the middle of the framing. It has a big hemisphere resting domeside-down, partly inside its hollow top. The hemisphere can be welded at different angles inside the hollow top of the sliding plate to accommodate the angle at which the pipeline is passing through above it. The u-shaped

bottom part of the saddle clamp goes on top of the hemisphere, the pipe rests on that and the top of the saddle clamp closes over the pipe, securing it to the support structure below.

To make a complete anchor support module, four piles are sunk into the ground, heat pipes and radiator assemblies are installed and brackets are attached to the piles. The imported framing is then bolted to the brackets on the piles, followed by the installation of the sliding plate, the welding of the hemisphere and the lower saddle clamp, the placement of the pipeline and the fastening of the upper saddle clamp. With a little imagination the completed unit resembles a giant four-poster bed with a column in its center supporting and clamping the pipeline.

The articles in question were imported in twenty-one separate entries. The classification of the articles in twenty of those entries was not protested until more than ninety days after the date of their liquidation, a fact which would normally make the protests untimely and would ordinarily preclude the bringing of an action in court under 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514(c)(2)(A). However, in this case the plaintiff proved that the entry papers were not available to its counsel for inspection at the Customshouse in Anchorage, Alaska in November, 1977 or January and February of 1980. The testimony of Mr. Leonard Fertman, Esq., as well as the testimony of Mr. Charles Edelin, a customshouse broker, persuaded the court that the entries had been misplaced, probably due to understaffing and difficult conditions in the Customshouse, and were not made available, despite repeated requests, until March 26 and 27, 1980. In these circumstances the liquidation of the entries was "tolled" and plaintiff did not lose its opportunity to make protests against administrative action on those entries. *Schering Corp.* v. *United States,* 67 CCPA. 83, C.A.D. 1250 626 F.2d 162 (1980). The subsequent inclusion of those entries on a document entitled "amended protest" was sufficient to inform the Customs Service of plaintiff's objection to classification. *United States* v. *Fred Gretch Mfg. Co., Inc.,* 26 CCPA 267 C.A.D. 26 (1938); *American Export Lines* v. *United States,* 85 Cust. Ct. 20, C.D. 4864 (1980), aff'd 69 CCPA 1 , C.A.D. 1268, 657 F.2d 1214 (1981).

The administrative treatment of the twenty-one entries raises an issue of classification and an issue with respect to the assessment of duties on the one entry which was unarguably protested in a timely manner.

On the classification issue, the government defends its classification of the imported articles under Item 657.20 of the Tariff Schedules of the United States ("TSUS") as articles of iron or steel, not coated or plated with precious metal, dutiable at the rate of 9.5% ad valorem, pursuant to T.D. 68–9.

Alternatively, the government claims that the importations are properly classifiable as other parts of structures of base metal

under Item 652.98 of the TSUS dutiable at the rate of 9.5% ad valorem.

The plaintiff claims that the framing, sliding plate and saddle clamp are properly classifiable under Item 652.94, as modified by T.D. 68-9, as "columns, pillars, posts, beams, girders, and similar structural units, not in part of alloyed iron or steel, dutiable at the rate of 3.5% ad valorem. Plaintiff claims that the nuts and bolts are classifiable under Item 646.54 as "bolts and their nuts imported in the same shipment" dutiable at 2 cents per pound and further, that the washers are free of duty under Item 646.70.

Alternatively, the plaintiff claims that all of the importations, including the nuts, bolts and washers are classifiable under Item 652.94.

A separate issue is raised by the fact, that on a single entry (No. 76-102427 of September 20, 1979) the Customs Service advanced the value by the amount of $2,589,294 to cover value advances relating to all these twenty-one entries (and two other entries, not before the Court) and then demanded duty in the amount of $245,982.93.

The plaintiff protests the advance as done in violation of law and regulation and seeks a refund of all but the pro-rata portion of the duty actually attributable to entry No. 76-102427.

The government contends that the court has no jurisdiction over the claim because the protest was insufficient to raise it, that plaintiff is equitably barred from prevailing on the claim, and that, if there was an error, it was harmless and the Court should order the value advance to be pro-rated over all the appropriate entries.

The exact language of the competing classification provisions is as follows:

Original Classification by customs:

	Articles of iron or steel, not coated or plated with precious metal:	
* * * * * * *		
	Other articles:	
* * * * * * *		
	Other:	
* * * * * * *		
657.20	Other	9.5% ad valorem

Alternative Government Claim:

	Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts and other structures and parts of structures, all the foregoing of base metal:	

* * * * * * *		
652.98	Other	9.5% ad valorem
Plaintiff's Claimed Classification:		
	Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts and other structures and parts of structures, all the foregoing of base metal:	
	Of iron or steel:	
* * * * * * *		
	Columns, pillars, posts, beams, girders and similar structural units:	
	Not in part of alloy iron or steel:	
* * * * * * *		
652.94	Other	3.5% ad valorem
	Bolts, nuts, studs and studding, screws, and washers (including bolts and their nuts imported in the same shipment, and assembled bolts or screws and washers, with or without nuts); screw eyes, screw hooks and screw rings, turnbuckles; all the foregoing not described in the foregoing provisions of this subpart, of base metal:	
	Of iron or steel;	
646.54	Bolts and bolts and their nuts imported in the same shipment	0.2¢ per pound
* * * * * * *		
646.70	Washers:	
* * * * * * *		
	Other	Free

The outcome of the classification dispute depends on whether one takes a limited view of what is a column or girder or a similar structural unit. The expert testimony in this case, the lexicographic authorities reviewed, and simple direct examination of the exhibits, lead the court to conclude that the imported articles are merely elaborate or creative forms of columns or girders, well within the range of acceptable variation of the named articles. They are most accurately described as girders, columns or similar structural units.

This holds true even if the Court looks at the entire assembled unit of framing, sliding plate and saddle clamp as a single object.

In that form the Court sees nothing more than a metal structure with a main horizontal supporting member and a single columnar element rising from its center. If we examine it as a single object or if we reduce it to its components, the similarity to girders and columns is equally impressive.

The framing has all the attributes of a girder as defined in *Webster's Third New International Dictionary Unabridged* (1966):

> Girder n.1 a: a horizontal main member supporting vertical concentrated loads as from beams) b: Beam; esp: an iron or steel beam either made in a single piece of built up typically of plates, flitches, latticework, or bars and often of very large proportions—compare * * * box girder * * *

The framing, impressive as it is, is but a simple object compared to the box girder which was the subject of *J. Ray McDermott & Co., Inc.* v. *United States,* 69 Cust. Ct. 197, C.D. 4344 (1972), and there held to be a girder under Item 652.921. The box girder was the portion of an offshore drilling platform that was welded on top of the legs of the platform and supported the entire deck sections, living quarters and drilling rig. In short, the box girder was an enormous variation of a girder, just as the framing here is another lesser sort of variation.

The sliding plate with its hemispherical top and the saddle clamp on top is clearly acting as a column in supporting a compression load, that is to say, a load which compresses the column. It also has the appearance of a column, no stranger in its way than those of antiquity.

The government argues that these importations are more than girders or columns but this argument is not persuasive. The combination into which they are fashioned after importations is nothing more than a combined girder and column which, in its basic function does just what such articles or similar structures would normally do.

These importations have not reached the point at which they become more than girders and columns. This contrasts with the articles in dispute in the recent opinion of *Nissho-Iwai American Corp.* v. *United States,* 10 CIT —— (Slip Op. 86-27, March 12, 1986). That decision dealt with the classification of unassembled bridges or bridge sections consisting of columns beams, girders, nuts bolts and, in notable addition, brackets, plates hinges, drain boxes, railing, bridge shoes and railing anchors. The court upheld the classification of these importations under Item 652.98 as bridge sections, and other structures and parts of structures of base metal. Here the imported objects did not undergo a transformation into something beyond a structure similar to girders or columns even, in this Court's opinion, when they were ultimately fastened to piles. The heating units and radiators however, give a new dimension to the structure, taking it past being a mere variant or combination of traditional weight or stress bearing elements. The piles and heat-

ing units have no bearing on this classification and are mentioned merely to show how much more would have to be involved in these importations to make them comparable to the stituation in the *Nissho-Iwai* case.

The capacity for movement of the sliding plate is an additional feature of the support module but it is not so unusual that it overtakes and transforms the basic support functions which make these articles girders, columns or similar structural units.

Based on a stipulation entered into by the parties and expert testimony on those entries which were not the subject of stipulation, the court concludes that the imported articles were not alloyed.

In the opinion of the court the proper classification of the imported articles is to treat the framing, sliding plate and saddle clamp as columns and girders or similar structural units. The nuts and bolts should be classified under Item 646.54, with their weight determined by the best available information. The washers are free of duty.

The court now turns to the question of the assessment of duties on Entry No. 76-102427.

The court finds that the first protest filed by plaintiff adequately expressed its objections to the value advance when it stated as follows:

> The above claims are made against the original entry as well as the value advance of $2,589,294 made against this entry but representing a value advance pertaining to approximately 24 additional entries of identical merchandise covered by P.O. 10771-SF60-M-3-SAC.

The value advance was properly challenged in this action as a dispute as to the appraised value or a dispute as to the classification and rate and amount of duties chargeable, under 19 U.S.C. § 1514a (1) and (2). *C.L. Hutchins & Co., Inc., Imperial Rug Mills, Inc.,* v. *United States,* 67 Cust. Ct. 60, C.D. 4252 (1971); *United States* v. *Macksond Importing Co., et al.,* 25 CCPA 44, T.D. 49041 (1937).

The law does not permit the Customs Service to assign to one entry the values of merchandise in other entries or the duties owing on them. 19 U.S.C. § 1500 provides for separate, unitary appraisement of entries as follows:

> § 1500. Appraisement, classification, and liquidation procedures:
>
> The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—
>
> (a) appraise merchandise by ascertaining or estimating the value thereof, under section 402 [19 U.S.C. § 1401a], by all reasonable ways and means in his power, any statement of cost of production in any invoice, affidavit, declaration, other document to the contrary notwithstanding;

(b) ascertain the classification and rate of duty applicable to such merchandise;

(c) fix the amount of duty to be paid on such merchandise and determine any increased or additional duties due or any excess of duties deposited;

(d) liquidate the entry of such merchandise; and

(e) give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

The necessity of separate appraisement was recognized in Customs Service Decision 83-39 in which it was stated that a value adjustment to imported merchandise may be reflected only on the entry or entries which cover the imported merchandise.

It follows that the only proper value increase for the entry in question would be one reflecting the value of the merchandise covered by that entry and no other merchandise.

There is no evidence of the claim made by the government in its brief that plaintiff was notified of this irregular procedure, consented to it, or waived its right to raise this issue. The allegedly harmless nature of this error is not apparent to the court.

Accordingly, it is the opinion of the court that the advance of value was improper, the liquidation was invalid and the Customs Service must refund the excess duties charged, i.e., the duties above those attributible to the merchandise covered by that entry.

In sum, the court upholds plaintiff's protests against the classification of these articles and against the advance of value made on Entry No. 76-102427. The importations shall be reliquidated in accordance with the decisions on classification and value expressed in this opinion.

(Slip Op. 86-80)

NATIONAL CORN GROWERS ASSOCIATION, NEW ENERGY CO. OF INDIANA, ARCHER DANIELS MIDLAND CO., OHIO FARM BUREAU FEDERATION AND A.E. STALEY MANUFACTURING CO., PLAINTIFFS *v.* JAMES A. BAKER III, SECRETARY, U.S. DEPARTMENT OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY, U.S. DEPARTMENT OF THE TREASURY, WILLIAM VON RAAB, COMMISSIONER, U.S. CUSTOMS SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS AND RAJ CHEMICALS, INC., CERTIFIED OIL CO. AND CITICORP INTERNATIONAL TRADING CO., INC., DEFENDANT-INTERVENORS

Court No. 85-08-01151

Before: RE, *Chief Judge.*

Memorandum Opinion

Defendant-Intervenor RAJ Chemicals, Inc. moves for reassignment of action to three-judge panel for rehearing of decision of single-judge court on grounds that the action raises broad and significant implications in the interpretation of the customs law.

Held: Although reassignment to three-judge panel after a decision by a single-judge court is not precluded as a matter of law, under the circumstances of this case, action will not be reassigned because the issues presented can be most expeditiously and finally resolved through direct appeal to the Court of Appeals for the Federal Circuit.

[Defendant-Intervenor's motion denied.]

[Decided August 4, 1986]

Williams & Connolly (Aubrey M. Daniel III, Stephen L. Urbanczyk, Manley W. Roberts, Robert W. Hamilton, and *William R. Murray, Jr.)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Kenneth N. Wolf*) for the defendants.

Spriggs Bode & Hollingsworth (William H. Bode, Joseph L. Nellis, Donald W. Fowler, Mark J. Reedy, and *Bruce J. Berger*) for defendant-intervenor RAJ Chemicals, Inc.

Wilmer, Cutler & Pickering (A. Douglas Melamed, Robert C. Cassidy, Jr., and *Deborah M. Levy*) for defendant-intervenor Citicorp International Trading Company, Inc.

Re, *Chief Judge:* Defendant-intervenor RAJ Chemicals, Inc., (RAJ) moves for reassignment of this action to a three-judge panel to rehear the decision of a single-judge court. Since the court has concluded that the ultimate resolution of the issues presented in this case can be determined most expeditiously by direct appeal to the Court of Appeals for the Federal Circuit, the motion is denied.

Background

Plaintiffs, who represent the domestic ethanol industry, on August 29, 1985, commenced this action challenging the Customs Service's decision to classify certain imported ethanol blends from Brazil under item 432.10 of the Tariff Schedules of the United States (TSUS) at a duty rate of 5 per centum ad valorem. Plaintiffs protested the classification of the imported ethanol products, and contended that they should properly be classified under items 427.88 and 901.50, TSUS at a duty rate of 3 per centum ad valorem, plus 60 cents per gallon. The action was assigned to a single-judge court pursuant to 28 U.S.C. § 253(c).

On September 9, 1985, plaintiffs moved for a temporary restraining order and preliminary injunction against the Customs Service, *inter alia,* to delay the liquidation of imports of ethanol mixtures entered after August 8, 1985. These motions were denied by a single-judge court. *See* 9 CIT 468, Slip Op. 85-98 (Sept. 20, 1985). Plaintiffs later renewed their motion for a preliminary injunction against liquidation of the entries of these ethanol blends. This motion was denied by a single-judge court. *See* 9 CIT ——, Slip Op. 85-105 (Oct. 9, 1985). Plaintiffs' motion for a rehearing of this deci-

sion was also denied. *See* 9 CIT ——, 623 F. Supp. 1262 (Nov. 26, 1985).

On November 15, 1985, the Customs Service liquidated an entry of ethanol blends imported by defendant-intervenor RAJ Chemicals, Inc. under item 432.10, TSUS. The court was advised of this fact by counsel for RAJ. Several other entries of ethanol blends, imported by defendant-intervenor Citicorp International Trading Company, Inc. (Citicorp), were also liquidated prior to judgment.

On May 22, 1986, the single-judge court issued and opinion and an accompanying judgment order, rendering judgment for plaintiffs. *See* 10 CIT ——, Slip Op. 86-55 (May 22, 1986). The court found that it had subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i), and that plaintiffs had stated a valid cause of action under the Administrative Procedure Act. In granting relief, the court ordered RAJ to "remit to the United States of America within thirty (30) days of the date hereof duties equal to the rate provided for under item 427.88 and 901.50, TSUS, on any entries * * * which have already been liquidated at a different rate of duty." Citicorp also was ordered to remit to the United States additional duties on entries already liquidated. The judgment will require RAJ to pay approximately 3.5 million dollars in additional duty, and Citicorp approximately 11 million dollars additional duty.

RAJ contends that this portion of the judgment which ordered the payment of additional duties to the United States is contrary to law. It contends that the court's order is in effect the granting of a direct money judgment for duties entered after liquidation has become final, and that this portion of the judgment constitutes the special circumstances which require reassignment and rehearing before a three-judge panel.

Plaintiffs oppose the motion for reassignment. The federal government defendants agree with RAJ's position that the portion of the judgment which grants a direct money judgment against the importers is contrary to law. Nevertheless, while "recogniz[ing] that assignment of this action to a three-judge panel is ultimately within the discretion of the Chief Judge," the government opposes the assignment of the case to a three-judge panel at this stage of the litigation. Defendant-intervenor Citicorp has also moved for rehearing, but takes no position on the motion for reassignment to a three-judge panel.

RAJ, while reserving its rights as to other issues decided in this litigation, bases its motion for reassignment and rehearing before a three-judge panel solely on the issue of the illegality of a money judgment against a private party in favor of the United States under the circumstances presented. RAJ maintains that Customs may not, with certain statutory exceptions not relevant here, reliquidate merchandise after the 90 days allowed for voluntary reliquidation has elapsed. *See* 19 U.S.C. §§ 1501, 1514. Furthermore,

RAJ contends that plaintiffs' cause of action was founded upon the Administrative Procedure Act, which authorizes the court only to "compel agency action unlawfully withheld or unreasonably delayed" or "set aside agency action" that is not supported by law. *See* 5 U.S.C. § 706. RAJ submits that, since there is no authority for the court to provide relief against private parties, the court's order to remit duties to the United States was erroneous and without authority.

DISCUSSION

RAJ's application for a three-judge panel raises an important question of first impression. The question presented is whether, pursuant to the authority conferred by statute, the chief judge may reassign a case to a three-judge panel after the judge to whom the case has been assigned has rendered a decision. The court holds that, although reassignment may be permissible after a decision has been entered, under the circumstances of this case, reassignment is not desirable, and the motion is denied.

The responsibility and authority of the chief judge to assign or reassign cases to individual judges of this Court, or to three-judge panels of the Court, is found in 28 U.S.C. §§ 253(c) and 255(a).

Section 253(c) of Title 28 provides:

> The chief judge, under rules of the court, may designate any judge or judges of the court to try any case and, when the circumstances so warrant, *reassign the case to another judge or judges.*

28 U.S.C. § 253(c) (1982) (emphasis added).

Section 255(a) provides:

> Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Court of International Trade shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

28 U.S.C. § 255(a) (1982).

These statutory provisions are implemented by Rule 77(d) of the Rules of the Court of International Trade, which provides in pertinent part:

> (2) *Assignment to Three-Judge Panel.* An action may be assigned by the chief judge to a three-judge panel either upon motion, or upon his own initiative, when the chief judge finds that the action raises an issue of the constitutionality of an Act of Congress, a proclamation of the President, or an Executive order; or has broad and significant implications in the administration or interpretation of the law.

* * * * * * *

(4) *Reassignment.* An action may be reassigned by the chief judge upon the death, resignation, retirement, illness or disqualification of the judge to whom it was assigned, *or upon other special circumstances warranting reassignment.*

U.S.C.I.T. Rule 77(d)(2),(4) (emphasis added).

Section 254 of Title 28 specifies that, except as otherwise provided in 28 U.S.C. § 255, the judicial power of this Court shall be exercised by a single judge. 28 U.S.C. § 254 (1982). In an exceptional case of constitutional or other broad significance, however, the chief judge may appoint a three-judge panel to hear and resolve the case. 28 U.S.C. § 255 (1982); *see Barnhart* v. *United States,* 5 CIT 201, 203–05, 563 F. Supp. 1387, 1389–90 (1983). The purpose of the three-judge panel is to secure a broader judicial representation, and a more extensive collegial consideration of those cases which present the most important issues before the Court. *See* H.R. Rep. No. 267, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 3188, 3200–01. As previous opinions of this Court have explained, the decision to assign an action to a three-judge panel lies within the sound discretion of the chief judge. *E.g., Barnhart* v. *United States,* 5 CIT 201, 204–05, 563 F. Supp. 1387, 1390 (1983); *Farr Man & Co.* v. *United States,* 1 CIT 104, 106 (1980); *see also SCM Corp* v. *United States,* 79 Cust. Ct. 163, 165–66, CRD 77–6, 435 F. Supp. 1224, 1227 (1977).

The statute expressly provides that the chief judge may, "*when the circumstances so warrant,* reassign [a] case to another judge or *judges.*" 28 U.S.C. § 253(c) (1982) (emphasis added). The statute specifically provides for reassignment to "judges," in the plural, and thus contemplates reassignment to a three-judge panel in accordance with 28 U.S.C. § 255(a). The phrase, "*when the circumstances so warrant,*" requires that the chief judge make a considered judgment, in light of all the facts and circumstances of the case, whether the action should be reassigned. Since the circumstances are not specified in the statute, it is clear that this decision is committed to the sound discretion of the chief judge. Read in conjunction with 28 U.S.C. § 255(a), section 253(c) must be interpreted to authorize and justify reassignment from a single judge to a three-judge panel only in those cases which, in the discretion of the chief judge, raise important constitutional issues or have broad or significant implications.

Rule 77(d)(4) implements 28 U.S.C. § 253(c) by providing that the chief judge may reassign an action, among other reasons, upon "special circumstances warranting reassignment." The situations in which a judge is unable to continue to perform judicial duties in a case appear exhausted by the specific references in the rule to "death, resignation, retirement, illness or disqualification." The provision for reassignment upon "other special circumstances" authorizes the chief judge to reassign the case in extraordinary situa-

tions in which the ability of the assigned judge to perform need not be implicated. This provision of the rule, therefore, enables the chief judge to reassign a case to a three-judge panel when an action raises important constitutional issues or has broad or significant implications in the administration of the laws regulating international trade.

In addition to fostering a fuller judicial consideration of the case, a three-judge panel also promotes the national policy of uniformity, as set forth in Article I, Section 8 of the United States Constitution which mandates that "all Duties, Imports and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8; *see* Re, *Litigation Before the United States Court of International Trade,* 19 U.S.C.A. at VII (West Supp. 1986). An important objective of Congress in enacting the Customs Courts Act of 1980 was to provide greater uniformity and consistency in the interpretation and application of the international trade laws. *See, e.g.,* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3731; 126 Cong. Rec. 27,056, 27,063 (1980) (remarks of Sen. DeConcini). By eliminating jurisdictional conflicts over the laws regulating international trade, and expanding the opportunities for judicial review, Congress sought to provide for greater certainty and stability in the law. The appointment of a three-judge panel ensures that the decision reached will reflect an institutional consensus, and thereby serves to further the statutory and constitutional mandate of uniformity in the interpretation of the international trade laws.

In addition to settling the controversy between the parties, the judicial decision has precedential value. *See* Re, *Stare Decisis,* 79 F.R.D. 509 (1979). Thus, all final decisions and decisions granting or refusing a preliminary injunction must be supported by "a statement of findings of fact and conclusions of law; or * * * an opinion stating the reasons and facts upon which the decision is based," 28 U.S.C. § 2645(a) (1982), and these decisions must be preserved and open to inspection. 28 U.S.C. § 257 (1982). The published opinions of this Court were intended to serve as valuable guides to the rights and obligations of the international trade community. This important statutory goal would be undermined if there were no mechanism for securing broad judicial representation and consideration in exceptional cases of far reaching significance. *Cf.* 28 U.S.C. § 46(c) (1982); Fed. R. App. P. 35(a) (providing for rehearing in banc by Courts of Appeal). Thus, Congress has conferred upon the chief judge the authority and responsibility to enable extensive collegial consideration of a case when it is determined to be necessary and in the public interest. *See* 28 U.S.C. § 255(a) (1982).

Of course, for reasons of judicial economy and efficiency, the authority to reassign should be used sparingly. Indeed, it may be stated that motions for reassignment to a three-judge panel, made after the case has been assigned to a single judge, will be viewed

with disfavor. Motions for reassignment made after a single judge has rendered a decision face an even heavier burden. Certainly, the chief judge will not allow any party to engage in what may appear to be "judge shopping." Nevertheless, it is clear that reassignment to a three-judge panel is not precluded as a matter of law, and may be desirable in certain circumstances. For example, a judge to whom a case has been assigned may conclude that the issues presented are of such significance as to justify consideration by a three-judge panel, and may recommend to the chief judge that the case be reassigned to a three-judge panel.

The asserting of novel jurisdictional issues or other questions of first impression, without more, would not necessarily warrant consideration by a three-judge panel. As has been noted, in this Court, "cases of novel impression are almost commonplace," *Barnhart, supra*, 5 CIT at 205, 563 F. Supp. at 1391 (quoting *SCM Corp., supra*, 79 Cust. Ct. at 166, 435 F. Supp. at 1227), and "a single-judge court has on numerous occasions decided far-reaching questions affecting the court's jurisdiction," *American Air Parcel Forwarding Co.* v. *United States*, 4 CIT 150, 151 (1982) (quoting *United States* v. *Accurate Mould Co.*, 3 CIT 155, 157 (1982)). For example, in this case, at the time of assignment, it appeared that the case would have affected the classification of only a limited number of entries during the brief three-month "grace period" that Customs had established. Thus, while the outcome of the case would be of great significance to the parties, there was no indication at that time that resolution of the issues presented would have significant implications that would have warranted consideration by a three-judge panel.

In this case, which is based on the Administrative Procedure Act, the single-judge court in fashioning a remedy assessed a money judgment against a private party in favor of the United States after liquidation. Whether this remedy is authorized by law and proper has broad and significant implications in the interpretation and administration of the customs laws. It cannot be questioned that the Court of International Trade possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. §1585 (1982). Indeed, 28 U.S.C. §2643(a) specifically provides that the court "may enter a money judgment * * * for or against the United States in any civil action commenced under section 1581 or 1582 of [Title 28]." 28 U.S.C. §2643(a) (1982). Nevertheless, it is a serious and important question whether the court may fashion relief which, as the defendant-intervenors assert, is not specifically authorized, and which may conflict with a carefully crafted statutory scheme.

The question presented in this case is not one of jurisdiction. Rather, the question presented is whether, assuming that plaintiffs have stated a valid cause of action, there is legal authority for the specific remedy or relief which was granted by the single-judge

court. It is not questioned that, in an action under the Administrative Procedure Act, the court may set aside or compel agency action. The crucial question presented, however, is whether the cause of action asserted authorizes a domestic party to obtain a money judgment in favor of the government after liquidation has become final.

Rule 1 of the Rules of this Court directs that the Rules be "construed to secure the just, speedy, and inexpensive determination of every action." Judicial economy and the expeditious resolution of the litigation are two factors that must be considerd in determining whether to assign or reassign a case to a three-judge panel. *See, e.g., Barnhart, supra,* 5 CIT at 203, 563 F. Supp. at 1389; H.R. Rep. No. 267, *supra,* 1970 U.S. Code Cong. & Ad. News at 3200. Indeed, in enacting 28 U.S.C. §§ 254 & 255, Congress recognized that the procedure under prior law which provided for intermediate review of the decision of a single judge by a three-judge panel in certain cases could be "an unnecessary and time-consuming step." H.R. Rep. No. 267, *supra,* 1970 U.S. Code Cong. & Ad. News at 3200. Because reassignment of the case at this juncture would likely protract the ultimate disposition of the action, the action will not be reassigned.

In this case, the parties have raised a number of issues that may be subject to appeal. The question of the legality of the relief granted is only one of them, and it would violate the principles of sound judicial management to have a case litigated in a piecemeal fashion. Of course, any decision by a three-judge panel of this Court would be subject to appeal to the Court of Appeals for the Federal Circuit. Although the parties may not file a notice of appeal while a motion for rehearing is pending, there is no reason to believe that any party who feels aggrieved will not appeal any adverse judgment. Indeed, two of the parties in this case have already sought relief in the Court of Appeals for the Federal Circuit on two separate occasions. *See National Corn Growers Ass'n* v. *Baker,* Misc. Doc. No. 94 (Fed. Cir. Dec. 4, 1985) (unpublished order); *In re RAJ Chemicals, Inc.,* Misc. Doc. No. 119 (Fed. Cir. June 26, 1986) (unpublished order).

The single-judge court has entered a stay of judgment to maintain the status quo pending disposition of the motion for rehearing and disposition of the appeal. Hence, it is the determination of the Court that the interests of justice can best be served by having all issues finally resolved on appeal in one forum as expeditiously as possible. Since reassignment of this case at this stage of the litigation to a three-judge panel will not aid in the expeditious disposition of the action, and will delay final resolution, the motion for reassignment to a three-judge panel is denied.

Nothing in this opinion is intended or to be interpreted as expressing any view as to the merits of the litigation.

(Slip Op. 86-81)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1160, MARION, INDIANA, PLAINTIFF *v.* RAYMOND J. DONOVAN, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 83-2-00188

Before RE, *Chief Judge.*

On Plaintiff's Motion for Review of Administrative Determination Upon Agency Record

Plaintiff, on behalf of former employees of the RCA Corporation, Marion, Indiana plant, moves to set aside the final determination of the Secretary of Labor which denied the RCA workers eligibility to apply for trade adjustment assistance benefits. Plaintiff contends that the determination was not supported by substantial evidence and is not in accordance with law.

Held: The Secretary's determination was supported by substantial evidence on the record and is in accordance with law. Therefore, plaintiff's motion is denied, and the action is dismissed.

[Judgment for the defendant; the action is dismissed.]

(Decided August 6, 1986)

Bruce M. Frey, for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff*), for the defendant.

RE, *Chief Judge:* Plaintiff, on behalf of former employees of the RCA Corporation (RCA), Picture Tube Division, challenges the Secretary of Labor's denial of certification of eligibility for benefits under the trade adjustment assistance program of the Trade Act of 1974, tit. II, §§ 221-249, 284, 19 U.S.C. §§ 2271-2321, 2395 (1982 & Supp. II 1984). These workers were engaged in the production of picture tubes for color television sets. Specifically, the Secretary found that increased imports did not contribute importantly to the workers' separation at the Marion, Indiana plant. 47 Fed. Reg. 56,935 (1982). Hence, they were deemed ineligible for trade adjustment assistance benefits.

After reviewing the administrative record and the arguments of the parties, the Court holds that the Secretary's denial of certification was supported by substantial evidence, and is in accordance with law. Therefore, the Secretary's determination is affirmed.

ADMINISTRATIVE PROCEEDINGS

On February 1, 1982, plaintiff, on behalf of its members, filed a petition, dated January 26, 1982, with the Secretary of Labor requesting certification of eligibility for trade adjustment assistance benefits. The Office of Trade Adjustment Assistance (OTAA) of the Department of Labor, pursuant to section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a), published a notice in the Federal Register stating that it had received the petition and instituted an investigation. 47 Fed. Reg. 7894 (1982).

Section 222 of the Trade Act provides that the Secretary shall certify a petitioning group of workers as eligible to apply for adjustment assistance benefits if it is determined:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Trade Act of 1974 § 222, 19 U.S.C. § 2272 (1982 & Supp. II 1984).

Plaintiff contended that increased imports of televisions contributed importantly to the decline in sales and production of color television picture tubes at the Marion plant. The OTAA's investigation disclosed that all workers at the Marion plant were engaged in the production of color television picture tubes. These tubes were exported overseas, sold to independent domestic manufacturers, or shipped to affiliated RCA plants for assembly into color television receivers.

During its investigation, the OTAA collected data from the Marion plant and the entire RCA Picture Tube Division concerning sales, production, and employment. This data, together with a customer survey taken by the OTAA, was compiled into a detailed report analyzing the cause of the decreased production of picture tubes at the Marion plant from January 1980 through July 1982. This report indicated that the decline in production was due to a decrease of the Picture Tube Division's export sales, and a decrease in the volume of intracompany shipments over the relevant period.

The statistics compiled by the OTAA revealed that more than half of all picture tubes produced by the RCA Picture Tube Division were shipped to the RCA Consumer Electronics Division to be used in assembling television receivers. During the period from January 1980 to July 1982, intracompany shipments increased slightly in the first year, but declined sharply over the first seven months of 1982. Officials at the Consumer Electronics Division Headquarters reported that the Consumer Electronics Division did not import color television picture tubes. The OTAA found the decrease in intracompany shipments to be attributed to a decline in the sales and production of color television sets by the Consumer Electronics Division. In a concurrent OTAA investigation of the RCA Consumer Electronics Division, Bloomington, Indiana plant, the OTAA concluded that the decrease in the sales of color televisions during the first half of 1982 was primarily due to a loss in the market share to other domestic manufacturers.

As to the export sales of picture tubes by the RCA Picture Tube Division, the OTAA's investigation revealed that from January 1, 1980 to January 1, 1981, export sales decreased 18.9 percent. During the first half of 1982, as compared to the first half of 1981, export sales declined 32.3 percent.

The only increase in the sales of picture tubes was in the Picture Tube Division's sales to independent manufacturers. Overall sales increased slightly in 1981 as compared to 1980, and, during the first seven months of 1982, sales to independent manufacturers increased 20.1 percent. In July 1982, sales to independent manufacturers accounted for 38.1 percent of the Picture Tube Division's total sales as compared to 28.5 percent of the total sales at the end of 1980. This increase occurred despite a decrease in sales to five manufacturers during the first seven months of 1982. As a result of a survey of these five manufacturers, the OTAA concluded that the manufacturers that decreased orders from RCA and increased purchases from foreign picture tube manufacturers "accounted for a relatively minor proportion of the Picture Tube Division's overall decline in sales during the period under investigation."

After reviewing the available data, the OTAA recommended that the plaintiff's request for eligibility to apply for adjustment assistance benefits be denied. Based on these findings, the Secretary determined that increased imports did not contribute importantly to the workers' separation from employment at the Marion plant, and issued a negative determination on the plaintiff's petition. 47 Fed. Reg. 56,935 (1982).

Following the denial of certification, plaintiff commenced this action seeking judicial review of the Secretary's negative determination.

Discussion

Section 284 of the Trade Act of 1974 empowers this Court to review a determination by the Secretary of Labor which denies certification of eligibility for trade adjustment assistance benefits, to ensure that the determination is supported by substantial evidence contained in the administrative record, and is in accordance with law. Trade Act of 1974 § 284(b), 19 U.S.C. § 2395(b) (1982). The findings of fact by the Secretary are conclusive if supported by substantial evidence. Trade Act of 1974 § 284(b), 19 U.S.C. § 2395(b). Moreover, "the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary or capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union* v. *Marshall,* 584 F.2d 390, 396 n.26 (D.C. Cir. 1978), *quoted with approval ILWU, Local 142* v. *Donovan,* 9 CIT 620, Slip Op. 85–127, at 9 (Dec. 11, 1985); *see* 19 U.S.C. § 2273(c).

Plaintiff contends that the findings of the Secretary of Labor, which resulted in the denial of certification of eligibility for trade adjustment assistance, were not supported by substantial evidence

contained in the administrative record. Plaintiff suggests that increased imports of foreign-produced television receivers contributed to the decline in production of television receivers by the RCA Consumer Electronics Division and, therefore, to the decrease in intracompany picture tube shipments by the Marion plant. Plaintiff also contends that there is no support for the Secretary's determination that the five independent manufacturers who had decreased orders from the RCA Picture Tube Division and increased purchases of imported picture tubes, accounted for a "relatively minor proportion" of the Picture Tube Division's overall decline in sales from January 1980 to July 1982.

Plaintiff's contentions are without merit. Plaintiff has not challenged the Secretary's finding that the workers produced color picture tubes. Since completed television sets are not "like or directly competitive" with color television picture tubes, it was proper for the Secretary not to consider imports of completed television sets. Section 222(3) of the Trade Act of 1974 requires the Secretary of Labor to determine whether increased imports contributed importantly to the workers' separation by examining the "increases of imports of articles like or directly competitive with articles produced by such workers' firm." Trade Act of 1974 § 222(3), 19 U.S.C. § 2272(3) (Supp. II 1984).

It is well established that an imported article is "like or directly competitive" with a domestic product if it is "interchangeable with or substitutable for" the article under investigation. *See UAW, Local 834* v. *Donovan,* 8 CIT 13, 20, 592 F. Supp. 673, 678 (1984); *Holloway* v. *Donovan,* 7 CIT 237, 240, 585 F. Supp. 1427, 1430 (1984) (quoting *Machine Printers and Engravers Ass'n* v. *Marshall,* 595 F.2d 860, 862 (D.C. Cir. 1979)). The courts have consistently held that a completed article is not "like or directly competitive" with a component part used in the production of the completed article. *See, e.g., United Shoe Workers* v. *Bedell,* 506 F.2d 174, 185–87 (D.C. Cir. 1974); *Morristown Magnavox Former Employees* v. *Marshall,* 671 F.2d 194, 198 (6th Cir.), *cert. denied sub nom.* 459 U.S. 1041 (1982); *Machine Printers and Engravers Ass'n* v. *Marshall,* 595 F.2d 860, 862 (D.C. Cir. 1979); *UAW, Local 834* v. *Donovan,* 8 CIT 13, 20, 592 F. Supp. 673, 678 (1984); *Holloway* v. *Donovan,* 7 CIT 237, 240, 585 F. Supp. 1427, 1430 (1984). Thus, in *Morristown Magnavox Former Employees* v. *Marshall,* the Court of Appeals for the Sixth Circuit held that "component parts of a television set are not 'like' a completed television set * * * and that imports of fully completed television sets are not directly competitive with the manufacture of printed circuit boards, flybacks and deflection yokes." 671 F.2d at 198.

In view of this well established authority, it is clear that the Secretary properly confined the scope of the investigation to ascertain whether imports of color television picture tubes contributed importantly to the workers' separation.

Plaintiff's remaining argument, that the Secretary erred in finding that increased imports of picture tubes accounted for a relatively minor proportion of the company's overall decline in sales, is unfounded. In order to certify workers as eligible for trade adjustment assistance benefits, the Secretary must determine that increased imports "contributed importantly" to the workers' separation. The term "contributed importantly" is defined by the statute as "a cause which is important, but not necessarily more important than any other cause." Trade Act of 1974 § 222, 19 U.S.C. § 2272 (Supp. II 1984); *see ILWU, Local 142* v. *Donovan*, 9 CIT 620, Slip Op. 85-127, at 10-11 (Dec. 11, 1985).

The record fully supports the Secretary's conclusion that increased imports of picture tubes were not an important cause of the Picture Tube Division's decline in sales, and did not contribute importantly to the workers' separation. The OTAA investigation clearly established that other factors accounted for the greatest portion of the overall decline in picture tube sales. A sharp decrease in intra-company shipments during the first seven months of 1982 was the primary reason for the decline in sales. A substantial decrease in shipments to the export market in 1981 and in the first seven months of 1982 also was a substantial factor in the Picture Tube Division's overall decline in sales. Although sales to five independent manufacturers declined, partially as a result of import competition, OTAA's investigation disclosed that total sales of picture tubes to independent manufacturers increased 20.1 percent during the first seven months of 1982 as compared to the first seven months of 1981.

A thorough review of the record reveals that the only sales lost to imported picture tubes were to the five independent manufacturers, and that these lost sales were minor in relation to the decline in sales caused by reduced intra-company shipments and the decrease in sales to the export market. Thus, increased imports of picture tubes cannot be said to have "contributed importantly" to the workers' separation from employment.

In view of the foregoing, it is the determination of the Court that the Secretary of Labor's denial of certification is supported by substantial evidence, and is in accordance with law. Therefore, the Secretary's determination is affirmed, and plaintiff's action is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/137	Re, C.J. August 1, 1986	New York Merchandise Co.	79-12-01769	Item 206.98 8%	Item A203.30 Free of duty	Agreed statement of facts	San Diego Woven wood ashtrays
C86/138	Watson, J. September 1, 1986	S. Ebisuzaki Inc.	79-4-00651, etc.	Item 309.06 17.5%	Item 731.44 12.5%	Agreed statement of facts	Honolulu Monofilament fishing line
C86/139	Restani, J. August 5, 1986	Algoma Tube Corp.	83-12-01723	Items 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Items 610.39 or 610.40 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing
C86/140	Restani, J. August 5, 1986	Algoma Tube Corp.	85-1-00038	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Items 610.39 or 610.40 0.1¢ per lb. or 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED HELD		BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/141	Restani, J. August 5, 1986	Algoma Tube Corp.	85-3-00345	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing
C86/142	Restani, J. August 5, 1986	Algoma Tube Corp.	85-3-00347	Item 610.42 or 610.43 7.5%, 6.8%, or 11% or 8.6% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.5% or 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing
C86/143	Restani, J. August 5, 1986	Algoma Tube Corp.	85-3-00348	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing
C86/144	Restani, J. August 5, 1986	Algoma Tube Corp.	85-3-00349	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing

C86/145	Restani, J. August 5, 1986	Algoma Tube Corp.	85-4-00599	Item 610.42 or 610.43 7.5%, 6.8%, 11% or 8.6% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.5% or 0.1¢ per lb. plus 4% or 3.8% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing
C86/146	Restani, J. August 5, 1986	Algoma Tube Corp.	85-4-00600	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing
C86/147	Restani, J. August 5, 1986	Algoma Tube Corp.	85-4-00601	Item 610.42 or 610.43 7.5%, 6.8%, 11% or 8.6% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.5% or 0.1¢ per lb. plus 4% or 3.8% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing
C86/148	Restani, J. August 5, 1986	Algoma Tube Corp.	85-10-01392	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 0.1¢ per lb. or 0.1¢ per lb. plus 4% plus additional duties on the alloy content	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casing

ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/149	DiCarlo, J. August 8, 1986	S. Madill, Ltd.	77-12-04978	Item 692.16 5% for skidder towers Item 664.10 5% or item 680.50 9.5% or item 680.54 9.5% for yarder parts	Item 666.00 Free of duty for skidder towers and yarder parts	Agreed statement of facts	Blaine Completely assembled Madill 071 Skidder Towers and specially designed parts for Madill logging yarder

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/217	Rao, J. August 5, 1986	Mitaubishi International Corp.	85-7-00957	American selling price	Appraised values less 22% per pair	Agreed statement of facts	New York Footwear
V86/218	Watson, J. August 7, 1986	Brother International Corp.	R63/15504, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New Orleans Sewing machine heads

Appeal to the U.S. Court of Appeals for the Federal Circuit

Heraeus-Amersil, Inc. v. United States, Ct. No. 82-4-00525 (June 9, 1986), *appeal docketed,* No. 86-1526 (Fed. Cir. July 29, 1986).

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Heraeus-Amersil, Inc. v. United States, 10 CIT ——, Slip Op. 85-88, *aff'd,* Appeal Nos. 86-602/650 (Fed. Cir. July 8, 1986).

McKinney v. U.S. Dept. of the Treasury, 10 CIT ——, Slip Op. 85-73, *aff'd,* Appeal No. 85-2806 (Fed. Cir. August 8, 1986).

Sunburst Farms, Inc. v. United States, 10 CIT ——, Slip Op. 85-107, *aff'd,* Appeal No. 86-749 (Fed. Cir. August 8, 1986).

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U.S. Customs Service

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19 CFR Parts 111, 171, and 178

(T.D. 86–161)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO CUSTOMS BROKERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to implement the statutory changes made by the Trade and Tariff Act of 1984 relating to the regulation of customs brokers. Among these changes were the creation of a single license for each broker and separate permits to operate in each Customs district, a listing of specific grounds for suspension or revocation of a license or permit, creation of a monetary penalty and specific procedures to be followed when an action is initiated to suspend or revoke a license or assess a monetary penalty. In addition, the regulations are being amended to incorporate recommendations of a Customs Headquarters Task Force on broker licensing and regulation.

EFFECTIVE DATE: September 25, 1986.

FOR FURTHER INFORMATION CONTACT: Steven I. Pinter or Fred Burns O'Brien, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

A customs broker ("broker") is a person who is licensed by the Customs Service ("Customs") to transact customs business on behalf of importers and other persons. Under § 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), the Secretary of the Treasury may prescribe rules and regulations governing the licensing as brokers of citizens of the U.S. of good moral character, and of corporations, associations, and partnerships. Rules and regulations also may be prescribed as necessary to protect importers and the revenue of the

U.S., to include requiring the keeping of books, accounts, and records by brokers, and the inspection of these and related papers, documents, and correspondence by any duly accredited agent of the U.S. Part 111, Customs Regulations (19 CFR Part 111), contains the regulations prescribed by the Secretary relating to the licensing of brokers and their duties and responsibilities.

A Customs Headquarters Task Force on broker licensing and regulations (Task Force) was established to make a comprehensive study of the laws and regulations administered by Customs which relate to brokers and to make recommendations for regulatory amendments.

Based upon the recommendations of the Task Force for regulations changes, on April 7, 1983, Customs published a notice in the Federal Register (48 FR 15154), proposing amendments to 19 CFR Part 111.

Subsequently, by § 212 of Pub. L. 98–573, the Trade and Tariff Act of 1984 (the Act), substantial revisions were made to 19 U.S.C. 1641, relating to brokers. Among the changes were the creation of a single license for each broker and separate permits to operate in each Customs district, a listing of specific grounds for suspension or revocation of a license or permit, creation of a monetary penalty, and specific procedures to be followed when an action is initiated to suspend or revoke a license or assess a monetary penalty.

Because of these legislative changes, the earlier proposal was redrafted and published in a Federal Register notice on August 7, 1985 (50 FR 31871).

Discussion of Comments

Fourteen comments were received in response to the notice, some quite detailed, touching on many aspects of the proposal. Many commenters offered suggestions of an editorial nature to clarify the existing and the proposed regulations. Some suggestions were adopted and others were found to be unnecessary.

Editorial Comments

The following editorial comments were not adopted.

(1) A suggestion that § 111.16(b)(4) be eliminated because it duplicates § 111.53.

We believe it is useful to spell out clearly that a willful misstatement of pertinent facts in the application for a broker's license is sufficient cause to justify the denial of a license. Section 111.53 concerns grounds for suspension or revocation of a license, not grounds for refusal to issue one.

(2) A suggestion that § 111.5(a) not be amended because a strict reading would preclude a broker with a West Coast permit from representing his importer before a National Import Specialist in New York or at Headquarters because he does not transact customs business in those districts.

The commenter is incorrectly interpreting § 111.5(a). A broker is not permitted to represent a client at a local level in a district where a permit has not been granted. However, a broker may represent a client at a national level at either Headquarters or with a National Import Specialist.

(3) A suggestion that the title of § 111.19(d) be changed to "Requirement for Permit" and that a subheading "Waiver of District Responsible Supervision" be inserted. No specific reasons were given for this suggestion.

We believe that no changes in the headings are necessary.

(4) A suggestion that the words "(including several related corporations)" be inserted in § 111.23(e)(1) before the words "in more than one region" because corporate brokers may choose to transact business in different districts under different names or may operate other offices in subsidiary or affiliate relationships.

We believe that the section is clear without the addition of the parenthetical explanation. Brokers who have been granted permits to do business in more than one region will personally have the permits. It is clear from the language that it makes no difference whether the broker with the permit to do business transacts the business under different names, as long as he has a permit.

The following editorial comments were adopted.

(1) In § 111.11(b)(2), the words "been granted" was changed to "applied for" to more clearly reflect the correct sequence of events.

(2) In § 111.11(c)(3), the words "where it has been granted" was changed to "where it has applied for" to more clearly reflect the correct sequence of events.

(3) In § 111.19(d), in the second sentence, the words "on or after" was changed to "on and after" to clarify that starting October 31, 1987, an applicant for a broker's permit must employ, in each district for which a permit is granted at least one licensed individual to exercise responsible supervision and control.

(4) In § 111.19(d), the word "matter" in the second to last sentence was changed to "request for waiver".

(5) In § 111.23(b), the words "may record on microfilm any records other than powers of attorney" was changed to "may maintain on microfilm or similar medium, in lieu of an original, any records other than powers of attorney", to clarify that original powers of attorney must be maintained, but there is no restriction against also putting copies of powers of attorney on microfilm or similar medium.

(6) Section 111.23(d), was revised to clarify that any document may be recorded in an alternative method in addition to maintenance of the original documents.

Other minor, non-substantive editorial changes have also been made to these regulations.

GENERAL CONCERNS

One of the major areas of concern indicated in the comments relates to the term "customs business". Some commenters were concerned that brokers be regulated by Customs only regarding their "customs business".

Customs traditional mission is to assess and collect duties on imported merchandise; to prevent fraud and smuggling; and to control carriers, persons, and articles entering and departing the U.S. In carrying out its mission, Customs must, to a certain extent, regulate the business of brokers. This includes requiring the retention of records relating to their adherance to the laws and regulations administered and enforced by Customs. Customs will not go beyond the scope of its mission.

One commenter stated that special permits should be issued to individuals who prove themselves capable of transacting customs business related to drawback. Customs cannot adopt this suggestion. As defined in 19 U.S.C. 1641 (a)(2), "customs business" includes drawback transactions and, according to 19 U.S.C. 1641(b), no person may conduct customs business unless that person holds a broker's license.

Another requested clarification that 19 U.S.C. 1641, as amended by the Act, does not require an attorney to obtain a broker's license to represent a client in an administrative proceeding before Customs.

Customs assures the commenter that it would not consider it a violation of the Act if an attorney represents a client before Customs without possessing a broker's license.

Two commenters stated that existing § 111.44, dealing with limits of liability for brokers' business activities, should be deleted as the broker-client relationship is not within Customs regulatory objective. As no change was proposed in this section, the comment is beyond the scope of this rulemaking and is not being adopted.

Another general concern was that brokers be protected from any arbitrary and/or capricious actions taken by Customs officials. This concern was indicated in suggested changes in various provisions concerning giving brokers reasonable notice in writing regarding Customs actions.

We are also concerned that adequate notice be given to all parties in their Customs dealings. Accordingly, specific language regarding notice has been included in §§ 111.23(e)(2)(v), 111.23(e)(3), and 111.45.

REQUIREMENTS FOR OBTAINING LICENSE OR PERMIT

It was suggested by one commenter that a basic requirement for an individual obtaining a broker's license be that the applicant demonstrate a minimum of 2 years experience with Customs procedures in the U.S. Customs rejects this suggestion as an unnecessary

restraint. Knowledge of Customs procedures is demonstrated by the applicant obtaining a passing grade on the broker examination.

A commenter stated that § 111.19 should not require, as a condition for the granting of a permit, that the district director be satisfied that the person intends to transact business within the district.

Customs disagrees. As amended by § 212 of the Act, 19 U.S.C. 1641(c) clearly provides that permits will be granted only in districts in which the broker conducts customs business.

Another stated that the issuance of permits should be pro forma and that the primary permit to accompany the license was automatically to be included with the license.

A permit is required in the district in which a license is issued. However, Customs agrees that issuance of a permit will be pro forma (1) if the applicant has a valid license which is not subject to an on-going revocation or suspension action, (2) the applicant has a place of business in the district for which the permit is sought, and (3) if a licensed broker is employed as a permanent employee in that district subject to the conditions in § 111.28 relating to responsible supervision and control. A permit for the district through which the license application was submitted will be issued concurrently with the license if these conditions are met.

It was also suggested that when a broker applies for a permit in an additional district, unnecessary delay could be eliminated if Headquarters would contact other district directors where brokers have permits to conduct business, rather than having the district directors contact each other.

Customs disagrees. Direct communication between district directors will facilitate and expedite the approval process, whereas centralized processing would create a bottleneck. Moreover, the issuance of a permit depends upon the applicant's holding a valid license, having a place of business within the district, and having made satisfactory arrangements to have responsible supervision of the work performed by his employees in the district. Inasmuch as the district director is in a better position to verify that these conditions exist than Headquarters, the suggested change is not adopted.

Another suggestion concerning § 111.19 was that when a corporation goes into another district located in another state and applies for a permit to do business in that district, it should be required to first apply to the state or local government for the right to use the business name in that state. This would prevent the possibility of more than one broker using the same business name, thus confusing the public.

Customs agrees. A sentence is added to the end of § 111.19(b) stating, "When a broker applies for a permit in an additional district, he must provide the district director with a document which reserves the business name with the state or local government, in order to avoid the use of the same or a confusingly similar name by two brokers".

DUTIES AND RESPONSIBILITIES OF BROKERS

Responsible Supervision and Control

Some concern was indicated regarding the term "responsible supervision and control" as explained in § 111.11(d). One commenter stated that the level of supervision and control that Customs is requiring—that of "substantially the same quality of service in handling customs transactions that the licensed broker is required to provide"—is unreasonable. If Congress had expected such a level of performance, it would have required all employees to be licensed brokers. This commenter also stated that the regulations should provide that an employee who is competent and experienced in the transaction of customs business shall be deemed to not require the same degree of supervision and control as an inexperienced employee.

It is Customs view that a broker must ensure the competence of services provided by his employees. The broker must supervise the work of his employees to the extent necessary to ensure that the service provided by those employees in particular aspects of customs business, if not exactly the same quality that is required of a broker, is "substantially" the same. We believe that this is necessary to ensure that competent service is provided to the public in transactions with Customs. Determinations of whether employees are adequately supervised will vary depending upon the particular circumstances in each instance. Accordingly, it would be impracticable to list all possible circumstances in the regulations.

Another commenter requested clarification as to whether the responsibility of supervision and control lies solely with the licensed broker who is an officer of a corporation.

Customs believes the regulations are clear that while customs transactions may be performed by a qualified employee of an association or corporation who need not be a licensed individual, that employee must be under the responsible supervision and control of a licensed individual, who may or may not be an officer of the corporation.

EMPLOYEE REPORTS

Many comments concerned § 111.28(b), which requires that a broker submit, in writing to each district director, a list of the names of persons currently employed in the district and other pertinent information concerning the employees.

Information on a broker's employees is used by Customs for law enforcement purposes. With this information, Customs is able to ascertain if any employees have criminal records which may affect their suitability for employment in the brokerage business. Customs believes that demanding this information from brokers is reasonable because the employing broker is in the best position to know

when employees are hired or terminated. Demanding the information from the employees would not be feasible as Customs regulates the brokers, not the employees.

One commenter stated that it is not fair for Customs to require immediate notification in the event of the death or substantial disability of an individual broker.

Customs believes that in the event of the death or substantial disability of a broker, a member of the brokerage firm must notify Customs immediately in order to enable Customs to verify compliance with the requirement of replacing the deceased or disabled licensee within the requisite period of time. For this reason, notification must be provided immediately or as soon as practicable after the death or disability of the broker.

In a related matter, § 111.28(b)(3) has been changed to increase the time a broker is allowed to submit the name of a terminated employee from 10 to 30 days.

RECORDKEEPING

The duties and responsibilities of brokers regarding maintenance of records of transactions was another area that generated comments. It was suggested that some of the items on the form provided for in § 111.22(d) do not fall within the definition of "custom business" and that the vast majority of brokers are exempted from maintaining the form anyway.

While the normal regulatory audits performed by Customs are limited in scope, Customs can, when a complaint against a broker is received, expand the scope of the audit to all charges relating to customs business. The suggestion to eliminate this section of the regulations is rejected. Customs ability to respond to complaints would be impaired if records were not maintained in the prescribed manner or some other manner approved by Customs.

While Customs is aware that many brokers are currently exempt from maintaining the prescribed form because of the adequacy of their recordkeeping systems, § 111.22 must be retained for those brokers who do not have an adequate system. Customs agrees with the comments that some of the item numbers on the form do not fall within the definition of "customs business". Accordingly, when the form is used, columns 7–15 may be left blank.

It was suggested by a few commenters that centralized storage be provided for other than accounting records. One commenter specifically would like centralized storage of microfilmed entry records.

Customs agrees that this suggestion has merit. We are looking into the possibility of allowing centralized storage for all broker's records. However, certain administrative and enforcement concerns must be resolved before such an option can be approved. Guidelines, which would ensure that Customs could examine records as necessary to carry out its enforcement and revenue-collection responsibilities, would have to be developed before the option could be offered.

If, after consulting with affected parties, acceptable guidelines are developed, a notice will be published in the Federal Register proposing the option.

Two commenters stated that proposed § 111.23(a) would require brokers to retain powers of attorney for 5 years after the date of revocation. Yet some powers of attorney are never revoked. Accordingly, it was recommended that the wording be changed to indicate that powers of attorney and letters of revocation should be retained for 5 years after either the date of revocation or the date the client ceases to be an "active client" as defined in § 111.29(b)(2)(ii). Customs has adopted language to this effect.

One commenter took issue with the requirement in § 111.23(e)(2)(i) that in the written request for authorization to maintain centralized financial records of customs business, the address indicated at which the broker desires to maintain the records must be within a district where the broker has been granted a permit.

Customs believes that this requirement is reasonable. By requiring brokers to maintain records within a district where a broker has a permit, Customs will have better control over entries in that district.

According to proposed § 111.23(f), when an audit indicates that a broker to whom an exemption has been granted is not keeping records as required, the regional commissioner who has granted the exemption shall notify the broker. The broker has 30 days to respond and if a satisfactory response is not given, the regional commissioner can withdraw the exemption. Two commenters suggested that in such a situation a broker should be able to appeal to the Commissioner and the exemption should remain in effect pending the Commissioner's decision.

Customs does not agree. The regional commissioner has the authority in these matters and there is no reason to have an appeal to the Commissioner. If an exemption is withdrawn, the broker can still operate; he simply must maintain records in the prescribed format. The loss of an exemption is not the loss of a right, but the loss of a privilege.

A few commenters stated that existing §§ 111.25 and 111.27 should be amended to state that records maintained by brokers should be made available to Customs regulatory auditors or special agents "upon reasonable notice."

Customs sees no reason to include that language because Part 162, Customs Regulations (19 CFR Part 162), which concerns recordkeeping, inspection, search, and seizure, states that reasonable notice will be given by Customs officers when they are conducting an examination. Sections 162.1a through 162.1i are specifically cited in § 111.25.

ACCOUNTING FOR FUNDS FROM CLIENT

One commenter stated that Customs should more specifically state in proposed § 111.29 the kind of document a broker is required to give a client to account for funds received from the client. The commenter is concerned that Customs may require more than the normal accounting documents such as invoices or credit memos and that the requirement of a written statement other than an accepted accounting document would be extremely onerous.

Customs agrees that normal accounting documents are sufficient. However, we believe the section, as written, emcompasses these documents, and need not be changed.

NOTIFICATION OF CHANGES IN BROKERAGE FIRM

One commenter stated that in proposed § 111.30(b), only the district directors of the districts to which the changes relate should have to be notified when there is a change in the broker's organization. We agree and wording to that effect has been added. The same commenter believes that it is onerous to require notification of the changes to be made immediately. We disagree. Immediate notification is now required and Customs has found this to be workable.

CANCELLATION, SUSPENSION OR REVOCATION OF LICENSE

It was suggested by one commenter that when a broker receives a statement of charges against him as provided for in proposed § 111.58, a maximum time period of suspension should be specified. Customs disagrees. As charges are merely being stated and the broker has the right to respond to them, it would be premature to decide on the length of a suspension until all the facts are submitted and evaluated, and a determination made.

One commenter suggested that the word "defense" be changed to "response" in the first and last sentences of existing § 111.60 to be consistent with the statutory language. We agree. As well as making that change, the word "defense" is changed to "response" in the second sentence of existing § 111.58.

Proposed § 111.74, concerning the notification to a broker of suspension or revocation or monetary penalty, generated several comments. A few commenters stated that the Secretary of the Treasury's determination should be based solely on the record and that a notice of suspension, revocation, or monetary penalty should not be published in the Federal Register and CUSTOMS BULLETIN if an appeal is filed and the action is not final yet.

Customs agrees and § 111.74 has been amended to reflect these changes.

One commenter asked that standards be set forth for determining the maximum penalties for certain types of violations by brokers based upon degree of culpability and seriousness of the violation.

Customs has drafted such guidelines. They are attached to this document and will be incorporated as Appendix C of Part 171, Customs Regulations.

Customs disagrees with the commenter who believes an administrative review should be provided for a determination that a monetary penalty of $1,000 or less should be assessed. Owing to the cost of such a review to both parties, it has been concluded that penalties of $1,000 or less should not be subject to a supplemental petition for relief.

Regarding the suggestions by commenters to increase from 30 to 60 days the time within which a broker must respond to a notice of possible disciplinary proceedings or penalties in §§ 111.59, 111.92, and 171.12, Customs believes that 30 days is generally adequate. However, district directors will be given explicit authority to grant extensions for good cause.

A suggestion to delete the parenthetical expression concerning infractions that will form the basis for an action to suspend or revoke a broker's license or permit, in proposed § 111.53(b)(3), is rejected because 19 U.S.C. 1641(d)(1) states that these infractions are not subject to a monetary penalty.

FEES

After publication of the proposal, Part 3 of the consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272, passed on April 7, 1986), established that an annual user fee of $125 is to be assessed for each broker's permit held by an individual, partnership, association or corporate broker. The legislative history of this law provides that this fee will help to defray the costs of regulating the brokerage industry. Accordingly, by T.D. 86–109, published in the Federal Register on June 11, 1986 (51 FR 21152), a new § 111.96, Customs Regulations, was provided to set forth the fee.

In this document we are setting forth the fees for the issuance of licenses and accompanying permits and the fee for filing a status report. The purpose of these fees is to defray the costs of issuing licenses and permits and of processing the receipt and storage of the triennial reports. Pursuant to 19 U.S.C. 1641(h), the Secretary of Treasury may prescribe reasonable fees and charges for these functions. While originally Customs planned to review these fees annually and revise them as necessary, it has been decided to charge a one-time fee of $300 for licenses, a $100 fee for the issuance of each permit, and a fee of $100 for filing the triennial reports. Customs will assess no further fees at this time. Of course, if current costs escalate, Customs will increase the fee and public notice of the increase will be published in the Federal Register and CUSTOMS BULLETIN. However, it is not anticipated that these fees will be revised annually. These fees are set forth in § 111.96.

EXECUTIVE ORDER 12291

These amendments do not constitute a "major rule" as defined by § 1(b) of E. O. 12291. Accordingly, a regulatory impact analysis is not required.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), are not applicable to these amendments because the rule will not have a significant economic impact on a substantial number of small entities. As most of the changes reflect § 212 of the Trade and Tariff Act of 1984 (Pub. L. 98–573), and Part 3 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272), any economic impact would be attributable to the actions of Congress and not Customs.

PAPERWORK REDUCTION ACT

The regulation is subject to the Paperwork Reduction Act of 1980, Pub. L. 96–511. Several commenters claimed that the collection of information requirements were too broad to be within the scope of this Act. Most of these comments are responded to in the discussion of comments in this document. Regarding the 5-year record retention period, pursuant to § 508, Tariff Act of 1930, as amended (19 U.S.C. 1508), Customs has authority to require maintenance of records of any owner, importer, consignee or agent thereof who imports any merchandise for up to 5 years from the date of entry of the merchandise. Due to their complexity, many cases extend to that length of time. Therefore, Customs believes it is in the best interest of the Government and the importing public to require maintenance of records for that time span.

As a result of our analysis of the issues and the changes made in this document, the regulation meets the requirements of this Act. Accordingly, applicable sections of the regulation have been cleared by the Office of Management and Budget and assigned Control Number 1515–0100.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Imports.

19 CFR Part 171

Administrative practice and procedure, Law Enforcement, Penalties, Seizuers and Forfeitures.

19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

Parts 111, 171, and 178, Customs Regulations (19 CFR Parts 111, 171, 178), are amended as set forth below.

PART 111—CUSTOMS BROKERS

1. The authority citation for Part 111, Customs Regulations (19 CFR Part 111), continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (Gen. Hdnte. 11), 1624, 1641.

§ 111.3 also issued under 19 U.S.C. 1484.

§ 111.96 also issued under 31 U.S.C. 9701.

2. The heading for Part 111 and § 111.0 are revised to read as follows:

PART 111—CUSTOMS BROKERS

§ 111.0 Scope.

This part sets forth regulations providing for the licensing of, and granting of permits to, persons desiring to transact customs business as customs brokers, the qualifications required of applicants, and the procedures for applying for licenses and permits. This part also prescribes the duties and responsibilities of brokers, the grounds and procedures for disciplining brokers, including the assessment of monetary penalties, and the revocation or suspension of licenses.

3. Section 111.1 is amended by redesignating paragraphs (c), (d), (e), (f), and (g) as paragraphs (d), (e), (f), (g) and (h), respectively, revising the heading and text of paragraph (b) and redesignated paragraphs (d), (f), and adding a new paragraph (c), to read as follows:

§ 111.1 Definitions.

* * * * * * *

(b) *Customs Broker.* "Customs broker" means a person who is licensed under this part to transact customs business on behalf of others.

(c) *Customs business.* "Customs business" means those activities involving transactions with Customs concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by Customs upon merchandise by reason of its importation, or the refund, rebate, or drawback thereof.

(d) *Broker.* "Broker" means "customs broker".

* * * * * * *

(f) *Records.* "Records" means those documents identified in § 162.1a of this chapter and kept as provided in § 162.1b of this chapter.

* * * * * * *

4. The heading and text of § 111.2 are revised to read as follows:

§ 111.2 License and district permit required.

A person shall obtain the license provided for in this part in order to transact the business of a broker. A separate permit is required for each Customs district in which a licensee conducts customs business.

5. Part 111 is amended by removing § 111.5, redesignating existing § 111.4 as § 111.5 and adding a new § 111.4 to read as follows:

§ 111.4 Transacting customs business without a license.

Any person who intentionally transacts customs business, other than as provided in § 111.3, without holding a valid broker's license, shall be liable for a monetary penalty for each such transaction as well as for each violation of the requirements of 19 U.S.C. 1641. The penalty shall be assessed in accordance with Subpart E of this chapter.

6. Paragraph (a) of redesignated § 111.5 is amended by removing the words "is not licensed" and inserting, in their place, "has not been granted a permit".

7. The heading to Subpart B is amended by adding the words "Or Permit" after the word "License".

8. Section 111.11(a)(4) is amended by removing the words "regulations, and procedures" and inserting, in their place, "regulations and procedures, bookkeeping, accounting, and all other appropriate matters".

9. Section 111.11(b) and (c) is revised and a new paragraph (d) is added, to read as follows:

§ 111.11 Basic requirements.

* * * * * * *

(b) *Partnership.* A partnership must:

(1) Have at least one member of the partnership who is a licensed broker, and

(2) Establish that it will have an office in the customs district where it has applied for a permit in which its customs transactions will be performed by the licensed member of the partnership, or an employee under the responsible supervision and control of the licensed member.

(c) *Association or corporation.* An association or corporation must:

(1) Be empowered under its articles of association or articles of incorporation to transact customs brokerage business;

(2) Have at least one officer who is a licensed broker; and

(3) Establish that it will maintain an office in the Customs district in which it has applied for a permit. Further, customs transactions in that office must be performed by a licensed officer or an employee under the responsible supervision and control of the licensed officer.

(d) *Responsible supervision and control.* The term "responsible supervision and control" means that degree of supervision and control necessary to ensure that the employee provides substantially the same quality of service in handling customs transactions that the licensed broker is required to provide. While the determination of what is necessary to maintain responsible supervision and control will vary depending upon the circumstances in each instance, factors which Customs will consider include, but are not limited to: the frequency of visits to officers of the licensee by the licensed broker(s); the training required of employees; the issuance of written instructions and guidelines to the employees; the volume and type of business of the licensee; the reject rate for the various customs transactions; the maintenance of current editions of the Customs Regulations, Tariff Schedules of the United States, and Customs issuances; the availability of the licensed broker(s) for consultation with the employee(s), when necessary; the frequency of audits and reviews by the licensed broker(s) of the customs transactions handled by the employee(s); and any circumstance which indicates whether a licensed broker of the firm has a real interest in the firm's operations.

10. Section 111.12(a) is amended by removing the subtitle *"(1) Application"* and the entire paragraph subtitled *"(2) Fee"*. The section is also amended by removing the words "paragraph (a)(2) of this section" in the third sentence and inserting, in their place, "§ 111.96 of this part". Also, § 111.12(a) is amended by adding at the end of the section the following:

"Applications may be accepted within 30 days before the scheduled examination in the district director's discretion".

11. Section 111.13(a) is amended by removing the words "regulations, and procedures" and inserting, in their place, "regulations and procedures, bookkeeping, accounting, and all other appropriate matters".

12. Section 111.13(c) is revised to read as follows:

§ 111.13 Examination of applicant for individual license.

* * * * * * *

(c) *Special examination.* When a partnership, association, or corporation loses the licensed member or officer and its license will lapse under the provisions of 19 U.S.C. 1641(b)(5) before the next scheduled examination, the Commissioner may authorize a special examination for an applicant who will serve as the licensed member or officer. He may also authorize a special examination for one who will be authorized to continue the business of an individual broker.

A special examination may also be authorized when a licensed brokerage firm loses its qualifying individual exercising responsible supervision and control over a district office and that office's permit will lapse before the next scheduled examination. Application and a statement of the reasons for the necessity of a special examination shall be filed with the district director in accordance with § 111.12.

13. Sections 111.13(d) and (e) are amended by removing the last sentence of each paragraph.

14. The heading and text of § 111.19 is revised to read as follows:

§ 111.19 Permits.

(a) *General.* Each person granted a broker's license under this part shall be concurrently issued a permit for the district through which the application was submitted, without the payment of the fee required by § 111.96 if it is shown to the satisfaction of the district director that the person intends to transact customs business within the district through which the broker's license application is submitted and the person otherwise complies with the requirements of this part.

(b) *Submission of application for permits for additional districts.* A licensed person who intends to conduct customs business in an additional Customs district, or a licensed person who was not concurrently granted a permit with the broker's license under paragraph (a) of this section, shall submit an application for each additional Customs district to the district director of that district on Customs Form 3124. If the information set forth by the applicant on the Customs Form 3124 submitted pursuant to § 111.12 is current, a copy of that application may be submitted inplace of a new Customs Form 3124. The Customs Form 3124 shall be modified to indicate that it is an application for a permit. The applicant shall comply with the requirements set forth in § 111.12(a). Each application for a permit shall identify the broker's license number and date of issuance. The broker shall list in its application all districts for which a permit has been granted. When a broker applies for a permit in an additional district, he must provide the district director with a document which reserves the business name with the state or local government, in order to avoid the use of the same or a confusingly similar name by two brokers.

(c) *Fee.* Each application for a permit shall be accompanied by the fees set forth in § 111.96.

(d) *Responsible supervision and control.* The applicant shall have a place of business within the district for which the application is filed, or shall have made firm arrangement satisfactory to the district director to establish such a place of business. The applicant shall exercise responsible supervision and control over the office as defined by § 111.11(d). On and after October 31, 1987, other than as provided below, the applicant shall employ in each district for which a permit is granted at least one individual licensed under

this subpart to exercise reponsible supervision and control over the customs business conducted in the district. If the applicant can demonstrate to the satisfaction of the Commissioner that he regularly employs, in the region in which the district is located, at least one individual who is licensed, and that adequate procedures exist for the person employed in that region to exercise responsible supervision and control, as defined by § 111.11(d), over the customs business conducted in the district, the Commissioner may waive the requirement for a licensed broker in that district. A request for a waiver, supported by information on the volume and type of customs business conducted, or planned to be conducted, and evidence demonstrating that the applicant is able to exericise responsible supervision and control, shall be sent to the district director of the district in which the waiver is sought. The district director shall review the request for a waiver and make recommendations which will be sent to the Director, Entry Procedures and Penalties Division, Customs Headquarters, through the appropriate regional commsissioner. The regional commissioner will review the district's recommendations and make appropriate recommendations before referring the matter to Customs Headquarters for a decision.

(e) *Action on application.* Upon receipt of the application for a permit, the district director shall immediately notify the district director in each other district in which the applicant has a permit and request comments as to the applicant's compliance with the duties and responsibilities of a broker in the other district. The district director in the other district shall timely submit his comments and recommendation to the district director making the request. The district director who received the application shall make a decision on it after considering all of the facts and circumstances. An application shall be approved unless action is pending in another district to suspend or revoke the applicant's license.

(f) *Investigation.* The district director may require an investigation to be conducted if additional facts are deemed necessary before making a decision upon the application.

15. The second sentence of § 111.21 is amended by removing the word "papers" both times it appears and inserting, in its place, "records".

16. The introductory paragraph of § 111.22(b) and § 111.22(b)(2) are amended by removing the words "books and" each time they are used.

17. Further, § 111.22 is amended by adding a new paragraph (e) to read as follows:

§ 111.22 Additional record of transactions.

* * * * * * *

(e) *Authorization.* The regional commssioner for the region in which a broker has been granted an exemption to maintain records of financial transactions on a centralized system basis, as set forth

in § 111.23(e), is responsible for providing an exemption or withdrawal of exemption under paragraphs (b) and (c) of this section.

18. The heading to § 111.23, paragraph (a), and the introductory text to paragraph (b) are revised to read as follows:

§ 111.23 Retention of records.

a. *Place and period of retention. (1) Place.* The records, as defined in § 111.1(f), and required by §§ 111.21 and 111.22 to be kept by a broker, shall be retained within the Customs district to which they relate, unless an exemption has been granted for centralized accounting records under paragraph (e) of this section.

(2) *Period.* The records described in paragraph (a)(1) of this section, other than powers of attorney, shall be retained for at least 5 years after the date of entry. Powers of attorney shall be retained until revoked, and revoked powers of attorney and letters of revocation shall be retained for 5 years after either the date of revocation or the date the client ceases to be an "active client" as defined in § 111.29(b)(2)(ii). When merchandise is withdrawn from a bonded warehouse, copies of papers relating to the withdrawal shall be retained for 5 years from the date of withdrawal fo the last merchandise withdrawn under the entry.

(b) *Microfilming of records.* A broker, with the approval of the district director for the district in which he has been granted a permit and the records are located, may maintain on microfilm or similar medium, in lieu of an original, any records other than powers of attorney required to be retained under the provisions of paragraph (a) of this section, at any time after the entry to which these records pertain has been liquidated, upon the following conditions:

* * * * * * *

19. Section 111.23(d) is revised to read as follows:

§ 111.23 Retention of records.

* * * * * * *

(d) *Other methods of reproduction for record retention.* If approved by the district director in which a broker has been granted a permit and in which he has records located, a broker may use, in lieu of original documents, methods or reproduction other than microfilm, including microfiche, for the reproduction of records, provided the requirements of paragraphs (b) and (c) of this section are met. While original powers of attorney must be retained, copies also may be retained.

20. Further, § 111.23 is amended by adding new paragraphs (e), (f), and (g), to read as follows:

§ 111.23 Retention of records.

* * * * * * *

(e) *Exemption.* (1) *Applicability.* The procedure to maintain financial records on a centralized system basis is available to brokers

who have been granted permits to do business in more than one district.

(2) *Request.* A written request for authorization to maintain financial records on a centralized system basis shall be submitted to the regional commissioner responsible for the region in which the centralized records are to be maintained. The written request shall include:

(i) The address at which the broker desires to maintain the centralized accounting records. This location must be within a district where the broker has been granted a permit.

(ii) A detailed statement describing all the records of financial transactions to be maintained at the centralized location, the methodology of record maintenance, a description of any automated data processing to be applied, and a list of all the broker's customs business activity locations.

(iii) An agreement that if the authorization is granted, no change in the records, the manner of recordkeeping, or the location at which they will be maintained, will be made unless approved by Customs. Each request for a change requires prior approval in the same manner as prescribed above.

(iv) An agreement to comply with § 111.22,

(v) An agreement that all financial records pertaining to customs transactions will be made available to Customs for complete inspection in accordance with § 111.25 and § 162.1d of this Chapter after reasonable notice in writing has been provided.

(3) *Approval.* After the broker's request has been received and reviewed by the regional commissioner, he shall advise the broker, in writing, of his decision whether to authorize the broker to maintain financial records on a centralized system basis. If the regional commissioner denies the request he shall advise the broker of the reasons. Denial shall be without prejudice to reapply for an exemption. If the request involves records from districts not within the jurisdiction of the regional commissioner of the region where the request was filed, the regional commissioner should consult with the other affected regional commissioners before acting on the request.

(f) *Withdrawal of exemption.* Whenever an audit by Customs indicates that a broker to whom an exemption has been granted is not keeping records in accordance with the requirements of paragraph (e) of this section, the regional commissioner who granted the exemption shall notify the broker, in writing, of the audit finding(s). The regional commissioner shall provide the broker with 30 days from the date of notification to respond to the audit finding(s) unless a shorter period is deemed necessary. If the broker fails to respond, or if the regional commissioner determines that a broker has not responded satisfactorily to the audit finding(s), the regional commissioner shall withdraw the exemption by notice in writing. The withdrawal shall not become effective until 30 days after the

date of mailing of the notice. The broker shall thereafter keep and maintain records as required by paragraph (a) of this section.

(g) *Reproduction of centralized accounting records.* The regional commissioner for the region in which a broker has been granted an exemption to maintain financial records on a centralized system basis, provided in paragraph (e) of this section, is responsible for approving requests for the reproduction of centralized financial records provided under paragraphs (b) and (d) of this section.

21. Sections 111.24 and 111.25 are amended by removing the words "Books and papers" in the section headings and, in each instance inserting, in their place, "Records".

22. The first sentence of §§ 111.24, 111.25, and 111.27, the second sentence of § 111.27, and the section heading of § 111.26 and 111.27 are amended by removing the words "books and papers" and, in each instance inserting, in their place, "records".

23. Section 111.26 is amended by removing the words "book or paper" and inserting, in their place, "record".

24. Section 111.28 is amended by revising paragraph (b) and adding a new paragraph (c), to read as follows:

§ 111.28 Responsible supervision.

* * * * * * *

(b) *Employee information.*

(1) *Current employees; General.* Each broker shall submit, in writing, to each district director where the broker has a permit to transact customs business, a list of the names of persons currently employed in that district. For each such employee, the broker also shall provide the current home address, last prior home address, social security number, date and place of birth, and if the employee has been employed by the broker for less than 3 years, the name and address of each former employer and dates of employment for the 3-year period preceding current employment with the broker. After the initial submission, the list shall be updated and submitted with the status report required by § 111.30(d) of this part.

(2) *New employees.* Within 10 days after a new employee has been employed for 30 days, the broker shall submit, in writing, to the district director, the same information as set forth above for any new employee.

(3) *Terminated employees.* Within 30 days after the termination of employment of any employee employed longer than 30 days, the broker shall submit, in writing, to the district director, the name of the terminated employee.

(4) *Broker's responsibility.* A broker is responsible for providing the information required in paragraphs (b)(1), (b)(2), and (b)(3) of this section. However, in the absence of culpability by the broker, Customs will not hold him responsible for the accuracy of the information provided to the broker by the employee.

(c) *Termination of qualifying member or officer.* If a licensed broker who is a qualifying member of a partnership, or officer of an association or corporation, ceases his employment as a qualified member or officer, that broker shall give written notice immediately of that fact to the Commissioner and send a copy of the written notice to each district director where a permit has been granted to the partnership, association, or corporation.

25. Section 111.29(a) is revised to read as follows:

§ 111.29 Diligence in correspondence and paying monies.

(a) *Due diligence by broker.* Each broker shall exercise due diligence in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of records relating to any customs business matter handled by him as a broker. Payment of duty, tax, or other debt or obligation owing to the Government for which the broker is responsible, or for which the broker has received payment from a client, shall be made to the Government on or before the date that payment is due. Payments received by a broker from a client after the due date shall be transmitted to the Government within 5 working days from receipt by the broker. Each broker shall provide a written statement to a client accounting for funds received for the client from the Government, or received from a client where no payment has been made, or received from a client in excess of the Governmental or other charges properly payable as part of the client's customs business, within 60 days of receipt. No written statement is required if there is actual payment by a broker of such funds.

26. Section 111.30 is amended by revision the section heading and paragraph (b) to read as follows, by removing the words "is licensed" in the first sentence of paragraph (c) and inserting in their place, "has been granted a permit", by revising paragraph (d) and adding a new paragraph (e) to read as follows:

§ 111.30 Notification of change of business address, organization, name, or location of business records; status report.

* * * * * * *

(b) *Organization.* A partnership, association, or corporation shall immediately inform the Commissioner and each district director of the districts in which it has a permit, of the following changes:

(1) The date on which the licensed member or officer who is the qualifying member or officer ceases to be a member or officer and the name of the broker who will succeed as the qualifying member or officer; or

(2) Any change in the Articles of Agreement, Charter, or Articles of Incorporation relating to the transactions of customs business.

* * * * * * *

(d) *Status report.* Each broker shall file a status report with Customs on February 1, 1979, and on February 1 of each third year

thereafter. The report shall be accompanied by a fee as set forth in § 111.96. A report received during the month of February will be considered filed timely. The report shall be addressed to the U.S. Customs Service, Attention: Entry, Licensing and Restricted Merchandise Branch, Washington, D.C. 20229. A copy also shall be filed with the district director in each district where the broker has been granted a permit to transact customs business. No form or particular format is required. Each individual broker shall state whether he is actively engaged in transacting business as a broker. If so, he shall state the name under, and the address at which, his business is conducted (if he is a sole proprietor); or the name and address of his employer, unless employer is a corporation, partnership or association broker for which he is a qualifying officer or member. The report of each corporation, partnership or association shall state the name under which its business as a broker is being transacted, its business address, the names and addresses of the members of the partnership or officers of the corporation or association qualifying it for a license, and whether it is actively engaged in transacting business as a broker. If the licensed person fails to file the required report by March 1 of the reporting year, the license is suspended by operation of law on that date. By March 31 of the reporting year, the Commissioner shall transmit written notice of the suspension to the licensee by certified mail, return receipt requested, at the address reflected in Customs records. If the licensed person files the required report within 60 days of receipt of the notice, the license shall be reinstated upon payment of $100. If the licensed person does not file the required report within the 60-day period, the license shall be revoked without prejudice to the filing of an application for a new license. Notice of the revocation shall be published in the CUSTOMS BULLETIN.

(e) *Location.* Upon the permanent termination of a brokerage business, both the Commissioner and the district director of each Customs district for which a permit has been issued shall be provided written notification of the name and address of the party having legal custody of the brokerage business records. Reponsibility for notification shall be as follows:

(1) The broker, upon the permanent termination of his brokerage business:

(2) The licensed partner(s), upon the permanent termination of the partnership brokerage business;

(3) The licensed association or corporate officer(s), upon the permanent termination of the association or corporate brokerage business.

27. Section 111.35 is amended by removing the words "merchandise imported after March 15, 1962," and inserting in their place, "customs transactions".

28. The heading and text of § 111.37 are revised to read as follows:

§ 111.37 Misuse of license or permit.

A broker shall not permit his license, permit or his name to be used by or for any unlicensed person, other than his own employees authorized to act for him, or by or for any broker whose license or permit is under suspension in the solicitation, promotion or performance of any customs business or transaction.

29. The heading and text of § 111.43 are revised to read as follows:

§ 111.43 Display of license and permits.

Each licensee shall display its permit in the principal office within the district so it may be seen by anyone transacting business in the office. Photocopies of the permit shall be conspicuously posted in each branch office within the district. Photocopies of the license also may be posted.

30. Part 111 is revised by adding a new § 111.45 to read as follows:

§ 111.45 Revocation by operation of law.

(a) *License.* The failure of a broker that is licensed as a corporation, association, or partnership to have, for any continuous period of 120 days, at least one officer of the corporation or association, or at least one member of the partnership, validly licensed, shall, in addition to causing the broker to be subject to any other sanction, result in the revocation by operation of law of its license and any permits issued to a corporation, association, or partnership. The Commissioner will notify the broker in writing of an impending revocation or lapse by operation of law 30 days before the revocation or lapse is due to occur.

(b) *Permit.* On or after October 31, 1987, the failure of a broker who has been granted a permit, to employ, for any continuous period of 180 days, at least one individual who is licensed within the district (or region, if an exception has been granted pursuant to § 111.19(d)), for which a permit was issued, shall, in addition to causing the broker to be subject to any other sanction, result in the revocation of the permit by operation of law.

(c) *Notification.* If the license or permit of a partnership, association, or corporation is revoked by operation of law, the Commissioner will notify the organization of the revocation. If an individual broker's permit is revoked by operation of law, the Commissioner will notify the broker. A copy of the notice will be sent to the district director. Notice to the public of the revocation will be given by publication in the CUSTOMS BULLETIN.

31. The heading for Subpart D is revised to read as follows:

SUBPART D—CANCELLATION, SUSPENSION, OR REVOCATION OF LICENSE OR PERMIT, OR MONETARY PENALTY IN LIEU THEREOF

32. Part 111 is revised by adding a new § 111.50 to read as follows:

§ 111.50 General.

This subpart relates to cancellation, suspension, or revocation of a license or a permit, or assessment of a monetary penalty in lieu thereof under the provisions of § 641(d)(2)(B), Tariff Act of 1930, as amended (19 U.S.C. 1641(d)(2)(B)). The provisions for assessment of a monetary penalty under § 641(b)(6) and § 641(d)(2)(A), Tariff Act of 1930, as amended (19 U.S.C. 1641(b)(6), 1641(d)(2)(A)), are contained in Subpart E.

33. The heading and text of § 111.51 are amended by adding the words "or permit" after "license" each time it is used.

34. Section 111.52 is revised to read as follows:

§ 111.52 Voluntary suspension of license or permit.

The Commissioner may accept a broker's written voluntary offer of suspension for a specific period of time of the broker's license or permit under such terms and conditions as the parties may agree.

35. The heading and text of § 111.53 are revised to read as follows:

§ 111.53 Grounds for suspension or revocation of license or permit or monetary penalty in lieu thereof.

Other than as set forth below, the appropriate Customs official may suspend, for a specific period of time, or revoke the license or permit of any broker or assess a monetary penalty in lieu of suspension or revocation, for the following reasons:

(a) The broker has made or caused to be made in any application for any license or permit under this part, or report filed with Customs, any statement which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any application or report any material fact which was required.

(b) The broker has been convicted, at any time after filing of an application for a license under § 111.12, of any felony or misdemeanor which the appropriate Customs officer finds:

(1) involved the importation or exportation of merchandise;

(2) arose out of the conduct of customs business; or

(3) involved larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds (infractions set forth in this subparagraph may form the basis for an action to suspend or revoke only);

(c) The broker has violated any provision of any law enforced by Customs or the rules or regulations issued under any such provision;

(d) The broker has counseled, commanded, induced, procured, or knowingly aided or abetted the violation by any other person of any provision of any law enforced by Customs or the rules or regulations issued under any such provision;

(e) The broker has knowingly employed, or continues to employ, any person who has been convicted of a felony, without the written approval of the Commissioner; or

(f) The broker has, in the course of customs business, with intent to defraud, in any manner willfully and knowingly deceived, misled or threatened any client or prospective client.

36. Section 111.54 is amended by removing the words "§ 641(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1641(b))" in the first sentence and inserting, in their place, "§ 641(d)(2), Tariff Act of 1930, as amended (19 U.S.C. 1641(d)(2))".

37. Section 111.57(b) is revised to read as follows:

§ 111.57 Determination by Commissioner.

* * * * * * *

(b) *Determination to prefer charges.* If the Commissioner determines that charges will be preferred, he shall notify the district director of his determination and require that a proposed statement of charges be prepared for his review, if not previously submitted.

38. Section 111.58 is amended by removing the last sentence and by adding a new sentence between the first and second sentences to read as follows:

§ 111.58 Content of statement of charges.

* * *The statement of charges also shall specify the sanction being proposed (e.g., suspension of the broker's license, or revocation of the license) but if a suspension is proposed the charges need not state a specific period of time for which suspension is proposed.* * *

39. Section 111.59(a) is amended by removing the words "Unless the Commissioner, under § 111.57, has determined that the preliminary proceedings shall not be followed, the" and inserting, in their place, "The", and by revising paragraph (b) to read as follows:

§ 111.59 Preliminary proceedings.

* * * * * * *

(b) *Notice of preliminary proceedings.* The district director shall serve upon the broker, as set forth in § 111.63, written notice that:

(1) Transmits a copy of the proposed statement of charges;

(2) Informs him that formal proceedings are available to him;

(3) Informs him that 5 U.S.C. 554 and 558 will be applicable if formal proceedings are necessary;

(4) Invites him to show cause why the formal proceedings should not be instituted;

(5) Informs him that he may make submissions and demonstrations of the character contemplated by the cited statutory provisions;

(6) Invites any negotiation for settlement of the complaint or charge that the broker deems it desirable to enter into;

(7) Advises him of his right to be represented by counsel;

(8) Specifies the place where the broker may respond in writing; and

(9) Advises the broker that the response must be received within 30 days of the date of the notice.

40. Sections 111.58 and 111.60 are amended by removing the word "defense" and inserting, in its place "response", wherever it appears.

41. Section 111.61 is amended by inserting the words "no response is filed or" between "If" and "the" in the fourth sentence.

42. Section 111.64(a) is amended by removing the number "5" and inserting, in its place, "15".

43. Section 111.65 is amended by removing the words "on the ground that additional time is necessary to prepare a defense" and inserting, in their place, "for good cause".

44. Section 111.66 is amended by removing the words "on behalf of the Government" in the first sentence inserting, in their place, "by the parties", and the words "suspension or revocation" in the last sentence and inserting, in their place, "suspension for a specified period of time or revocation or monetry penalty in lieu thereof".

45. Section 111.67 is amended by revising paragraphs (a) and (d) and adding a new paragraph (e) to read as follows:

§ 111.67 Hearing.

(a) *Hearing officer.* The hearing officer shall be an administrative law judge appointed pursuant to 5 U.S.C. 3105.

* * * * * * *

(d) *Transcript of record.* The district director shall provide a competent reporter to make a record of the hearing. When the record of the hearing has been transcribed by the reporter, the district director shall deliver a copy to the hearing officer, the broker and the Government representative without charge.

(e) *Government representatives.* The Commissioner shall designate one or more persons to represent the Government at the hearing.

46. The heading and text of § 111.74 are revised to read as follows:

§ 111.74 Decision and notice of suspension or revocation or monetary penalty.

If the Secretary of the Treasury, in the exercise of his discretion based solely on the record, issues an order of suspension for a specified period of time or revocation of the license of a broker or a monetary penalty in lieu thereof, the Commissioner will notify the broker in writing and publish a notice of suspension or revocation or monetary penalty in lieu thereof in the Federal Register and in the CUSTOMS BULLETIN unless an appeal is filed by the broker in the

Court of International Trade as provided for under § 641(e), Tariff Act of 1930, as amended (19 U.S.C. 1641(e)). The order of suspension or revocation shall become effective 60 days after the issuance of such order unless the Secretary finds that a more immediate effective date is in the national or public interest. If a monetary penalty is assessed and no appeal is filed, that penalty shall be tendered within 120 days of the issuance of the order, or the license shall automatically be suspended until payment is made.

47. Section 111.75 is revised to read as follows:

§ 111.75 Appeal from the Secretary's decision.

An appeal from the order of the Secretary of the Treasury suspending or revoking a license or permit or assessing a monetary penalty in lieu thereof may be taken in accordance with the provisions of § 641(e), Tariff Act of 1930, as amended (19 U.S.C. 1641(e)). The commencement of such proceedings shall, unless specifically ordered by the Court, operate as a stay of the Secretary's order.

48. Section 111.76 is amended by removing the words "hearing officer" in the first sentence of paragraph (a) and in every sentence of paragraph (b) and, in each instance, inserting, in their place, "Commissioner".

49. Section 111.80 is revised to read as follows:

§ 111.80 Saving provision.

Any proceeding for revocation or suspension of a license instituted prior to October 30, 1984, shall be governed by the provisions of 19 CFR Part 111 which were in force at the time the proceeding was instituted. For the purposes of this provision, the commencement of preliminary proceedings shall be considered the institution of proceedings for revocation or suspension, is preliminary proceedings were held.

50. Part 111 is amended by adding a new § 111.81 to read as follows:

§ 111.81 Settlement and compromise.

The Commissioner, with the approval of the Secretary of the Treasury, may settle and compromise any disciplinary proceeding which has been instituted under this Part according to the terms and conditions agreed to by the parties, including but not limited to the reduction of any proposed suspension or revocation to a monetary penalty.

51. Further, Part 111 is amended by adding a new Subpart E and § 111.91 through § 111.95 to read as follows:

SUBPART E—MONETARY PENALTY

§ 111.91 Grounds for imposition of a monetary penalty; maximum penalty.

The appropriate Customs officer may assess a monetary penalty or penalties as follows: (a) an amount not to exceed an aggregate of $30,000 for any of the reasons set forth in § 111.53, except for those listed in paragraph (b)(3) of that section or (b) an amount not to exceed an aggregate of $30,000 for all violations and $10,000 for each violation of § 111.4.

§ 111.92 Notice.

The appropriate Customs officer shall issue a written notice which advises the broker or other person of the allegations or complaints against him and explains that the person has a right to respond to the allegations or complaints in writing within 30 days of the date of mailing of the notice. The district director has discretion to provide additional time for good cause. Any notice, the basis of which is an alleged violation of § 111.53(b) or which exceeds and aggregate of $10,000 for all alleged violations, shall be referred to the Director, Entry Procedures and Penalties Division, Customs Headquarters, for approval before it is issued.

§ 111.93 Application for relief.

The person shall follow the procedures set forth in Part 171 of this Chapter in filing an application for relief.

§ 111.94 Decision of appropriate Customs officer.

The appropriate Customs officer shall follow the procedures set forth in Part 171 of this Chapter in considering the application for relief. After the appropriate Customs officers have considered the allegations or complaints and any timely response made, a written decision shall be issued which sets forth the final determination and the findings of fact and conclusions of law on which the determination is based. If the final determination is that the person is liable for a monetary penalty, the person shall pay, or make arrangements for payment, within 60 days of the date of the final determination. If the monetary penalty is not paid or arrangements made for payment within the time limitations, the appropriate Customs officer shall refer the matter to the Department of Justice for institution of appropriate judicial proceedings.

§ 111.95 Supplemental petition for relief.

A final determination of the district director or other appropriate Customs officer in excess of $1,000 may be the subject of a supplemental petition for relief under the provisions of § 171.33 of this Chapter. A final determination of $1,000 or less is a final decision and is not subject to further administrative review.

52. Part 111 is amended by removing the words "Customhouse broker" and "Customhouse brokers" wherever they appear and inserting, in their place, "Customs broker" and Customs brokers", respectively.

53. Section 111.96 is revised to read as follows:

§ 111.96 Fees.

(a) *License fee.* Each applicant for a broker's license pursuant to § 111.12, or by special examination pursuant to § 111.13(c), shall be charged a fee of $300 to defray the costs to Customs for the preparation and administration of the examination and other expenses in processing the application. If an applicant either fails to appear for an examination without giving notice at least 24 hours before the examination, or does not pass the examination required by § 111.11(a)(4), $100 of the fee will be refunded.

(b) *Permit fee.* Each application for a permit pursuant to § 111.19 shall be accompanied by a one-time fee of $100 to defray the costs of processing the application. If for any reason a permit lapses or is revoked, payment of the permit fee is necessary before the permit can be reinstated.

(c) *User fee.* An annual user fee of $125 will be assessed for each permit held by an individual, partnership, association or corporate broker.

(1) The fee is payable for each calendar year in each district where a broker has a permit to do business. If a broker receives a permit at a time other than the beginning of a calendar year, the full $125 must be paid immediately. If a broker fails to pay the fee by January 1 of each year or immediately at the time he receives his permit, the district director will notify the broker in writing of failure to pay and revoke the permit to operate. The notice will constitute revocation of the permit.

(2) For calendar year 1986, brokers must remit payment of $125 by August 5, 1986, in each district where they have a permit to do business. If payment is not made by August 5, 1986, notice will be given and revocation will be effective August 5, 1986.

(d) *Status report fee.* The status report provided for in § 111.30 shall be accompanied by a fee of $100 to defray the costs of administering the reporting requirement.

(e) *Payment of fee.* All fees shall be paid by check or money order payable to the U.S. Customs Service.

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The authority citation for Part 171, Customs Regulations (19 CFR Part 171), is revised to read as set forth below.

Statutory citations appearing elsewhere in Part 171 are removed.

Authority: 19 U.S.C. 66, 1592, 1618, 1624.

a. § 171.14 also issued under 46 U.S.C. 883.

b. Subpart C also issued under 19 U.S.C. 1641, 22 U.S.C. 401, 46 U.S.C. 7, 320.

c. § 171.44 also issued under 40 U.S.C. 304j, 304k.

2. Section 171.12(b) is amended by removing the words "paragraph (c)" and inserting, in their place, "paragraph (c) or (d)".

3. Paragraph (d) of § 172.12 is redesignated as paragraph (e) and a new paragraph (d) is added to read as follows:

§ 171.12 Filing of petition.

* * * * * * *

(d) *Petitions for remission or mitigation of monetary penalty.* Petitions for remission or mitigation of a monetary penalty assessed under the provisions of Part 111, Subpart E, shall be filed within 30 days of the date of mailing of the notice.

* * * * * * *

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by deleting OMB Control No. 1515–0089 and the entry pertaining to it and the language presently pertaining to OMB Control No. 1515–0100 and inserting the following in the appropriate numerical sequence according to the section number under the columns indicated:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	Description	OMB Control No.
Part 111	Requirements that licensed customs brokers must keep current records of all accounts and all financial transactions as a broker	1515–0100

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 31, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 26, 1986 (51 FR 30336)]

19 CFR Part 101

(T.D. 86-162)

CUSTOMS REGULATIONS AMENDMENT RELATING TO A CHANGE IN THE CUSTOMS SERVICE FIELD ORGANIZATION—BRUNSWICK, GEORGIA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to change the Customs field organization by extending the geographical limits of the port of entry at Brunswick, Georgia. Currently, Customs officers at the port service many locations which are outside the Brunswick city limits, those limits having been the unofficial port limits. This expansion will better serve the public by including several locations routinely requiring Customs service within the official port limits.

EFFECTIVE DATE: September 25, 1986.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, by notice published in the Federal Register on February 3, 1986 (51 FR 4172), Customs proposed to amend § 101.3, Customs Regulations (19 CFR 101.3), by extending and officially defining the geographical limits of the port of entry of Brunswick, Georgia, located in the Savannah, Georgia, Customs District in the Southeast Region.

Currently, there is no official definition of the Brunswick port limits. The Brunswick city limits have been serving as the port limits. However, Customs officers at the port routinely service many locations which are outside the city limits, and an additional out-of-port terminal facility recently began operation. Therefore, it was proposed to expand the Brunswick port limits to include those several locations now receiving service.

DISCUSSION OF COMMENTS

In response to the notice, only one was received. No specific opposition was raised in regards to the expansion and redefinition of the port limits. The commenter was against increasing ports of entry. This change does not increase the number of ports of entry. Therefore, after further review of the matter, Customs has determined that it is in the public interest to extend and redefine the geographical limits of the port of entry of Brunswick.

The expanded port limits are as follows: Beginning from the intersection of the boundary between the counties of Camden and Glynn and the Atlantic Ocean, and proceeding in a northwesterly direction along the Little Satilla River to U.S. Highway Interstate 95; then in a northeasterly direction along U.S. Highway Interstate 95 to the boundary between McIntosh and Glynn Counties; then in a easterly direction along the Altahama River to the Atlantic Ocean; then in a southerly direction along the Atlantic coaastline to the place of beginning.

CHANGES IN THE CUSTOMS FIELD ORGANIZATION

The Secretary of the Treasury is advised by the Commissioner of Customs in matters affecting the establishment, abolishment, or other change in ports of entry. Customs ports of entry are established under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

AMENDMENTS TO THE REGULATIONS

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101, Customs Regulations (19 CFR Part 101), continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624, Reorganization Plan 1 of 1965; 3 CFR 1965 Supp.

2. To reflect this change, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by removing the period after "Brunswick" in the column headed "Ports of entry" in the Savannah, Georgia, Customs District of the Southeast Region and inserting, in its place, the phrase, "including the territory described in T.D. 86–162."

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this document. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have limited effect upon some small entities in the Brunswick, Georgia area, it is not

expected to be significant because the extension of the limits of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under provisions of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment will not have a significant economic impact on a substantial number of small entities.

EXECUTIVE ORDER 12291

Because the amendment relates to the Customs field organization, and will not result in a "major rule" as defined in § 1(b) of E.O. 12291, the regulatory impact analysis and review prescribed by the E.O. are not reguired.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: August 5 1986.
FRANCIS A. KEATING,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 26, 1986 (51 FR 30335)]

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19 CFR Part 177

(T.D. 86-163)

REVISION OF GUIDELINES CONCERNING TARIFF CLASSIFICATION OF IMPORTED BACKPACKING TENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revised guidelines.

SUMMARY: Pursuant to a court decision that recognized backpacking as a sport, Customs developed a set of guidelines to use to determine which imported backpacking tents qualify a sports equipment for tariff purposes. Those guidelines established parameters concerning the material, capacity, dimensions, and weight of tents. However, due to technological advances involving tent material and construction methods, Customs was of the opinion that the guidelines may have become obsolete. Comments were solicited on the matter, and after review and further analysis, this document sets forth a revised set of guidelines for the classification of imported

backpacking tents. Use and application of the new guidelines will in some instances result in higher rates of duty being assessed on certain tents that will no longer qualify as sports equipment.

EFFECTIVE DATE: The revised guidelines will become effective for all merchandise entered for consumption or withdrawn from warehouse for consumption on or after November 24, 1986.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. (202–566–8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 8, 1985, Customs published a notice in the Federal Register (50 FR 27831), that the guidelines used to determine the tariff classification of imported backpacking tents were being reviewed. The necessity for these guidelines resulted from the decision in *The Newman Importing Co., Inc.* v. *United States*, 76 Cust. Ct. 143, C.D. 4648 (1976), wherein the court held that backpacking was a sport and tents used in pursuit of backpacking could be considered sport equipment. This made it necessary to distinguish between tents used for backpacking and tents used for other purposes.

Those guidelines, published in C.S.D. 79–108 (August 21, 1978) are as follows:

(1) Backpacking tents must be composed of dacron or nylon.

(2) Such tents must be designed for no more than 4 persons.

(3) If designed for 1 or 2 persons, the tents must weigh no more than 10 pounds, including all accessories necessary to pitch the tent, and have a carry size of no more than 24 inches in length and 8 inches in diameter.

(4) If designed for 3 or 4 persons, the tents must weigh no more than 15 pounds, including all accessories necessary to pitch the tent, and have a carry size of no more than 36 inches in length and 12 inches in diameter.

Tents meeting these guidelines are currently classified as sport equipment, not specially provided for, in item 735.20, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), at a rate of duty of 5.04 percent ad valorem. Prior to the issuance of these guidelines Customs had been classifying backpacking tents under item 389.60, TSUS, a residual provision for articles of textile materials.

Since those guidelines were issued in 1978, technological advances in tent material and construction methods have occurred which permit tent manufacturers to produce lightweight camping tents for general recreational use, so-called family or car camping tents. These lightweight camping tents fall within the specifications of the 1978 guidelines and, therefore, for Customs purposes, are classified in item 735.20, TSUS, although the tents were not "specially designed" for backpacking within the meaning of *Newman*

Importing, supra. Tents not designed as sport equipment for backpacking should be classified under the provision for tents and sleeping bags, of manmade fibers, in item 386.11, TSUS, at a current rate of duty of 12.5 percent ad valorem.

To correct this situation, Customs proposed that a revised set of guidelines be used for classifying tents. These revisions were planned to account for new materials and construction methods and return the classification scheme to one consistent with the intent of *Newman Importing, supra*. The proposed revised guidelines were as follows:

To qualify for classification as "sport equipment" under item 735.20, TSUS, Customs is of the opinion that a tent must meet the following guidelines:

(1) It must be specially designed for the sport of backpacking.

(2) It must be composed of nylon or polyester fabric.

(3) If designed for 1 or 2 persons, the tent must meet the following criteria:

(a) Have a floor area of 45 square feet or less;

(b) Weigh 8½ pounds or less, including tent bag and all accessories necessary to pitch the tent;

(c) Have a carry size of 30 inches or less in length and 9 inches or less in diameter. If other than cylindrical in shape, the tent package must not exceed 1,900 cubic inches.

(4) If designed for 3 or 4 persons, the tent must meet the following criteria:

(a) Have a floor area of 65 square feet or less;

(b) Weigh 12 pounds or less, including tent bag and all accessories necessary to pitch the tent;

(c) Have a carry size of 30 inches or less in length and 10 inches or less in diameter. If other than cylindrical in shape, the tent package must not exceed 2,350 cubic inches.

Any tent with a floor space of more than 65 square feet and a standing height of more than 60 inches is a tent designed for general recreational use. Written comments were solicited concerning this proposal.

DISCUSSION OF COMMENTS

Seven comments were received, the majority being favorable. Those in favor generally were of the view that lightweight tents for general recreational use should not be classifiable as sports equipment.

Four commenters suggested that the language as to fabric content be broadened. Specifically, it was requested that item 2 of the criteria be amended to read "2) It must be composed of nylon, polyester or any other fabric of man-made fibers." The commenters

claimed that such a definition would encourage and permit the development and use of higher technology fabrics and finishes. Customs agrees with this change and has incorporated it into the final revised guidelines.

Another concern of three commenters was the current practice of certain importers entering tent "skins", i.e., the fabric portion of the tent, separately from the metal frame portion in order to comply with the size and weight standards of the guidelines. Through such action these importers would receive the more favorable duty treatment that the sport equipment classification provides. It is proposed that the revised guidelines specifically address this issue and permit classification of tent "skins" under item 735.20, TSUS, only if Customs is supplied with the remainder of the tent package that will actually be sold with the tent skin and that the entire package comply with the provisions of these guidelines.

Customs agrees that tent "skins" imported separately from the total tent package should not be classified as sport equipment unless the entire package complies with the guidelines. Customs would go further, however, and deny classification of tent "skins" as sport equipment unless proof satisfactory to Customs is provided that the entire package of which the "skins" are a part complies with the guidelines. If any part of the tent package (including tent skin, frame, tent bag, accessories or packing) is not imported in the same shipment with all remaining parts, in order to receive the benefit of the sport equipment classification for such part, the importer must supply Customs with a sample of the complete tent package so a determination of compliance can be made. The burden in such situations shall be on the importer.

One commenter suggests that an effective date for the guidelines of July 1, 1986, should be promulgated. This would ensure that the revised guidelines apply only to prospective transactions. Many transactions have been negotiated in the industry on the basis of existing guidelines. Through specification of the July 1, 1986, effective date, the guidelines would become effective without compromising those transactions. Customs agrees that the effective date of these revised guidelines should provide sufficient time for the industry to adjust. However, instead of naming a specific date which might provide too short a period when finally published, the revised guidelines will come effective for merchandise entered for consumption or withdrawn from warehouse for consumption 90 days after publication in the Federal Register.

One commenter who generally favors the proposed guidelines suggests further refinement of the guidelines to provide specific measurements for 3 as well as 4-person tents. Customs does not believe separate guidelines for 3 and 4-person tents are necessary. Further refinement will only serve to cause confusion and defeat the purpose of relatively uncomplicated guidelines.

One commenter states that the phrase "sport of backpacking" is ambiguous. We do not agree. In *Newman Importing, supra*, the court provided a clear definition, holding backpacking to be "an activity in which persons travel on foot in wild areas and maintain themselves with supplies and equipment carried on their backs * * *". *The Newman Importing Co., Inc.* v. *United States, supra*, at p. 144. These guidelines are an inappropriate forum in which to expand clear judicial definition.

Three commenters state that no technological advances have occurred that warrant revision of the guidelines. Customs notes that this view is in direct contravention to statements made by other commenters taking notice of the changes that technology has wrought in this area. Without further proof that no advances have been made, the bare statements of these commenters cannot be accepted.

One commenter requested that an alternative standard of measurement be made applicable because of nontraditional tent packages that are now being marketed. Customs is of the view that the new guidelines take such alternatives into account. Carry size may now be measured in cubic inches. The guidelines further recognize that not all tents are carried in a cylindrical shape.

One commenter suggests that backpacking tents should be classified on the basis of their portability. The physical measurements and weight of the tent are deemed to be arbitrary standards upon which to classify the tent. Customs is of the view that this argument is without merit. Portability is an absolutely subjective means upon which no meaningful standards can be constructed. The only sensible method of determining a tent's eligibility for classification as a backpacking tent is by quantifying its size and weight.

It was noted by one commenter that technological advances have expanded the numbers and styles of tents available to the backpacker and that the proposed guidelines would curtail the choices available. Customs notes that many of the tents entering under the current guidelines are general recreational tents and not those contemplated by judicial decision as qualifying for treatment as sport equipment.

Finally, one commenter states that size restrictions penalize tall people who wish to backpack. The guidelines do not take into account the comfort of these backpackers. Customs is of the opinion that backpacking tents are not designed for the storage of gear and equipment, changing, standing, or eating, but rather to serve as a shelter and a temporary sleeping area for backpackers. Therefore, Customs believes that the square footage and size criteria in the revised guidelines are more than ample for the designated number of persons. The tents qualifying for the tariff classification as sport equipment are not to be used for general recreation.

REVISED GUIDELINES

The following are the final revised guidelines governing the classification of imported backpacking tents.

To qualify a tent as "sport equipment" under item 735.20, TSUS, the following criteria must be met:

(1) It must be specially designed for the sport of backpacking.

(2) It must be composed of nylon, polyester, or any other fabric of man-made fibers.

(3) If designed for 1 or 2 persons, the tent must meet the following criteria:

(a) Have a floor area of 45 square feet or less, and

(b) Weigh 8½ pounds or less, including tent bag and all accessories necessary to pitch the tent, and

(c) Have a carry size of 30 inches or less in length and 9 inches or less in diameter. If other than cylindrical in shape, the tent package must not exceed 1,900 cubic inches.

(4) If designed for 3 or 4 persons, the tent must meet the folllowing criteria:

(a) Have a floor area of 65 square feet or less; and

(b) Weigh 12 pounds or less, including tent bag and all accessories necessary to pitch the tent; and

(c) Have a carry size of 30 inches or less in length and 10 inches or less in diameter. If other than cylindrical in shape, the tent package must not exceed 2,350 cubic inches.

Any tent with a floor of more than 65 square feet and a standing height of more than 60 inches is a tent designed for general recreational use.

In any part of the tent package (including tent skin, frame, tent bag, accessories or packing) is not imported in the same shipment with all remaining parts, in order to receive the benefit of the sport equipment classification for such part, the importer must supply Customs with a sample of the complete tent package so a determination of compliance can be made.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: August 5, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 26, 1986 (51 FR 30346)]

U.S. Customs Service

General Notices

19 CFR Chapter I

CHANGE IN TARIFF CLASSIFICATION SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of change in Tariff Classification System.

SUMMARY: Classification of imported merchandise for rate of duty and statistical purposes is determined presently in the U.S. by reference to the Tariff Schedules of the United States (TSUS). The U.S. intends to replace the TSUS on January 1, 1988, by acceding to the International Convention on the Harmonized Commodity Description and Coding System (HS). The HS is a multipurpose nomenclature, intended to be used to describe and classify goods in international trade for customs purposes, for reporting all import and export trade statistics, and eventually for freight and transport documentation. In view of the fundamental differences between the TSUS and HS coding schemes, Federal agencies are advised that all regulations, directives, forms, etc., which presently incorporate TSUS item numbers or references to TSUS provisions, must be revised to conform with the new U.S. prior to its implementation on January 1, 1988.

FOR FURTHER INFORMATION CONTACT: Hubbard L. Volenick, International Nomenclature Staff, 202–566–8530.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Harmonized System (HS) is the culmination of a 10 year effort by the member states of the Customs Cooperation Council (CCC), particularly the U.S. and its major trading partners, to develop a single modern structure for product classification which can be used for customs, tariff, trade statistics, and transport documentation purposes. Based on the present Customs Cooperation Council Nomenclature (CCCN), the HS is a more detailed classification scheme reflecting changes in technology, trade patterns and user requirements.

In August 1981, the President requested the U.S. International Trade Commission to initiate an investigation for the purpose of preparing a conversion of the Tariff Schedules of the U.S. (TSUS), the current reference source for determining the classification of imported merchandise, into the structure of the HS. The conversion provides numerical coding beyond the 6-digit categories of the international system, taking into account U.S. tariff and statistical requirements. Thus, each tariff provision is coded in 8-digits and the tariff reporting number in 10-digits.

This conversion, submitted to the President on June 30, 1983, was reviewed and revised by the Trade Policy Staff Committee, Office of U.S. Trade Representative, and republished as TPSC 84–76 on September 30, 1984. A further, more comprehensive, revision will be made in October 1986 and this will be the basic working document aimed at U.S. adoption of the HS.

The HS Convention was opened for signature July 1, 1983, and thus far has been signed by 45 countries and customs unions, five without reservation of ratification. The U.S. is expected to sign, subject to ratification by the Congress, in the spring of 1987.

In February 1986, the meeting of the General Agreement on Tariffs and Trade (GATT) Tariff Concessions Committee in Geneva resulted in the firm political commitments of the U.S., Canada, Japan, the European Community, the Nordic countries and Switzerland, to a January 1, 1988, date for entry into force of the International Convention on the HS.

Purpose of Harmonized System

The HS is a multipurpose nomenclature, intended to be used to describe and classify goods in international trade for customs purposes, for reporting all import and export trade statistics, and eventually for freight and transport docmentation. Its use is expected to increase uniformity and predictability of trade data, and promote standardization of trade and transport documentation. Implementation of the HS will impact not only all areas of trade, *i.e.*, imports, exports, transportation of goods, and trade statistics, but all aspects of customs operations, including classification and appraisement of merchandise selection for and examination of merchandise data entry into the Automated Commercial System (ACS) and the pre-release and release of goods. Brokers and importers will experience significant changes to their entry procedures.

Action Requested of Other Agencies

Customs directives, regulations, informational publications and forms are all being revised to conform with the proposed new commodity classification system. Federal agencies currently using TSUS item numbers in any of their publications are advised to take appropriate steps to amend their publications prior to the entry into force of the HS-based tariff system on January 1, 1988. Customs

is prepared to work with those agencies which require assistance in bringing their publications into conformity with the new tariff and will provide additional information on request.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: August 13, 1986.
MICHAEL H. LANE,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, August 29, 1986 (51 FR 30933)]

IMPORTATIONS BEARING RECORDED U.S. TRADEMARKS; SOLICITATION OF PUBLIC COMMENT ON GRAY MARKET POLICY OPTIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of comment period.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the importation of parallel imports, or so-called gray market goods, which are products manufactured overseas bearing genuine trademarks that are purchased from foreign retailers or wholesalers and imported into the U.S. without the permission of the individual or corporation who owns the rights to the trademark in the U.S. market. Customs regulations traditionally have interpreted existing U.S. law to permit these goods to enter the U.S. when the foreign and American owners of the trademark are "related". Three U.S. Courts of Appeal recently reached different conclusions concerning the validity of the regulations.

A previous solicitation for comments was published in the Federal Register on June 17, 1986 (51 FR 22005). Comments were to have been received on or before August 18, 1986. Customs has received several requests to extend the comment period because additional time is required to prepare reasonably responsive comments. Customs believes the requests have merit. Accordingly, the period of time for the submission of comments is extended to October 17, 1986.

DATE: Comments and/or data are requested on or before October 17, 1986.

ADDRESS: Comments and/or data may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

All comments and/or data submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between

9:00 a.m. and 4:30 p.m. on normal business days, at the address above.

FOR FURTHER INFORMATION CONTACT: Steven Pinter, Entry, Licensing and Restricted Mechandise Branch (202–566–5765).

Dated: August 15, 1986.

JOHN P. SIMPSON,
Director,
Regulations and Rulings.

[Published in the Federal Register, August 21, 1986 (51 FR 30024)]

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 112

PROPOSED CUSTOMS REGULATIONS AMENDMENT CONCERNING SUSPENSION OR REVOCATION OF A CARTMAN'S OR LIGHTERMAN'S LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations concerning the suspension or revocation of a cartman's or lighterman's license. Currently, one of the enumerated circumstances under which a district director may suspend or revoke such a license is when the holder of that license, or the officer of a corporation holding that license, is convicted of a felony, or is convicted of a misdemeanor involving theft, smuggling, or theft-connected crime.

It has come to Customs attention that a literal interpretation of the regulation allows corporation officers to commit acts constituting the specified offenses, resign from the corporation before conviction, and therefore allow the corporation to retain its cartman or lighterman license. This may occur even if the officer resigns in name only but continues to exercise control over the corporation.

Therefore, Customs now proposes to amend its regulations to permit suspension or revocation of a cartman or lighterman license if the officer of a corporation holding such a license is convicted of a felony or a misdemeanor involving theft, if the criminal act was committed while the person was still an officer of that corporation. This would end the ploy of resigning to avoid suspension or revocation of the license and would more accurately reflect Customs position that those demonstrating criminal behavior are not entitled to the position of trust involved in the professions of cartman or lighterman.

DATE: Comments must be received on or before October 27, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Kathleen McGuigan, Office of the Chief Counsel (202–566–6245).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 112, Customs Regulations (19 CFR 112), contains the regulations governing the conduct of carriers, cartmen, and lightermen. Subpart C of that part set forth the regulations controlling the licensing of cartmen and lighterman. Cartmen are those who transport goods or merchandise within the limits of a port. Lightermen are those who transport goods or merchandise on a barge, scow, or other small vessel to or from a vessel within a port, or from place to place within a port.

Section 112.30, Customs Regulations (19 CFR 112.30), lists the grounds under which the license of a cartman or lighterman may be suspended or revoked. Section 112.30(a)(5) states that if the holder of such a license, or an officer of a corporation holding such a license is convicted of a felony, or is convicted of a misdemeanor involving theft, smuggling, or a theft-connected crime, the district director may suspend or revoke the license.

It has come to Customs attention that a literal interpretation of this regulation is allowing officers of corporations to commit acts constituting the specified offenses, resign from the corporation before conviction, and therefore allow the corporation to retain its cartman and lighterman license. This is occurring even in instances when the officer has resigned from his or her corporation in name only but continues to exercise control over the corporation.

Customs desires to make it clear that application of this provision is dependent upon a conviction arising from an act or acts committed while a person was a corporate officer. The person's employment status at the time of the conviction is unimportant. Therefore, resignation, discharge, demotion, or promotion, or any change in the employment status of the corporate officer prior to conviction will not preclude the district director from suspending or revoking the corporation's cartman or lighterman license.

Therefore, Customs is now proposing to amend § 112.30(a)(5) to permit suspension or revocation of a cartman or lighterman license if the officer of a corporation holding such a license is convicted of a felony, or is convicted of a misdemeanor involving theft, smuggling, or a theft-connected crime, if the criminal act was committed while the person was still an officer of that corporation. This amendment would end the ploy of the corporate officer resigning to avoid the corporation losing its cartman or lighterman license even though the resignation may be in name only. The amendment would also more accurately reflect Customs position that those demonstrating criminal behavior are not entitled to the position of trust involved in the professions of cartman or lighterman.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CRF 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was John Doyle, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS

In General
Customs duties and inspection, Imports.

19 CFR Part 112
Administrative practice and procedures, Common carriers.

PROPOSED AMENDMENT

It is proposed to amend Part 112, Customs Regulations (19 CFR Part 112), as set forth below.

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. It is proposed to amend § 112.30(a)(5) by removing the semicolon, replacing it with a period, and adding the following, "Any change in the employment status of the corporate officer (*e.g.*, discharge, resignation, demotion, or promotion) prior to conviction for

a felony or conviction for a misdemeanor involving theft, smuggling, or a theft-connected crime resulting from acts committed while a corporate officer, will not preclude application of this provision;"

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: August 8, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 26, 1986 (51 FR 30376)]

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19 CFR Part 6

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO INTERNATIONAL AIRCRAFT REPORTING REQUIREMENTS AT DOUGLAS, ARIZONA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations relating to the requirements concerning the arrival and reporting to Customs of civil aircraft at Douglas, Arizona.

Within the Douglas, Arizona, area there are two airports: Bisbee-Douglas International, which has been designated as an "international airport", and Douglas Municipal, a "landing rights" airport. Bisbee-Douglas International has also been designated by Customs as one of the airports at which private aircraft arriving from areas south of the U.S. must land for Customs processing.

Because of minimal use of the facility and due to various enforcement considerations detailed in this document, it is not feasible for Customs to continue to provide service.

Accordingly, the designation of Bisbee-Douglas as an international airport should be revoked and Douglas-Municipal should be substituted for Bisbee-Douglas on the list of airports designated for the arrival of private aircraft from areas south of the U.S. for Customs processing.

DATE: Comments must be received on or before October 27, 1986.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington D. C. 20229.

FOR FURTHER INFORMATION CONTACT: Thomas Hargrove, Officer of Inspection & Control (202) 566-5607.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under § 1109(b), Federal Aviation Act of 1958, as amended (49 U.S.C. 1509(b)), the Secretary of the Treasury is authorized to designate places in the U.S. as ports of entry for civil aircraft arriving from any place outside the U.S., and for merchandise carried on the aircraft. These airports are referred to as "international airports", and the location and name of each are listed in § 6.13, Customs Regulations (19 CFR 6.13). In accordance with § 6.2, Customs Regulations (19 CFR 6.2), the first landing of every civil aircraft arriving in the U.S. must be at one of these international airports unless the aircraft has been specifically exempted from this requirement or permission to land elsewhere has been granted. Customs officers are assigned to all international airports to accept entries of merchandise, collect duties, and enforce Customs laws and regulations. If a civil aircraft desires to land at a "landing rights airport", which means an airport which has not been designated as an international airport, permission must first be obtained and Customs must assign personnel to that airport for that aircraft.

Within the Douglas, Arizona, area there are two airports: Bisbee-Douglas International Airport, which has been disignated as an "international airport", and Douglas Municipal Airport, a landing rights airport.

A review of Customs operations in the area indicates that there is a relatively low number of international aircraft arrivals at Bisbee-Douglas International Airport. Most of the arrivals are light aircraft (single/multi-engine) as opposed to jets or turbos and very few of the arrivals are locally based. It has also been learned that the Federal Aviation Administration (FAA) is planning on closing its facility at the airport. Because of the minimal use of the facility, it is not cost-effective for the FAA, Customs, or the Immigration & Naturalization Service, which share responsibility for clearing private aircraft, to continue to provide service. It has also been determined that because of the surrounding mountainous terrain; three restricted military areas to the west; and two military operations to the northeast; safety hazards exist in landing in the area. Of particular concern to Customs is the fact that the airport is located approximately 15 miles from the U.S.-Mexican border. This distance give smugglers the opportunity to engage in "touch and go" or air drop smuggling of illegal drugs and contraband. "Touch and go" smuggling involves reporting Bisbee-Douglas as the first U.S. destination but actually landing somewhere else first, quickly unloading contraband, and continuing on to Bisbee-Douglas. Air drop smuggling involves flying very low over some point between the border and Bisbee-Douglas, pushing contraband out of the aircraft to be retrieved on the ground, and continuing on to Bisbee-Douglas. Additionally, the lack of security lighting and inability to see aircraft on

touchdown makes tracking of individual aircraft very difficult. This is a further impediment to effective drug interdiction in the area. It takes 10–15 minutes after touchdown for aircraft to arrive for inspection.

Douglas Municipal Airport is located closer to the U.S.-Mexican border thus significantly reducing the distance in which aircraft can "touch and go" or engage in air drop smuggling. Further, the lighting and space available for Customs officers will allow full view of aircraft immediately on touchdown.

For all of these reasons, the designation of Bisbee-Douglas as an international airport should be revoked and Douglas Municipal should be substituted for Bisbee-Douglas on the list of airports designated for the arrival of private aircraft from areas south of the U.S. for processing.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECT IN 19 CFR PART 6

Customs duties and inspection, Imports, Air Carriers, Aircraft, Airports.

PROPOSED AMENDMENTS

It is proposed to amend Part 6, Customs Regulations (19 CFR Part 6), as set forth below.

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624; 49 U.S.C. 1474, 1509.

2. It is proposed to amend § 6.13 by removing "Douglas, Ariz." under the column headed "Location" and "Bisbee-Douglas International Airport" under the column headed "Name".

3. It is proposed to amend § 6.14(g) by removing "Bisbee-Douglas International Airport" under the column headed "Name" and inserting, in its place, "Douglas Municipal Airport".

WILLIAM VON RABB,
Commissioner of Customs.

Approved: July 31, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 26, 1986 (51 FR 30375)]

U.S. Court of Appeals for the Federal Circuit

August 15, 1986

ERRATUM

(Appeal No. 85-2806)

REPRESENTATIVE STEWART B. MCKINNEY, ET AL., APPELLANTS *v.* U.S. DEPARTMENT OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY OF THE TREASURY (ENFORCEMENT AND OPERATIONS); U.S. CUSTOMS SERVICE; AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, APPELLEES

(Decided August 8, 1986)

Please make the following corrections to Appeal No. 85-2806, published in CUSTOMS BULLETIN, Vol. 20, No. 34, dated August 27, 1986:

Page 8, line 6, delete the words "the Treasury".

Page 8, line 9, insert the word "the" before the word "Treasury".

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samual M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–82)

ZENITH RADIO CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80-5-00861

Before MALETZ, *Senior Judge.*

(Dated August 8, 1986)

OPINION AND ORDER

Frederick L. Ikenson, P.C. (Frederick L. Ikenson on the briefs) for plaintiff.
Richard K. Willard, Assistant Attorney General; *Michael F. Hertz,* Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs) for defendant.

MALETZ, *Senior Judge:* The government moves for assessment of damages on a $250,000 injunction bond posted by Zenith. For the reasons that follow, the motion is denied.

I. BACKGROUND

On March 10, 1971, the Secretary of the Treasury found that televison sets from Japan were being dumped. 36 Fed. Reg. 4597 (1971). Such sets, therefore, became subject to antidumping duties. From 1971 through 1979, however, most of these duties were not collected. On March 28, 1980, the Secretary of Commerce, to whom responsibility for administering the antidumping laws has been transferred, announced an administrative review of the antidumping finding. 45 Fed. Reg. 20,511 (1980); *see* Tariff Act of 1930 § 751, 19 U.S.C. § 1675. Before the administrative review was completed, on April 28, 1980, the Secretary of Commerce settled for $77 million all claims for antidumping duties related to entries of television sets from July 1, 1973 to March 31, 1979. Zenith brought this action to challenge the lawfullness of the settlement agreement.[1] In challenging the settlement, Zenith relied on two theories: (1) the agreement was not authorized by 19 U.S.C. § 1617 and was, therefore, ultra

[1] For a detailed discussion of the background of this action, see *Zenith Radio Corp. v. United States,* 1 CIT 180, 509 F. Supp. 1282 (1981).

vires; and (2) the government officials who recommended and entered into the settlement acted arbitrarily, capriciously, and in bad faith.

Early in the history of this action, Zenith moved for a preliminary injunction barring government officials from implementing the terms of the settlement agreement. Finding that Zenith had "made out a substantial case on the merits on its second alternative cause of action alleging that Government officials * * * acted arbitrarily and in bad faith," *Zenith Radio Corp* v. *United States*, 1 CIT 53, 56, 505 F. Supp. 216, 219 (1980), the court granted a preliminary injunction, *id.* at 58, 505 F. Supp. at 220–21.[2] Later, the court granted the government's motion to require Zenith to post security for the injunction under rule 65(c) of this court. Although the government requested that security be set at $11.5 million,[3] the court directed Zenith to post security or a bond in the amount of $250,000 "to indemnify the defendant should it ultimately be determined that the defendent was wrongfully enjoined or restrained by the preliminary injunction issued by this court * * *." *Zenith Radio Corp.* v. *United States*, 2 CIT 8, 11, 518 F. Supp. 1347, 1350 (1981).[4]

Subsequently, our appellate court ruled that this court lacked jurisdiction to entertain an action such as Zenith's. *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 69 CCPA 96, 673 F.2d 1254, *cert. denied*, 459 U.S. 943 (1982). Prior to denial of *certiorari* in *Montgomery Ward*, this court denied the government's motion to dissolve the preliminary injunction, because government implementation of the settlement agreements would moot the controversy and prevent Supreme Court review. *Zenith Radio Corp* v. *United States*, 3 CIT 243, 244 (1982).[5] After the Supreme Court denied *certiorari*, however, this court dissolved the preliminary injunction. *Zenith Radio Corp.* v. *United States*, 4 CIT 201, 4 CIT 202 (1982). The government then moved for assessment of damages on the injunction bond.[6]

II. RULE 65(C)

Rule 65(c) of this court, in language identical to the parallel provision of the Federal Rules of Civil Procedure, provides in part: "No

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[2] In this connection, the court noted that the United States Court of Appeals for the District of Columbia Circuit had issued a substantially identical injunction in a related action. The court further observed that the D.C. Circuit's injunction was certain to be dissolved imminently because of the impact of the Customs Courts Act of 1980, 28 U.S.C. § 1581, which vested in this court exclusive jurisdiction over the type of international trade action brought by Zenith. *Zenith Radio Corp.* v. *United States*, 1 CIT 53, 54–55, 505 F. Supp. 216, 218 (1980). As matters developed, this court also lacked jurisdiction over Zenith's action. *See Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 69 CCPA 96, 673 F. 2d 1254, *cert. denied*, 459 U.S. 943 (1982).

[3] The government performed the following calculation to arrive at the figure of $11.5 million: the injunction delayed the government's receipt and use of the $77 million settlement; one year's interest on the figure, at 15% interest, is $11.5 million.

[4] The court considered various factors in setting security at $250,000. It found that Zenith's action had the potential of benefiting other United States television manufacturers, 2 CIT at 10, 518 F. Supp. at 1350; that Zenith might advance the public interest in faithful enforcement of the antidumping laws, *id.* at 10–11, 518 F. Supp. at 1350; and that prohibitive security would undermine the congressional goal that the government's administration of the antidumping laws be subject to judicial review, *id.* at 11, 518 F. Supp. at 1350.

[5] The court rejected the government's suggestion that the preliminary injunction should be dissolved and that Zenith should be required to seek an injunction from the court of appeals or the Supreme Court pending filing of a petition for *certiorari*, finding such a procedure wasteful. 3 CIT at 244.

[6] Between dissolution of the preliminary injunction and final submissions of the motion for assessment of damages, the parties sparred over discovery for some time. *See Zenith Radio Corp.* v. *United States*, 7 CIT 398, 588 F. Supp. 1443 (1984), *rev'd*, 764 F.2d 1577 (Fed. Cir. 1985).

restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The circuits do not agree unanimously on the interpretation of rule 65(c).[7]

A. *The* PAGE COMMUNICATIONS *Approach*

The District of Columbia Circuit has taken the position that even where rule 65(c) requires a bond, this does not mean that the court is required to award damages on the bond if the injunction is dissolved, because the court still must avoid inequitable results. *Page Communications Engineers, Inc.* v. *Froehlke*, 475 F.2d 994, 997 (D.C. Cir. 1973) (per curiam). Similarly, the Tenth Circuit has held that whether to award damages on an injunction bond is a question committed to the discretion of the trial court, which should weigh considerations of equity and justice. *Kansas* EX REL. *Stephan* v. *Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983). *Accord H & R Block, Inc.* v. *McCaslin*, 541 F.2d 1098, 1099 (5th Cir. 1976) (per curiam) ("The awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction.").

B. *The* COYNE-DELANY *Approach*

On the other hand, the Seventh Circuit has criticized *Page Communications* and *H & R Block*, holding that when a defendant sustains damages because of a wrongfully issued preliminary injunction, the plaintiff should "normally be required to pay the damages, at least up to the limit of the bond." *Coyne-Delany Co.* v. *Capital Development Board of Illinois*, 717 F.2d 385, 391 (7th Cir. 1983).[8] *Coyne-Delany* was particularly unimpressed with the reliance that *Page Communications* and *H & R Block* placed on *Russell* v. *Farley*, 105 U.S. 433, 441–42 (1882) (in absence of imperative statute to contrary, court should have power to mitigate terms imposed as condition for injunction, or to relieve from such terms altogether, whenever it appears continuation of terms would be inequitable or oppressive). The Seventh Circuit reasoned that (1) the portion of *Russell* upon which reliance was placed was dictum because in that case the injunction had not been dissolved completely, *Coyne-Delany*, 717 F.2d at 391, and (2) *Russell* was superseded by the adoption of rule 65(c), *id.*[9] In *Page Communications*, however, the D.C. Circuit

[7] Because of the identity of language between this court's rule 65(c) and the same rule of the Federal Rules of Civil Procedure, it is particularly helpful to consider precedents from other circuits. *Cf.* U.S.C.I.T. R. 1 ("The court may refer for guidance to the rules of other courts.").

[8] In *Coyne-Delany* as here, the plaintiff was "not a poor person but a substantial corporation." 717 F.2d at 392. Whereas this court required an injunction bond of $250,000, the district court in *Coyne-Delany* required a bond of only $5,000. *Id.* at 390.

[9] *Coyne-Delany* was willing to accept the possibility of good reasons for not awarding damages on an injunction bond: "objective factors—such as the resources of the parties, the defendant's efforts or lack thereof to mitigate his damages, and the outcome of the underlying suit * * *." 717 F.2d at 392. The Seventh Circuit also stated that a change in the law after issuance of the preliminary injunction may not always be a good reason for denying damages, "but it is a legitimate consideration, perhaps especially where the prevailing party is a state agency that benefited from a change in the law of its state." *Id.* at 392–93. These factors are discussed further in Part III, *infra*.

A recent student note goes further than *Coyne-Delany*:

Continued

noted that rule 65(c) did not make judgment on the bond automatic upon a showing of damages, 475 F.2d at 997, and concluded:

> [T]he [district] court in considering the matter of damages was exercising its equity powers, and was bound to effect justice between the parties, avoiding any result that would be inequitable or oppressive for either party. The Rule [65(c)] was not intended to negate the court's duty in this regard. Thus, we hold that the court had discretion to refuse to award damages, in the interest of equity and justice. This conclusion is consistent with the provision of the Rule which gives the court discretion to fix bond in a nominal amount; clearly the Rule does not contemplate that a defendent who is wrongfully enjoined will always be made whole by recovery of damages.

Id.

C. *Contrasting the Approaches*

The court finds itself in greater agreement with the approach of *Page Communications* than with that of *Coyne-Delany*. The court does not understand rule 65(c) as vitiating *Russell* v. *Farley*[10] and believes that trial courts must retain a modicum of discretion in assessing damages on injunction bonds. Inasmuch as the rule does not mandate an automatic assessment of damages—even if the wrongfully enjoined defendant sustained legitimate damages—the court must read the rule in a manner that will "secure the just, speedy, and inexpensive determination of every action," U.S.C.I.T. R. 1. *Cf. Manuli Autoadesivi, S.P.A.* v. *United States*, 9 CIT, ——, ——, 602 F. Supp. 96, 98 (1985) (intervention denied because of likelihood of prejudice to original parties, citing rule 1's direction of just, speedy, and inexpensive determinations).

While the court has expressed a preference for the approach of *Page Communications*, the tension between that case and *Coyne-Delany* might not be as great as appears at first blush. It is doubtful that the D.C. Circuit, or other circuits that follow *Page Communications*, would contest *Coyne-Delany's* assertion that damages normally should be assessed on the bond posted for a wrongfully issued injunction. And *Coyne-Delany* certainly recognizes that there are situations when damages should not be assessed. Thus, the question is one of emphasis: is the presumption that damages will be assessed overwhelming and rebuttable only in rare circumstances (*Coyne-Delany*), or do the court's equitable responsibilities mandate careful examination before assessment of damages (*Page Communications*)?

Courts should not be free to deny, in their discretion, the recovery of damages otherwise available under rule 65(c). Courts should not deny recovery only when damages are not recoverable under the general law of damages or under a just interpretation of the conditions of the bond.

Note, *Recovery for Wrongful Interlocutory Injunctions under Rule 65(c)*, 99 Harv. L. Rev. 828, 842-43 (1986). The note reads rule 65(c) as undoing *Russell* v. *Farley*, *id.* at 843, and rejects *Coyne-Delany's* list of factors that might lead to denial of recovery of damages, *id.* at 844.

[10] It is interesting that the Advisory Committee note to the 1946 amendment to Federal Rule of Civil Procedure 65 indicates that the rule prevents the court from requiring, as was possible under *Russell* v. *Farley*, 105 U.S. at 446, institution of a new action for recovery on the bond. To this extent, rule 65 overruled *Russell* by enabling the defendent to move for damages on the bond as part of the original action. Nothing in the Advisory Committee notes states, however, that rule 65(c) abrogates *Russell's* grant of equitable power to decline to assess damages.

This court finds the latter formulation more palatable but believes that in this case the government is not entitled to an assessment of damages on either construction of rule 65(c).

III. Equitable Factors

The reasons for the court's conclusion that the government is not entitled to damages are evident upon an examination of the equitable factors discussed in *Coyne-Delany* and other cases.

A. *Good Faith*

That an injunction was obtained in good faith is not enough to defeat assessment of damages. If the rule were otherwise, damages would almost never be assessed on an injunction bond, because a party seeking a preliminary injunction must demonstrate four prerequisites:

> (1) [a] threat of immediate irreparable harm; (2) that the public interest would be better served by issuing than by denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favored [the party seeking the injunction].

S.J. Stile Associates v. *Snyder*, 68 CCPA 27, 30, 646 F.2d. 522, 525 (1981); *accord Zenith Radio Corp.* v. *United States*, 1 Fed. Cir. 74, 76, 710 F.2d 806, 809 (1983). In light of these stiff requirements, a party acting in bad faith will not often obtain an injunction, unless he was capable of misleading the court on a grand scale. Nevertheless, the good faith of the party who obtained the injunction is one of the factors the court may consider. *See Coyne-Delany*, 717 F.2d at 392 (court should consider full range of factors, which might include plaintiff's good faith); *Page Communications*, 475 F.2d at 997 ("The good faith of Page cannot be doubted."). Based on its familiarity with the proceedings in this case, the court is entirely satisfied that Zenith acted in good faith when it sought injunctive relief.

B. *Resources of the Parties*

The relative resources of the parties, *see Coyne-Delany*, 717 F.2d at 392, do not tip the scales strongly in favor of or against assessment of damages. The court takes judicial notice that Zenith is hardly impecunious. But there is probably no party in the world better situated than the government of the United States to absorb the loss of $250,000 without dire consequences.

C. *Mitigation of Damages*

The court will not consider the factor of mitigation of damages, *see id*. Because the interest lost by the government on the $77 million settlement dwarfed the bond of $250,000, even a high degree of governmental lassitude would not suffice to make failure to mitigate damages significant. If the injunction damaged the government, damages—even if vigorously mitigated—would exceed

$250,000. Therefore, the government should not be penalized if it failed to mitigate damages.[11]

D. *Outcome of the Underlying Suit*

While the outcome of the underlying suit is one of the factors discussed in *Coyne-Delany*, *see id.*, it has minimal relevance to this action, which was dismissed on jurisdictional grounds. The court will neither speculate nor require a minitrial on the question of whether Zenith's allegation of bad faith in the $77 million settlement agreement had substantive merit. The court does find, however, that the allegation was not frivolous. To that extent, Zenith's failure to win the underlying suit is not a significant factor in favor of assessment of damages.[12]

E. *Change in the Law*

The most significant factor in Zenith's favor, and the one upon which the court relies in denying assessment of damages, is the change in the law that took place after the preliminary injunction was issued and thus deprived Zenith of its day in court. That change was the decision by the court of appeals in *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 69 CCPA 96, 673 F.2d 1254, *cert. denied*, 459 U.S. 943 (1982). *Montgomery Ward* held that neither of the relevant statutes—28 U.S.C. §§ 1581(c) or (i)—conferred jurisdiction on Zenith's claim of bad faith in the antidumping settlement. 69 CCPA at 104–11, 673, F.2d at 1260–65. While *Montgomery Ward* did not change the law in the sense that it overruled a prior precedent, it did decide a novel jurisdictional question in a manner contrary to what Zenith legitimately could have expected.[13]

In *Coyne-Delany*, the Seventh Circuit held that a change in the law might not always be a good ground for denying damages, but that "it is a legitimate consideration, perhaps especially when the prevailing party is a state agency that benefited from a change in the law of its state." 717 F.2d at 392–93. Here, the federal government benefited from a construction of federal law by a federal court of appeals.

A change in the law was the major reason that damages were denied in *Kansas* EX REL. *Stephan* v. *Adams*, 705 F.2d 1267 (10th Cir. 1983). The court stated:

> In our judgment the trial court did not abuse its discretion by holding that costs and expenses were not to be awarded. The record discloses that the plaintiffs raised valid environmental

[11] Because the court holds on other grounds that the government is not entitled to damages, it does not reach the merits of Zenith's alternative contentions that the government was not damaged by the injunction or that the government failed to mitigate damages.

[12] The non-frivolity of Zenith's substantive claim is a factor quite similar to Zenith's good faith, discussed previously. Neither is crucially important, and the court will not give Zenith "double credit" for bringing a good faith action that was not frivolous.

[13] In particular, 28 U.S.C. § 1581(i)(2) grants this court exclusive jurisdiction of civil actions commenced against the government that arise out of any law providing for tariffs and duties. On its face, section 1581, which became law during the pendency of this action on October 10, 1980, Pub. L. 96-417, tit. II, § 201, 94 Stat. 1728–29, seemed to offer Zenith an opportunity to press its claims in this court.

concerns. Moreover, the restraining order was vacated not because the concerns on the part of plaintiffs-appellees were unfounded. It was the intervention of Congress that brought about the change.

Id. at 1270.

Because of the jurisdictional ruling in *Montgomery Ward*, Zenith will never have an opportunity to prove its allegation, which the court has found non-frivolous, that the $77 million settlement was tainted by bad faith. Under all the circumstances, however, it would be manifestly unfair to add a rule 65(c) insult to the jurisdictional injury. The $77 million settlement has never been vindicated on the merits. Rather, this court was held to lack jurisdiction to review the merits of the settlement. If Zenith lost the opportunity to be heard on its good faith claim of governmental impropriety, it should not be required to pay damages to the government as well.

IV. CONCLUSION

For the foregoing reasons, the government's motion, under rule 65(c) of this court, for assessment of damages on the injunction bond is denied.

(Slip Op. 86–83)

AMERICAN PERMAC, INC., AND BOEWE MASCHINENFABRIK, GMBH, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85–1–00050

Before WATSON, *Judge.*

MEMORANDUM OPINION AND ORDER

[Plaintiffs' motion for partial judgment upon the agency record is denied.]

(Decided August 12, 1986)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr.), for the plantiffs.
Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch *(Velta A. Melnbrencis)*, for defendant.

WATSON, *Judge:* This action is brought by Boewe Maschinenfabrik, GmbH ("Boewe"), a West German manufacturer of drycleaning machinery, and American Permac, Inc. ("API"), Boewe's American distributor. The plantiffs contest the final results of a periodic review of an antidumping finding, conducted by the United States Department of Commerce, International Trade Administration ("ITA") pursuant to Section 751(a) of the Tariff Act of 1930, 19 U.S.C. § 1675(a). 50 Fed. Reg. 1256 (Jan. 10, 1985). The ITA found that drycleaning machinery manufactured by Boewe and sold

in the United States between July 1, 1979 and June 30, 1980 was dumped at a weighted average margin of 30.05 percent.[1]

Plantiffs have moved for partial judgment upon the agency record, pursuant to Rule 56.1 of this court, contending that application of the ITA's January 10, 1985 determination to the entries covered by the review is barred by the four-year limitation on liquidations imposed under 19 U.S.C. § 1504(d). By that provision, any entry of merchandise not liquidated within four years after the date of entry or final withdrawal from warehouse shall be "deemed liquidated" at the amount of duty asserted at the time of entry by the importer "unless liquidation continues to be suspended as required by statute or court order." For the reasons set forth below, the court concludes that suspension of liquidation was required by statute so that § 1504(d) does not bar application of the challenged determination to the entries under review.[2]

BACKGROUND

The ITA review involved in this case arises from a 1972 antidumping finding by the Treasury Department under the Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.* (1976). 37 Fed. Reg. 23715 (November 8, 1972). Because that finding remained in effect on January 1, 1980, the effective date of the Trade Agreements Act of 1979 ("1979 Act")[3], the amount of duties imposed under the finding became subject to periodic review pursuant to 19 U.S.C. § 1675(a) (1982).[4] *See* 45 Fed. Reg. 20511 (March 28, 1980).

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[1] The review covered one other West German manufacturer of dry cleaning machinery, Soco Maschinenbau, GmbH & Co., which has not contested the ITA's determination.

[2] The defendant strenuously argues that the plantiffs' failure to raise the limitation on liquidation issue at the administrative level constitutes a waiver and bars this court from considering the issue. In view of the court's holding on the merits, any nonexhaustion of administrative remedies by the plaintiffs is clearly immaterial. *See Philip Brothers, Inc. v. United States*, 10 CIT ——, 630 F. Supp. 1317, 1324 n. 11 (1986). In addition, the court notes that the limitation issue did not arise because the four year period under 19 U.S.C. § 1504(d) had not elapsed as to any of the covered entries until long after the comment period specified in the preliminary results (46 Fed. Reg. 60868, 60869) had passed. Because the ITA could have issued its final results at any time, it is unclear that plaintiffs had a definite opportunity to raise the issue. *Cf. Id.* at ——, 630 F. Supp. at 1324 (no exhaustion requirement where issue did not arise until ITA's final decision). Under the circumstances, the court finds imposition of an exhaustion requirement to be innappropriate. *See* 28 U.S.C. § 2637(d).

[3] The Trade Agreements Act of 1979 repealed the Antidumping Act of 1921 and enacted a new antidumping law as part of Title VII of the Tariff Act of 1930. Pub. L. 96-39, Title I, §§ 101, 106(a), 93 Stat. 150-189, 193 (1979). Administration of the law was simultaneously transferred from Treasury to the Commerce Department.

[4] 19 U.S.C. § 1675(a) (1982) provides, in pertinent part:

> (1) In general. At least once during each 12-month period beginning on the anniversary of the date of publication of * * * an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, * * * the administering authority, after publication of notice of such review in the Federal Register, shall —
>
> * * *
>
> (B) review, and determine (in accordance with paragraph (2)), the amount of the antidumping duty,
>
> * * *
>
> and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.
>
> (2) Determination of antidumping duties. For the purpose of paragraph (1)(b), the administering authority shall determine—
>
> (A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
>
> (B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.
>
> The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

Although not applicable in this case, the Trade and Tariff Act of 1984 amended 19 U.S.C. § 1675(a)(1) by inserting the words "if a request for such a review has been received and" immediately before "after publication of notice." Pub. L. 98-573, Title VI, § 611(a)(2)(A), 98 Stat. 3031 (1984). Hence, where applicable, the amendment eliminates mandatory annual reviews and requires review only when the ITA has received a proper request. *See* Pub. L. 98-573, § 626(b)(1), 98 Stat. 3042 (effective date); 19 C.F.R. §§ 353.53a, 355.10 (1986) (implementing regulations).

In its preliminary results, published December 14, 1981 (46 Fed. Reg. 60868), the ITA calculated the weighted average margin for the Boewe imports under review to be 65.95 percent. The high margin was due in part to the agency's denial of certain selling expense adjustments which it felt Boewe and API had not properly quantified in their questionnaire responses.

On February 8, 1982, the ITA conducted a hearing pursuant to 19 C.F.R. § 353.47. Subsequently, Boewe and API filed two submissions of additional data. The first, filed February 25, 1982, pertained to trade-in allowances in the German home market. The second, filed March 18, 1982, corrected certain errors Boewe and API had discovered in their prior submissions. The ITA initially deemed this new data to be untimely and refused to incorporate it into the final margin calculations. However, prior to issuance of a final determination, the West German Embassy contacted the Commerce Department expressing concern over certain aspects of the ITA's computations. West German representatives thereafter met with Commerce officials and requested delay in the publication of the final results to allow the West German government time to submit additional legal arguments. In January 1983, Commerce agreed to incorporate the February and March, 1982 submissions of Boewe and API in the final determination.

The ITA completed its final draft in the summer of 1983, finding a weighted average margin for Boewe entries of 31.03 percent. The proposed notice was approved on August 9, 1983 and forwarded to the Federal Register for publication on August 10. However, because the West German government sought further discussion on legal aspects of the review, the notice was recalled. Following a meeting with West German officials on August 24, 1983, the ITA decided not to publish the final results and to further review certain data. The final results which the ITA ultimately issued were signed by the Under Secretary of Commerce on January 3, 1985 and published on January 10, 1985. As noted above, the weighted average margin calculated for Boewe equipment was 30.05 percent.

DISCUSSION

"Liquidation" of an entry of merchandise is defined as the final computation by the Customs Service of all duties (including any antidumping or countervailing duties) accruing on that entry. *See generally Ambassador Division of Florsheim Shoes* v. *United States*, 748 F.2d 1560, 1562 (Fed. Cir. 1984). Under 19 U.S.C. § 1504 (1982)[5], if Customs fails to liquidate entries within specified time limits, those entries are deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer,

[5] 19 U.S.C. § 1504 was enacted in the Customs Procedural Reform and Simplification Act of 1978, as Section 504 of the Tariff Act of 1930. Pub. L. 95-410, Title II, § 209(a), 92 Stat. 902 (1978).

his consignee, or agent.[6] The general time limit on liquidation, imposed under § 1504(a), is one year from the date of entry or final withdrawal from warehouse. However, § 1504(b) permits Customs to extend that period, by providing notice to the importer, for any of the following reasons:

> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officers;
>
> (2) liquidation is suspended as required by statute or court order; or
>
> (3) the importer, consignee, or his agent requests such extension and shows good cause therefor.

Where liquidation of an entry is "suspended", notice to the importer and any authorized agent and surety is required under § 1504(c). Finally, under § 1504(d), any entry not liquidated at the expiration of four years from the date of entry or withdrawal from warehouse is deemed liquidated at the initially asserted amount of duty "unless liquidation continues to be suspended as required by statute or court order."[7]

In this case, the ITA did not publish its review determination until over four years after the latest entry date covered by the review. Plaintiffs do not dispute that the pendency of the § 1675(a) review necessitated an extension of the liquidation period beyond the one-year deadline specified in § 1504(a). They contend, however, that there was no lawful basis for an extension or suspension beyond the four-year limit under § 1504(d). Plaintiffs assert that there was no statutory authority for a suspension beyond the limit; and since defendant failed to seek a court ordered suspension, the entries should have been deemed liquidated after four years.

Although apparently no court has addressed a challenge to an ITA review based on 19 U.S.C. § 1504(d), in *Ambassador Division of Florsheim Shoes* v. *United States, supra,* the Federal Circuit had occasion to interpret the terms of 19 U.S.C. § 1504(a) and (b) in the connection with a challenge to a periodic review of a countervailing duty determination. The court therein upheld the ITA's authority to apply the final results of its review retrospectively to entries of merchandise covered by the review. The court found that authority in the language of § 1504(b)(1) and (2), which it concluded could be invoked to extend the period within which liquidation must occur beyond the one-year limit prescribed in § 1504(a). Such an extension could be based on § 1504(b)(1), inasmuch as information concerning

[6] The Trade and Tariff Act of 1984 amended 19 U.S.C. § 1504 by substituting references to "the importer, his consignee, or agent" with the term "importer of record." Pub. L. 98-573, § 191(d).

[7] The full text of 19 U.S.C. § 1504(d) (1982) is as follows:

> Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer, his consignee, or agent, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

liability for contervailing duties (which the court reasoned "could well be considered an item of 'classification' ") was not available to Customs officers until the ITA had completed its review. 748 F.2d at 1563. The extension could also be based on § 1504(b)(2) because the administrative review scheme established in 19 U.S.C. § 1675(a) would be frustrated unless it created an implied statutory requirement that liquidation be suspended. *Id.* at 1563–65.

Applying the *Florsheim* analysis to this case, it is equally true that the defendant could invoke § 1504(b)(1) to extend the liquidation period beyond one year, since liability for antidumping duties is no less an "item of classification" than liability for countervailing duties. However, that ground for extension is not incorporated in § 1504(d), which sets the outside limit on extensions at three extra years. Consequently, the fact that Customs officials lack information necessary to assess antidumping duties due to the ITA's failure to complete its review would not, of itself, justify extending the liquidation deadline beyond four years.

The basis for extending the liquidation period found in § 1504(b)(2)—that "liquidation is suspended as required by statute"—is also satisfied in this case. In concluding that a periodic review of a countervailing duty determination triggers an implied statutorily required suspension of liquidation, the Federal Circuit in *Florsheim* focused on the "absurd consequences" of holding otherwise. That rationale is unnecessary where, as here, the administrative review is of an antidumping finding. Because 19 U.S.C. § 1675(a)(2) expressly calls for the retrospective application of antidumping review determinations (*see ante*, note 4), suspension of liquidation during the pendency of a periodic antidumping review is unquestionably "required by statute".

As previously noted, the suspension exception in § 1504(b)(2) is also incorporated in § 1504(d) as an exception to the four-year outside limit on liquidation. Accordingly, so long as suspension of liquidation continues to be required by statute (or court order), a suspension may continue indefinitely. In this case, suspension of liquidation was required by virtue of § 1675(a)(2). Hence, the court must determine whether that suspension continued until the ITA completed its review on January 10, 1985, or whether any statutory time limit on agency action operated to terminate the suspension before that date. Plaintiffs have cited two limitations provisions in the antidumping statutes which are arguably pertinent.

The first and most obvious provision is the 12-month deadline for publication of periodic review results specified in 19 U.S.C. § 1675(a)(1). That deadline, of course, was well exceeded in this case. In *Phillip Brothers, Inc.* v. *United States*, 10 CIT ——, 630 F. Supp. 1317, 1323–24 (1986), this court rejected the contention that the statutory suspension of liquidation during a periodic review terminates when the ITA exceeds the 12-month deadline under § 1675(a)(1) so that the merchandise under review must be deemed

liquidated pursuant to § 1504(a). The court noted that statutory time limits on administrative acts have generally been viewed as directory, rather than mandatory, where the statute does not specify adverse consequences for the agency's failure to meet the time limit. *E.g., Katunich* v. *Donovan*, 8 CIT 156, 160–62, 594 F. Supp. 744, 748–50 (1984); *Alberta Gas Chemicals, Inc.* v. *United States*, 1 CIT 312, 315–16, 515 F. Supp. 780, 785 (1981). Turning specifically to § 1675(a)(1), the court stated:

> [T]here is nothing in the statute or legislative history that compels the conclusion that the implied suspension automatically terminates at the close of the twelve-month period specified in [§ 1675(a)(1)]. Thus, in this situation the court is unable to impose a penalty of deemed liquidation for the delay.

10 CIT at ——, 630 F. Supp. at 1324.

Plaintiffs have made no attempt to distinguish *Phillip Brothers* other than to point out that the claim of "deemed liquidation" was based on § 1504(a) rather than § 1504(d). That fact would seem immaterial, since neither provision directs that entries be deemed liquidated when liquidation is statutorily suspended. The only relevant question is whether the ITA's failure to meet the 12-month deadline under § 1675(a)(1) terminated the statutory suspension, and *Phillip Brothers* at least purported to hold that it did not.

One could argue, however, that although the court in *Phillip Brothers* only considered § 1504(b)(2) (i.e., liquidation is statutorily suspended) as a basis for extending the liquidation period beyond the one-year limit in § 1504(a), *Florsheim* established that an extension could also be based on § 1504(b)(1) (i.e., Customs officers lack necessary information). Hence, despite what the court said in *Phillip Brothers*, one could reach the same result by holding that the publication deadline under § 1675(a)(1) terminated the statutory suspension of liquidation, and thus the ground for extension in § 1504(b)(2), but not the ground in § 1504(b)(1) since Customs still lacked information needed to assess antidumping duties. However, because the statutory suspension would have terminated, there would be no basis for an extension past the four-year limit under § 1504(d).

One deficiency in this argument is its failure to elucidate *why* the § 1675(a)(1) deadline should extinguish the § 1504(b)(2) ground for extension but not the (b)(1) ground. If in fact the suspension of liquidation has expired, why shouldn't Customs simply assess antidumping duties in the "deemed liquidated" amount? (*See infra*, note 12). Furthermore, because nothing in the text or history of § 1675(a) shows that Congress intended to impose the penalty of deemed liquidation when a review is not completed after four years, the *reasoning* of *Phillip Brothers* would necessarily apply in this case.

It should also be emphasized that the *Phillip Brothers* holding does not leave private parties powerless to stop the ITA from exceeding the § 1675(a)(1) deadline by as long as it pleases. In the recent case of *Brock* v. *Pierce County*, —— U.S. ——, 106 S. Ct. 1834 (1986), the Supreme Court unanimously held that where the Labor Department failed to meet a comparable statutory deadline in issuing its final determination regarding misuse of CETA funds by a grant recipient, the agency did not lose its power to recover those funds. The court stated:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended for the agency to lose its power.

—— U.S. at ——, 106 S. Ct. at 1839. One "less drastic remedy" discussed by the Court is a judicial action to enforce the statutory deadline. *Id.* at n. 7. That remedy clearly would be available to participants in ITA review proceedings where the ITA exceeds the publication deadline, by virtue of this court's jurisdiction under 28 U.S.C. § 1581(i)(4).[8] *Cf., Allen* v. *Regan*, 9 CIT ——, 607 F. Supp. 133, 134 (1985) (action under § 1581(i)(4) to compel disposition on broker's license application after four-year delay).

The only other pertinent provision invoked by plaintiffs is 19 U.S.C. § 1673e(a)(1), which imposes deadlines on the Customs Service for the assessment of antidumping duties. That provision states:

> Within 7 days after being notified by the Commission of an affirmative determination under section 1673d(b) of this title, the administering authority shall publish an antidumping duty order which—
>
> (1) directs customs officers to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than—
>
> (A) 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption, or
>
> (B) in the case of merchandise not sold prior to its importation into the United States, 12 months after the end of the annual accounting period of the manufacturer or exporter within

[8] 28 U.S.C. § 1518(i)(4) provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> • • •
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

> which it is sold in the United States to a person who is not the exporter of the merchandise.

The provision was enacted in the Trade Agreements Act of 1979 (about a year after the enactment of 19 U.S.C. § 1504) as part of the Tariff Act of 1930. Plaintiffs especially emphasize the following comments on § 1673e(a)(1) from the 1979 report of the Senate Finance Committee:

> *Present law.*
> * * *
>
> There are no time limits on assessments of special dumping duties under current law. However, under section 504 of the Tariff Act (19 U.S.C. 1504), liquidation of entries must generally occur within 1 year after the date of entry, with administrative extensions in certain circumstances for up to 3 years.
> * * *
>
> *Reason for the provision.*—Section 736 [of the Tariff Act of 1930 (19 U.S.C. § 1673e)] would establish time limits on the assessment of antidumping duties, require cash deposits of estimated duties upon entry, and prescribe the entries to which antidumping duties may be applied. In establishing time limits on assessments, [§ 1673e] creates an affirmative obligation on the Customs Service. Although the requirement that estimated antidumping duty deposits be made as security pending liquidation should reduce the damage which delayed assessment may cause a domestic industry, the committee intends that antidumping duties be collected expeditiously. This will reduce the uncertainty which prevails during suspension of liquidation for both the importer and the domestic industry. In light of the dismal performance of the Department of the Treasury in assessing special dumping duties in the recent past, the committee considers this time limit to be an extremely important addition to the law.

S. Rep. No. 96–249, 96th Cong., 1st Sess. 75–77 (1979).

Plaintiffs' position presumably is that the time limits on assessment under § 1673e(a)(1) have expired, which cancelled the suspension of liquidation; and that, in any event, the legislative history shows that Congress intended the 4-year limit on liquidation under 19 U.S.C. § 1504(d) to serve as the outside limit on all antidumping duty assessments.

As an initial matter, it is hardly clear that the time limits on assessment under § 1673e(a)(1) have in fact expired in this case. It could be argued that because the deadlines specified in sub-parts (A) and (B) of § 1673e(a)(1)—which clearly were exceeded—are preceded by the words "but in no event later than", Congress intended those deadlines to apply in all cases as outside limits on the assessment of antidumping duties. The context of those time limits within the

statute, however, reveals that they apply to assessments of antidumping duties consequent to the ITA's publication of an antidumping duty order. Even assuming that those time limits were intended to apply to assessments of duties on merchandise subject to a § 1675(a) periodic review, the time limits would not reasonably come into play until after the ITA has published the final results of its review. The obligation created by § 1673e(a)(1), as the above quoted legislative history underscores, is *upon the Customs Service* to collect antidumping duties "expeditiously." That obligation logically would not arise, and thus could not be breached, until the ITA has furnished Customs with the determination upon which assessments must be predicated. *See* 19 U.S.C. § 1675(a)(2).

But even were the court to assume that the deadlines on assessment in § 1673e(a)(1) properly applied despite the pendency of a periodic review, it would not follow that the consequence of exceeding those deadlines was termination of the statutory suspension of liquidation. Neither the terms of § 1673e(a)(1) nor the legislative history compels such a result. Although the Senate Finance Committee report strongly expressed the expectation that Customs comply with applicable time limits, it did not specify deemed liquidation as a penalty for noncompliance. Accordingly, under the reasoning of *Phillip Brothers*, the suspension of liquidation continued regardless of whether the assessment deadlines in § 1673e(a)(1) were exceeded. If plaintiffs felt they were prejudiced by the defendant's delay, their remedy was to bring an action to enforce the applicable statutory deadlines.

Finally, the court rejects plaintiffs' contention that the Senate report's reference to 19 U.S.C. § 1504 shows that Congress intended the four-year deadline in § 1504(d) to be outside limit on the suspension of liquidation of entries covered by a periodic review. Significantly, the report mentions § 1504 only in its description of the law in effect prior to the 1979 Act. The construction of that prior law is not before the court[9] because the provisions of the 1979 Act govern assessments on all entries covered by this review. Indeed, because the effective dates of § 1504 and the 1979 Act operate to overlap[10], apparently no case will ever arise in which the assessment of dumping duties is governed by pre-1979 Act law (i.e., the Antidumping Act of 1921) as well as by the time limits on liquidation imposed

[9] The legislative history of 19 U.S.C. § 1504 makes no specific mention of the provision's impact on antidumping duty assessments. *See* S. Rep. No. 95–778, 95th Cong., 2d Sess. 4, 31–32 (1978); H.R. Rep. No. 95–621, 95th Cong., 1st Sess. 24–26 (1977). The House report gives only one example of a statutorily required suspension of liquidation, in connection with § 1504(b)(2), namely where "evidence that merchandise subject to an 'actual use' provision was in fact used for that prescribed purpose may be filed, pursuant to statute, up to three years after entry". *Id.*, at 25. *See* General Interpretive Rule 10(e), Tariff Schedules of the United States.

The Senate report, on the other hand, offers no explanation of the specific grounds for extending the liquidation period, but states generally that § 1504 would eliminate "unanticipated requests by Customs, many years after importation, for additional duties which often result in substantial losses to importers because they were unable to anticipate such duties when pricing their products." S. Rep. No. 95–778, at 4.

[10] 19 U.S.C. § 1504 applies to merchandise entered or withdrawn for consumption at least 180 days after the enactment date, October 3, 1978. Pub. L. 95–410, Title II, § 209(b), 92 Stat. 903 (1978). The provisions of the 1979 Act, on the other hand, apply to "the assessment of, or failure to assess, any countervailing duty or antidumping duty if the assessment is made after [January 1, 1980]." Pub. L. 96–39, Title X, § 1002(b)(3), 93 Stat. 307 (1979). The ITA indicated in the notice of its intent to conduct administrative reviews of Treasury antidumping findings, published March 28, 1980, that in each case the first review would cover "all entries with dates of purchase or export, as appropriate, occurring subsequent to the period covered by the last published master list, or, as a minimum, the last 12-month period." 45 Fed. Reg. at 20512.

under § 1504. At any rate, although it seems reasonable to read the Senate report as indicating that § 1504(d) *would have* imposed an outside deadline of four years on special dumping duty assessments under the Antidumping Act of 1921 (had it not been repealed), it does not follow that § 1504(d) imposes the same deadline on assessments under the current antidumping law. In addition to the considerations discussed above, a comparison of the assessment and review procedures under prior law with those established in the 1979 Act persuades the court that Congress intended the suspension of liquidation required during § 1675 reviews to override the "deemed liquidated" provisions of § 1504.

The Antidumping Act did not provide for special duty assessments pursuant to periodic administrative reviews. Rather, Customs officers assessed duties upon entries subject to a prior Treasury finding by conducting and comparing appraisals of the foreign market value and the purchase price or exporter's sales price for specific entries. 19 U.S.C. § 168 (1976). Importers could challenge antidumping findings and assessments of special dumping duties only by means of the protest procedures applicable to challenges or ordinary duty assessments. 19 U.S.C. § 169 (1976). Thus, an importer was required to wait until an entry was liquidated and then file a protest pursuant to 19 U.S.C. § 1514 (1976). If the protest was denied as provided in 19 U.S.C. § 1515 (1976), the importer could challenge that denial in an action in the Customs Court pursuant to 28 U.S.C. § 1582(a) (1976).[11]

If the Antidumping Act had not been repealed shortly after 19 U.S.C. § 1504 took effect, then entries subject to an antidumping finding which were not liquidated within four years presumably would have been "deemed" liquidated" at the amount of duties asserted at the time of entry by the importer, in accordance with § 1504(d).[12] Under the Antidumping Act, Treasury usually required the importer to post a bond pending liquidation of entries subject to an antidumping finding covering the amount of estimated special dumping duties, pursuant to 19 U.S.C. § 1623 (1976). *See* S. Rep. No. 96-249, at 75. Hence, if such entries were "deemed liquidated", the dumping duties assessed would have been the amount of the bond covering estimated dumping duties on those entries. Thereafter, if the importer felt that the amount was excessive or that dumping duties should not have been assessed, he could challenge the assessment by filing a protest. Customs officers would then have up to

[11] Under pre-1979 Act law, parties representing domestic interests had a right of action only to challenge either the non-assessment of dumping duties or a negative antidumping determination, following procedures prescribed in 19 U.S.C. § 1516 (1976).

[12] The amount of duties "asserted at the time of entry by the importer", within the meaning of § 1504(a) and (d), is not what the importer *desires* to assert upon entry, but what the importer is *required by Customs officers* to assert when filing the entry summary. *See* 19 C.F.R. §§ 159.11(a) and 159.12(f); *Detroit Zoological Society* v. *United States*, 10 CIT ——, 630 F Supp. 1350, 1355 n. 9 (1986).

two years to review the protest (during which time they undoubtedly would conduct a proper appraisal of the merchandise). If the protest was denied, in whole or in part, the importer would be entitled to a trial *de novo* in the Customs Court.

In short, importer challenges to assessments on "deemed liquidated" entries under the Antidumping Act would have, fairly and straightforwardly, involved the same procedures used for challenges to dumping duty assessments on appraised entries and for challenges to normal customs duty assessments.

Under the 1979 Act, by contrast, antidumping duties are assessed upon entries subject to a prior order or finding based upon the results of periodic agency reviews. 19 U.S.C. § 1675(a) (1982). As discussed above, the retroactive effect of such reviews requires that liquidation of the covered entries be suspended while the review is pending.

In addition, the use of protest procedures for importer challenges to administrative determinations and special duty assessments under the Antidumping Act has been eliminated. The 1979 Act establishes a uniform procedure in which any "interested party" who has participated in an administrative proceeding (such as a periodic review by the ITA) may directly challenge the agency's final determination by bringing an action for review upon the agency record in the Court of International Trade. 19 U.S.C. §§ 1514(b), 1516a (1982); 28 U.S.C. § 1581(c) (1982). In explaining this new review procedure under the 1979 Act, the Senate Finance Committee stated:

> Subsection (a) of new [19 U.S.C. § 1516a] provides a list of the types of antidumping and countervailing determinations which will now be reviewable. This increase in the number of determinations subject to judicial review in the Customs Court is intended to provide greater procedural safeguards than exist under current law and to expedite the obtaining of judicial relief * * *
>
> Under current law, no suit can be instituted by an importer or by an American manufacturer, producer, or wholesaler under [19 U.S.C. § 1516(a)–(c) (1976)] until at least one entry has been liquidated. This requirement that at least one entry be liquidated can result in the denial of effective relief in some instances * * *
>
> Under [19 U.S.C. § 1516a] any person with standing in an antidumping or countervailing duty case can challenge a determination in the Customs Court within 30 days of notice of the determination. There is no need for administrative review by the authority or the Commission * * * The bill thus represents a significant improvement over present law both in terms of shortening the overall review process and eliminating the disparity in review procedures provided to importers and domestic interested parties * * *
>
> *For importers, this fact will result in a significant change of procedure.* Under current law, an importer may challenge the imposition of a countervailing or antidumping duty only with

> respect to those entries of his which have been assessed with a duty of this nature. *Pursuant to [§ 1516a], the importer's right to challenge the assessment of a countervailing and antidumping duty is contained exclusively in [§ 1516a] and the importer will be required to challenge the assessment of an antidumping or countervailing duty when the final finding or order is published or when periodic announcement of the amount to be assessed is published pursuant to [19 U.S.C. § 1675].*

S. Rep. No. 96–249, at 250–51 (1979) (emphasis added). The plain implication of these comments is that Congress eliminated the use of protests and made § 1516a challenges to agency determinations the exclusive remedy for parties wishing to contest the basis of antidumping duty assessments, not because it wished to curtail the availability of judicial review of those assessments, but because it contemplated that antidumping duties would be assessed *only* pursuant to reviewable agency determinations.

Because present law mandates that importers deposit estimated antidumping duties on entries subject to an antidumping duty order, *see* 19 U.S.C. § 1673e(a)(3), if entries under periodic review could be "deemed liquidated", as plaintiffs contend, antidumping duty assessments on those entries would be in the amount of the deposits. The question then would arise: how might a party who is dissatisfied with the amount of such assessments go about challenging them? Because the assessments would not stem from a new agency determination, they could not be challenged in a § 1516a action and this court would not have jurisdiction under 28 U.S.C. § 1581(c).

Arguably, perhaps, a "constructive determination" could be recognized, consisting of the previous final determination (upon which the required deposits were based) as applied to those entries deemed liquidated. It is unclear, however, when the limitation period for filing such an action would commence (since no determination was "published"), or what the "agency record" would consist of. Perhaps jurisdiction could be found under 28 U.S.C. § 1581(i)(4), but the parameters of such an action would also be uncertain. The complexity of the situation would be compounded if the ITA were to publish the results of its review after a *portion*, but not all, of the covered entries were "deemed liquidated" at the amount of estimated duty deposits. Finally, because the ITA must reply on current information for a review determination to be lawful, *see Freeport Minerals* v. *United States*, 776 F.2d 1029 (Fed. Cir. 1985); *Timken Co.* v. *United States*, 10 CIT ——, 630 F. Supp. 1327, 1332–34 (1986), any recognized action challenging the basis of dumping assessments on entries deemed liquidated would necessarily result in a remand to the ITA for a determination using data attributable to those entries. Hence, the end result would be no different than if the suspension of liquidation had continued until the ITA completed its review. Although the court could impose time limits upon the ITA for compliance with the order of remand, the same degree of judicial control

could sooner be obtained in an action to enforce the statutory deadlines, discussed previously.[13]

The court has engaged in the above speculation merely to demonstrate that plaintiffs' reading of the new law in relation to § 1504, if not "absurd", is at least "highly implausible". The court cannot believe that Congress tacitly envisioned such a construction. The "deemed liquidated" penalty of § 1504 operates irrationally, and if applied in an antidumping context could lead to particularly inequitable assessments, since the amount of deposited duties may bear little relation to actual dumping margins.[14] In that situation it would seem especially critical that parties be guaranteed an adequate means to challenge the basis of the assessments. The scheme for judicial review of agency determinations under the new law, if applicable at all, is ill-suited to that purpose. Congress' failure to address its difficulty, coupled with its clearly expressed expectation that periodic review determinations would provide the basis for antidumping duty assessments on covered entries, persuades the court that Congress intended the statutory suspension of liquidation during a periodic review to override the possibility of deemed liquidation under § 1504(d).

The court, of course, does not condone the ITA's failure to meet its statutory time limits. However, the availability of an action to enforce those time limits accords adequate protection to parties who are truly aggrieved by undue agency delays.

Because the court holds that the statutorily required suspension of liquidation continued until the ITA published the final results of its review, it is ORDERED that plaintiffs' motion for partial judgment upon the agency record is hereby denied.

[13] Congress facilitated this court's ability to enforce such deadlines with the grant of full equitable powers in the Customs Court Act of 1980. *See* 28 U.S.C. §§ 1585, 2643(c)(1) (1982).

[14] It is unclear from the record whether Customs required deposits of estimated dumping duties on all or any of the entries covered in this review, but the court presumes that plaintiffs would escape considerable potential liability if the entries were deemed liquidated. *See* Defendant's brief, at 41–42. The resulting windfall to plaintiffs would penalize not only the defendant, by depriving it of revenues, but also plaintiffs' domestic competitors (who played no part in the defendant's delay), by depriving them of the protection of the antidumping law. The inequity in this case would be especially egregious, since the ITA's delay was occasioned principally to facilitate the late intervention of the West German government on plaintiffs' behalf. It is doubtful that plaintiffs actually felt prejudiced by this delay which, indeed, resulted in substantial reductions in the ITA's margin calculations.

Of course, "deemed liquidation" could equally operate to unfairly penalize an importer, if the assessed deposits of estimated duties were greater than actual dumping margins.

(Slip Op. 86–84)

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; MATSUSHITA ELECTRIC CORP. OF AMERICA; PANASONIC HAWAII, INC.; MATSUSHITA ELECTRIC OF PUERTO RICO, INC.; VICTOR CO. OF JAPAN, LTD.; AND US JVC CORP., PLAINTIFFS *v.* UNITED STATES, THE DEPARTMENT OF COMMERCE; MALCOLM T. BALDRIDGE, SECRETARY OF COMMERCE; BRUCE SMART, UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE; PAUL FREEDENBERG, ASSISTANT SECRETARY OF COMMERCE FOR TRADE ADMINISTRATION; GILBERT B. KAPLAN, DEPUTY ASSISTANT SECRETARY OF COMMERCE FOR IMPORT ADMINISTRATION, DEFENDANTS

Court No. 86–07–00902

MEMORANDUM OPINION AND ORDER

RAO, *Judge:* This civil action is before the Court on plaintiffs' application, brought on by an order to show cause, for a preliminary injunction. Plaintiffs seek to enjoin the Commerce Department (Commerce) from conducting any administrative reviews of T.D. 71–76, the dumping finding covering television receiving sets, monochrome and color, from Japan, as to such merchandise produced by plaintiffs, for periods after August 18, 1983, unless and until it is determined that final revocation of T.D. 71–76 as to plaintiffs is not warranted.

Plaintiffs also seek to require Commerce to conduct and complete administrative reviews under T.D. 71–76 as to their merchandise for the periods April 1, 1981 to March 31, 1982, April 1, 1982 to March 31, 1983 and April 1, 1983 to August 18, 1983 and to require Commerce to employ the "traditional methodology" for determining whether dumping margins exist. Plaintiffs seek to compel Commerce to determine, based on these reviews, whether final revocation of T.D. 71–76 as to plaintiffs is warranted.

Defendants oppose the motion for a preliminary injunction and have moved to dismiss the action for lack of jurisdiction and failure to state a claim upon which relief can be granted, or alternatively, for summary judgment. Defendants also move for a stay of discovery and for a protective order relieving them of the obligation to respond to discovery requests, including a request for documents and notices of deposition for six Commerce Department officials.

It is defendants' position that plaintiffs' motion for a preliminary injunction is not supported by sufficient facts that show that plaintiffs are likely to be immediately and irreparably harmed in the absence of an injunction, that they have not made the requisite showing that they are likely to prevail on the merits of their claim or that the balance of hardships or the public interest favors the grant of the preliminary injunction.

The Court will decide only the question of whether the preliminary injunction should issue, since the Rules of this Court provide for response time for the other pending motions.

FINDINGS OF FACTS

T.D. 71–76, promulgated in March, 1971 and later modified by T.D. 75–40, is a dumping finding with respect to television receivers from Japan. On April 28, 1980 plaintiffs entered into a settlement agreement with the United States respecting their potential liability for dumping duties assessed pursuant to T.D. 71–76 on entries of color television receivers imported from Japan through March 31, 1979.

Since that time, the administration of the antidumping laws of the United States devolved to Commerce and Commerce was required by statute to perform annual reviews of antidumping duty orders. Commerce performed two such annual reviews with respect to television sets from Japan and found no dumping of the involved merchandise by Matsushita and only *de minimus* dumping margins with respect to Victor Company of Japan (VCJ). Pursuant to 19 U.S.C. § 1675(c) plaintiffs then applied for a revocation of T.D. 71–76 as to their merchandise, based on the two year, no dumping findings of the first and second annual reviews. Commerce issued a tentative revocation of T.D. 71–76 as to plaintiffs' merchandise on August 18, 1983, published in the Federal Register at 48 Fed. Reg. 37508 (1983). Since that time defendants have made no further determinations with respect to plaintiffs' color television sets, despite plaintiffs' submissions at a hearing in December, 1983 which plaintiffs allege demonstrated no likelihood of the resumption of sales at less than fair value.

Commerce admits that it has delayed in initiating and completing the annual administrative reviews mandated by the statute and that it has not made any final determinations in its third, fourth, partial fifth, full fifth, sixth or seventh reviews. It does not offer any explanation as to the reason that a final determination respecting plaintiff's application for revocation of T.D. 71–76 has not been made. This despite the language of Commerce's own regulation, 19 C.F.R. 353.54(f) to the effect that "[a]s soon as possible after publication of a 'Notice of Tentative Determination to Revoke or Terminate', the Secretary will determine whether final revocation or termination is warranted. * * *"

Commerce relies on *Freeport Minerals Co.* v. *United States*, 776 F.2d 1029 (Fed. Cir. 1985) for support of its position that if the data supporting the revocation application have become stale, Commerce may not lawfully revoke an antidumping duty order or finding. Commerce also defends its intended use of a new methodology by explaining that plaintiffs have not been injured by such use since it has not yet been implemented.

Based on the above facts, the Court grants the preliminary injunction to the following extent:

[1] The Court preliminary enjoins defendants from conducting any administrative reviews under T.D. 71–76 as to these plaintiffs until it has made a final determination as to the final revocation of T.D. 71–76 with respect to plaintiffs' products covered by that order. The plaintiffs have demonstrated that they have acted promptly in supplying Commerce with all the data requested and that they have attempted to adhere to pricing formulae which would not put them within the ambit of T.D. 71–76 and which would keep them in compliance with the terms of the settlement agreement. Commerce, in that agreement, provided that it would "promptly revoke or modify T.D. 71–76 as soon as circumstances warrant such revocation or modification in accordance with procedures set forth in * * * applicable regulations * * *" Considering that Commerce has given no reason for the delay in making a final determination as to whether to revoke T.D. 71–76 as to plaintiffs' television sets, this Court finds that the plaintiffs would be irreparably harmed by having to comply with Commerce's demands for data and verification of those data for years beyond those involved in the revocation determination decision. The compilation of data and its verification requires an expenditure of effort in both human and other resources for which plaintiffs will not be recompensed should it be found that plaintiffs have not been dumping and that T.D. 71–76 is revoked as to them.

Without deciding the final issues in the case in this preliminary proceeding and considering that defendants have not yet filed their answer to the complaint, it is the opinion of this Court that a prima facie case can be made out on the allegations in the complaint and the affidavits that have been filed in support of plaintiffs' motions. Additionally, defendants have not adduced a reasonable ground for not acting on plaintiffs' application for revocation of the dumping order as to them. See *Chevron Standard Limited and Chevron Chemical Co.* v. *United States*, 563 F. Supp. 1381, 5 C.I.T. 178 (1983).

If the preliminary injunction does not issue, plaintiffs will be required to provide a large amount of information and verify it for years beyond August 18, 1983, both irrelevant activities if T.D. 71–76 was revoked as to their merchandise. If Commerce is enjoined from including plaintiffs' television imports in any administrative review conducted for years *after* those required for a determination pertaining to revocation of T.D. 71–76 as to plaintiffs and it is later determined that T.D. 71–76 should *not* be revoked as to plaintiffs, it can then determine whether plaintiffs fall within the purview of the dumping order for those years. Whereas plaintiffs would be required to provide a large amount of information and provide for its verification if the preliminary injunction does not issue, defendants are merely being required to refrain from activity without losing any advantage if the preliminary injunction issues. The balance of hardships thus favors the plaintiffs.

The public interest will also be served if the motion for the preliminary injunction is granted. The public interest is best served when a government agency expends its resources to perform its duties in a timely and expeditious manner, considering only relevant data. If it should be determined that T.D. 71-76 should be revoked as to plaintiffs any additional review which Commerce would make as to entries subsequent to the revocation would be an unwarranted utilization of agency resources.

The Court also decides that, since there can be no change in the information available for entries of plaintiffs' color television sets for the periods April 1, 1981 to March 31, 1982, April 1, 1982 to March 31, 1982 and April 1, 1983 to August 18, 1983, that Commerce cannot logically request new (not "stale") information for those years. Nor can plaintiffs logically be expected to have maintained their records for those years based on Commerce's new accounting procedures. Commerce must examine the information and verify it using accounting procedures that were agreed to during these time periods.

Defendants motion to dissolve the temporary restraining order is denied as mooted by this Order.

The Court reserves all other matters and motions now pending in this case.

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/219	Watson, J. August 7, 1986	Nanasi Co.	R67/18931	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, together with their accessories and parts, an entirety
V86/220	Watson, J. August 12, 1986	Bloomfield Industries	R63/8627	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Knives
V86/221	Watson, J. August 12, 1986	Bunge Corp.	290982A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
V86/222	Watson, J. August 12, 1986	Craig Panorama, Inc.	R65/10600, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts, an entirety
V86/223	Watson, J. August 12, 1986	Domast Inc.	R61/13740, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Boston Transistor radios, together with their accessories and parts, an entirety
V86/224	Watson, J. August 12, 1986	John L. Westland & Son, Inc.	R60/11868, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts, an entirety

V86/225	Watson, J August 12, 1986	Durlacher & Co	282681A, etc	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs
V86/226	Watson, J August 12, 1986	Kayten Trading Co	R59/17461, etc	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts; an entirety
V86/227	Watson, J August 12, 1986	Karl Schroff & Assoc	R63/7275, etc	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, together with their accessories and parts;
V86/228	Watson, J August 12, 1986	Mitsui & Co	R62/15617, etc	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Sewing machine parts
V86/229	Watson, J August 12, 1986	National Silver Co	R63/5030	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Flatware
V86/230	Watson, J August 12, 1986	National Silver Co	R64/23489, etc	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Flatware
V86/231	Watson, J August 12, 1986	National Silver Co	R65/18869	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Flatware
V86/232	Watson, J August 12, 1986	National Silver Co	R69/25	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Flatware
V86/233	Watson, J August 12, 1986	Nichimen Co	R58/22077, etc	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Fabric
V86/234	Watson, J August 12, 1986	Nichimen Co	R59/683, etc	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Fabric
V86/235	Watson, J August 12, 1986	Rugby Int'l Corp	R66/22046	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Houston Tube mats
V86/236	Watson, J August 12, 1986	Rugby Int'l Corp	R67/14258	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Tube mats
V86/237	Watson, J August 12, 1986	Suncoast Merchandise Corp	R59/9198	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Folding opera glasses
V86/238	Watson, J August 12, 1986	Triumph Import & Export Co	R58/161, etc	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Chicago Binoculars

ABSTRACTED VALUATION DECISIONS — Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/239	Watson, J. August 12, 1986	Waller Corp.	R65/2543, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios, together with their accessories and parts, an entirety
V86/240	Newman, S.J. August 13, 1986	The DeLaval Separator Co.	80-10-01682	Export value	Invoice unit values, net packed, shown on the commercial invoices with the entry papers	Agreed statement of facts	Buffalo Not stated
V86/241	Re, C.J. August 18, 1986	Korvettes	73-7-01849	Export value	Appraised values to reflect currency revaluation	Agreed statement of facts	New York not stated
V86/242	Re, C.J. August 18, 1986	M. Pressner Co.	73-3-00642	Export value	Appraised values to reflect currency revaluation	Agreed statement of facts	Newark Not stated

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/150	Restani, J. August 11, 1986	Algoma Tube Corp.	83-9-01348	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/151	Restani, J. August 11, 1986	Algoma Tube Corp.	84-2-00188	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/152	Restani, J. August 11, 1986	Algoma Tube Corp.	84-5-00654	Item 610.42 or 610.43 7.5% or 11% plus additional duties on alloy content	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/153	Restani, J. August 11, 1986	Algoma Tube Corp.	84-6-00776	Item 610.42 or 610.43 7.5%, 7%, 11% or 9.4%	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/154	Restani, J. August 11, 1986	Algoma Tube Corp.	84-6-00844	Item 610.42 or 610.43 7.5%, 7%, 11% or 9.4% plus additional duties on alloy content	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/155	Restani, J. August 11, 1986	Algoma Tube Corp.	84-9-01293	Item 610.42 or 610.43 7.5% or 11%	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/156	Restani, J. August 11, 1986	Algoma Tube Corp.	85-3-00350	Item 610.42 or 610.43 7.5% or 11%	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/157	Restani, J. August 11, 1986	Algoma Tube Corp.	85-9-01251	Item 610.42 or 610.43 7.5%, 6.5%, 11% or 7.8%	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/158	Newman, S.J. August 13, 1986	Dubton House, Inc.	85-12-01737	Item 254.4620 3.5%	Item 252.6745 Free of duty	Agreed statement of facts	Baltimore Publipress 60 gsm printing paper

NOTICE OF AMENDMENTS TO THE RULES OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

The court, on July 21, 1986, approved certain amendments to the Rules of the United States Court of International Trade, which are to become effective October 1, 1986. The Rules affected by these changes are: Rules 3, 4, 47, 48, 60, 62, 67, 75, 77.1, 89 and Form 3.

Copies of the amendments have been transmitted to the following sources for publication:

U.S. Customs Service
Bureau of National Affairs, Inc.
Clark-Boardman Co.
Invictus Publishing Corp.
The Lawyers Co-operative Publishing Co.
LEXIS Federal Databases
Matthew Bender & Co.
Oceana Publications, Inc.
Rules Service Co.
Shepard's/McGraw-Hill
West Publishing Co.

If you have a copy of the Rules from a commercial publisher, you may wish to communicate with that publisher to determine when the amendments will be available.

Copies of the amendments are available for examination in the court's Library and Case Management Section.

August 20, 1986.

JOSEPH E. LOMBARDI,
Clerk of the Court.

United States Court of International Trade

Amendments to Rules 3, 4, 47, 48, 60, 62, 67, 75, 89 and Form 3

New Rule 77.1

July 21, 1986

Effective date:
October 1, 1986

United States Court of International Trade

Chief Judge
Edward D. Re

Judges
Paul P. Rao
~~[Morgan Ford]~~
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges
Morgan Ford
Frederick Landis
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Rules of the United States Court of International Trade

EFFECTIVE NOVEMBER 1, 1980
(AS AMENDED, [~~JANUARY 1, 1983~~] OCTOBER 1, 1986)

Amendments to Rule 3

Rule 3 is amended as follows:

Rule 3. Commencement of Action

(a) *Commencement.* * * *

(1) * * *

(2) An action described in 28 U.S.C. § 1581(c) to contest a determination listed in section 516A(a)(2) or (3) of the Tariff Act of 1930.*

(b) *Filing Fee—Information Statement.* * * *

(c) *Complaint Fee.* * * *

(d) *Amendment of Summons.* * * *

(e) *Notice to Interested Parties.* * * *

(f) *Precedence of Action.* * * *

Unless the court, upon motion for good cause or upon its own initiative, determines otherwise in a particular action, the following actions shall be given precedence, in the following order, over other actions pending before the court, and expedited in every way:

(1) An action seeking temporary or preliminary injunctive relief;

(2) An action involivng the exclusion of perishable merchandise or the redelivery of such merchandise;

(3) An action described in 28 U.S.C. § 1581(c) to contest a determination under section 516A of the Tariff Act of 1930;

(4) An action described in 28 U.S.C. § 1581(a) to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930, involving the exclusion or redelivery of merchandise;

(5) An action described in 28 U.S.C. § 1581(b) to contest a decision of the Secretary of the Treasury under section 516 of the Tariff Act of 1930.

PRACTICE COMMENT: * * *

*As provided in section 516A(a)(2) of the Tariff Act of 1930, a complaint shall be filed within 30 days after the filing of the summons.

PRACTICE COMMENT: * * *
PRACTICE COMMENT: * * *
PRACTICE COMMENT: * * *

(As amended, July 21, 1986, eff. Oct. 1, 1986.)

Amendments to Rule 4

Rule 4 is amended as follows:

Rule 4. Service of Summons and Complaint

(a) *Summons—Service by the Clerk.* * * *

(1) * * *

(2) * * *

(3) * * *

(4) When the action is described in 28 U.S.C. § 1581(c) and contests a determination listed in section 516A(a)(2) **or (3)** of the Tariff Act of 1930, the clerk shall, in addition to the service prescribed in paragraph (1) of this subdivision (a), also mail a copy of the summons: to the Secretary, United States International Trade Commission, when a determination of that Commission is contested; and to the General Counsel, Department of Commerce, when a determination of that Department is contested.

(5) * * *

(b) *Summons and Complaint—Service by Plaintiff.* * * *

(c) *Service.* * * *

(1) * * *

(2) * * *

(d) *Summons and Complaint—Person To Be Served.* * * *

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(6) * * *

(e) *Return.* * * *

(f) *Amendment of Proof of Service.* * * *

(g) *Alternative Provisions for Service in a Foreign Country.* * * *

(1) * * *

(2) * * *

(h) *Summons and Complaint—Time Limit for Service.* * * *

PRACTICE COMMENT: The clerk is authorized by Rule 4(a) to make service of the summons only in those actions commenced by a summons, i.e., actions described in 28 U.S.C. § 1581(a) or (b), and only those actions described in 28 U.S.C. § 1581(c) which contest a determination listed in section 516A(a)(2) **or (3)** of the Tariff Act of 1930. In all other actions, including those actions described in 28 U.S.C. § 1581(c) which contest a determination listed in section

516A(a)(1) of the Tariff Act of 1930, the plaintiff is required by Rule 4(b) to effect concurrent service of the summons and complaint.

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1985; **July 21, 1986, eff. Oct. 1, 1986.**)

Amendments to Rule 47

Rule 47 is amended as follows:

Rule 47. Jurors

(a) ***Number of Jurors.*** **A jury shall consist of six persons, unless a greater number is specified in the local rules of the district court for the judicial district in which the case is to be tried.**

[~~(a)~~**]** **(b)** *Examination of Jurors.* * * *

[~~(b)~~**]** **(c)** *Alternate Jurors.* The court may direct that not more than **[**~~six~~**] four** jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory callenges if three of four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

(As amended, July 21, 1986, eff. Oct. 1, 1986.)

Amendments to Rule 48

Rule 48 is amended as follows:

Rule 48. **[**~~Juries of Less Than Twelve~~**] Stipulation as to Juries**—Majority Verdict

The parties may stipulate that the jury shall consist of any number less than **[**~~twelve~~**] the number of jurors otherwise required under Rule 47(a),** or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

(As amended, July 21, 1986, eff. Oct. 1, 1986.)

Amendments to Rule 60

Rule 60 is amended as follows:

Rule 60. Relief From Judgment or Order

(a) *Clerical Mistakes.* * * *

(b) *Mistakes, Inadvertence, Excusable Neglect—Newly Discovered Evidence—Fraud, Etc.* On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing under Rule 50(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. **[**~~A motion of a party shall be served and filed not later than 30 days after the judgment, order, or proceeding was entered or taken. The court, upon its own initiative, may also grant relief from a judgment or order as prescribed by this rule not later than 30 days after the date of entry of the judgment or order.~~**] The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.**

This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended, eff. Jan. 1, 1985; **July 21, 1986, eff. Oct. 1, 1986.**)

Amendments to Rule 62

Rule 62 is amended as follows:

Rule 62. Stay of Proceedings To Enforce a Judgment

(a) *Automatic Stay—Exceptions—Injunctions.* Except as stated herein **or as otherwise ordered by the court**, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of

an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on Motion for New Trial or Rehearing, or for Judgment.* * * *

(c) *Injunction Pending Appeal.* * * *

(d) *Stay Upon Appeal.* * * *

(e) *Stay in Favor of the United States or Agency Thereof.* * * *

(f) *Stay According to State Law.* * * *

(g) *Stay of Judgment as to Multiple Claims or Multiple Parties.* * * *

PRACTICE COMMENT: **The court-ordered exception to the 30-day automatic stay under subdivision (a) is intended to permit timely enforcement of judgments in cases involving perishable merchandise, or where time is otherwise shown to be of the essence.**

(As amended, eff. Jan. 1, 1985; **July 21, 1986, eff. Oct. 1, 1986.**)

Amendments to Rule 67

Rule 67 is amended as follows:

Rule 67. Deposit in Court

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of 28 U.S.C. § § 2041, **[and]** 2042 **and 2043**; **[~~the Act of June 26, 1934, c. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), 31 U.S.C. § 725v;~~]** or any other like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

(As amended, eff. Jan. 1, 1985; **July 21, 1986, eff. Oct. 1, 1986.**)

Amendments to Rule 75

Rule 75 is amended as follows:

Rule 75. Practice—Appearance—Substitution of Attorneys—Withdrawal of Attorney—**Notification of Changes**

(a) *Practice.* Only an attorney admitted to the bar of the court may practice before the court **[*], except that an individual may represent himself in an action.** An attorney who is employed or retained by the United States, or an agency or officer thereof, may

[*~~An individual may represent himself in an action commenced on his own behalf.~~]

enter an appearance, file pleadings, and practice in this court in cases in which the United States or the agency is a party.

(b) *Appearances.*

(1) **Except where an individual represents himself in an action, [~~There~~] there** shall be an attorney of record for a party.**[*]** If a summons, pleading or other paper provided for in these rules bears the name, address and telephone number of a member of the bar of this court, he shall be recognized as the attorney of record and no separate notice of appearance shall be required of him. Provided, however, that an attorney representing the United States, or an agency of officer thereof, who is not otherwise admitted to practice before the court, shall serve a separate notice of appearance as prescribed by paragraph (2) of this subdivision (b).

(2) * * *

(c) *Substitution of Attorneys.* * * *

(d) *Withdrawal of Attorney.* * * *

(e) *Notification of Changes.* * * *

PRACTICE COMMENT: * * *

(As amended, July 21, 1986, eff. Oct. 1, 1986.)

Rule 77.1

Rule 77.1 reads as follows:

Rule 77.1. Judicial Conference

(a) *Purpose.* The chief judge is authorized to summon annually the judges of the court to a judicial conference, at a time and place the chief judge designates, for the purpose of considering the business of the court and improvements in the administration of justice in the court. The chief judge shall preside at the conference.

(b) *Composition.* All members of the bar of this court may be members of the conference and participate in its discussions and deliberations.

(c) *Registration Fee.* A registration fee shall be paid by attendees of the conference, and shall be applied to the payment of the expenses of the conference, as approved by the chief judge.

(As added, July 21, 1986, eff. Oct. 1, 1986.)

Amendments to Rule 89

Rule 89 is amended as follows:

Rule 89. Effective Date

(a) *Effective Date of Original Rules.* * * *

(b) *Effective Date of Amendments.* * * *

(c) *Effective Date of Amendment.* * * *

(d) *Effective Date of Amendments.* * * *

(1) * * *

(2) * * *

(e) *Effective Date of Amendments.* * * *

(f) *Effective Date of Amendments.* The amendments adopted by the court on July 21, 1986, shall take effect on October 1, 1986. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(As added, eff. Jan. 1, 1985; as amended June 19, 1985, eff. Oct. 1, 1985; **July 21, 1986, eff. Oct. 1, 1986.**)

Amendments to Appendix of Forms

The Specific Instructions in the Appendix of Forms are amended as follows:

Specific Instructions

Form 1 * * *
Form 2 * * *
Form 3 * * *

This form of summons is to be used only in those actions described in 28 U.S.C. § 1581(c). It is to be used both: (1) when the action is commenced by filing a summons only (i.e., to contest a determination listed in section 516A(a)(2) **or (3)** of the Tariff Act of 1930); and (2) when the action is commenced by filing concurrently a summons and a complaint (i.e., to contest a determination listed in section 516A(a)(1) of the Tariff Act of 1930).

The summons must be filed together with a $50 filing fee, **[~~and~~]** a completed Information Statement (Form 5) **and a completed Disclosure of Corporate Affiliations and Financial Interest (Form 13).**

When the clerk of the court is required to make service of the summons (i.e., those actions commenced by filing a summons only), the original and one copy of the summons must be filed with an additional copy for each defendant to be served; and the back of the summons must list the complete name and mailing address of each defendant to be served.

When the plaintiff is required to make service of the summons (i.e., those actions commenced by filing concurrently a summons and a complaint), the original and one copy of the summons must be filed with proof of service. Before making service of the summons, plaintiff must obtain a court number from the office of the clerk and endorse the number on the summons. For this purpose, a court number may be assigned to the action and obtained by telephone request.

Form 4 * * *
Form 5 * * *

Form 6 * * *
Form 7 * * *
Form 8 * * *
Form 9 * * *

(As amended, July 21, 1986, eff. Oct. 1, 1986.)

Amendments to Form 3

Form 3 is amended as follows: FORM 3

UNITED STATES COURT OF INTERNATIONAL TRADE, PLAINTIFF *v.* UNITED STATES, DEFENDANT

SUMMONS

To: The Attorney General, the Department of Commerce, and/or the United States International Trade Commission:

PLEASE TAKE NOTICE that a civil action has been commenced pursuant to 28 U.S.C. § 1581(c) to contest the determination described below.

L.S. _____
Clerk of the Court

---

1. _____
(Name and standing of plaintiff)

2. _____
(Brief description of contested determination)

3. _____
(Date of determination)

4. _____
(If applicable, date of publication in Federal Register of notice of contested determination)

_____ _____
Signature of Plaintiff's Attorney | Name, Address and Telephone Number of Plaintiff's Attorney

_____
Date

SEE REVERSE SIDE

United States Court of International Trade

SERVICE OF SUMMONS BY THE CLERK

If this action, described in 28 U.S.C. § 1581(c), is commenced to contest a determination listed in section 516A(a)(2) **or (3)** of the Tariff Act of 1930, the action is commenced by filing a summons only, and the clerk of the court is required to make service of the summons. For that purpose, list below the complete name and mailing address of each defendant to be served.

(As amended, July 21, 1986, eff. Oct. 1, 1986.)

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Third Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, October 24, 1986, at The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The Conference will be composed of the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury, members of the Bar of the Court, and other distinguished guests. The theme of the Conference is "Judicial Oversight — Relations Between the Court and the Agencies."

Sir Roy Denman, Head of the Delegation, Delegation of the Commission of the European Communities, is the Conference Luncheon Speaker.

Senator Dennis DeConcini, United States Senator from Arizona, and co-sponsor of the Customs Courts Act of 1980, will receive the Court's Annual Award for his outstanding contributions to the administration of justice in international law.

Last year, the Second Annual Judicial Conference was attended by over 400 conferees from 16 states, the District of Columbia, Puerto Rico, and Japan.

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Wednesday, October 1, 1986.

For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

JOSEPH E. LOMBARDI,
Clerk of Court.

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*U.S. GOVERNMENT PRINTING OFFICE: 1986-491-952:40000

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

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The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85–2558)

LANNOM MANUFACTURING CO. INC., PETITIONER *v.* U.S. INTERNATIONAL TRADE COMMISSION, RESPONDENT

Nathaniel Humphries, Mason, Fenwick & Lawrence, of Washington, D.C., argued for appellant. With him on the brief were *Paul F. Kilmer* and *Linda J. Shapiro*. Also on the brief were *Michael A. Hertzberg, Stuart E. Benson* and *Gary W. Christian*, Graham & James, of Washington, D.C.

Jack Simmons, III, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee. With him on the brief were *Lyn M. Schlitt* and *Michael P. Mabile*.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85–2558)

(Inv. No. 337–TA–190)

LANNOM MANUFACTURING CO., INC., PETITIONER *v.* U.S. INTERNATIONAL TRADE COMMISSION, RESPONDENT

(Decided August 27, 1986)

Before FRIEDMAN, BALDWIN, and NEWMAN, *Circuit Judges*. NEWMAN, *Circuit Judge*.

Lannom Manufacturing Company, Inc. appeals the final decision of the United States International Trade Commission, which held that there was no violation of section 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337, in that Lannom's U.S. Patent No. 3,976,295 ("the '295 patent") was invalid and that the importation and sale of certain articles did not tend to injure the domestic industry. The Commission declined to determine infringement. *In re Certain Softballs and Polyurethane Cores Therefor*, Inv. No. 337–TA–190, USITC Pub. No. 1751 (September 1985).

We vacate the determinations of patent invalidity and absence of tendency to injure, and remand for determination of the question of infringement and redetermination of the question of injury.

COMMISSION PROCEEDINGS

On April 3, 1984 Lannom filed a complaint pursuant to section 337 alleging, *inter alia,* unfair methods of competition and unfair acts in the importation and sale of certain softballs and polyurethane cores for softballs, by the direct or contributory infringement of claims 3, 4, and 5 of the '295 patent, having the effect or tendency to destroy or to substantially injure an efficiently and economically operated industry in the United States.

The '295 patent describes and claims a softball usable for organized league play, having a core of polyurethane foam and a leather cover. Claim 3 is representative:

> 3. A composite ball having the appearance, physical characteristics and dimensions of a conventional softball including a core of cork or kapok, yarn windings, and a leather cover comprising
>
> a spherical core member formed of flexible and resilient molded polyurethane foam and a leather cover portion enclosing and stitched over said core portion
>
> wherein said core portion is formed of polyurethane foam of such density and resilience as to give said composite ball essentially the same rebound weight, hardness, size, feel and sound qualities as said conventional softball so as to be usable in organized league play of softball.

The advantages of this softball are that it is five to ten times more durable than conventional cork or kapok softballs, and its resilience or liveliness can be varied by manipulation of the chemical composition of the core. Polyurethane core softballs, since their introduction by Lannom, have obtained a significant portion of the United States softball market.

On May 1, 1984 the Commission ordered that an investigation be instituted, in accord with 19 U.S.C. § 1337(b). Lannom named as respondents the Taiwan manufacturing companies Success Chemical Company, Ltd., Tusa, Inc., and Complete Merchants Corporation; the U.S. importer Diamond Sports Company; Regent Sports Company, a U.S. manufacturer of softballs; and Diamond's eight U.S. distributors (also called manufacturer's representatives). Only Diamond Sports entered an appearance and filed a response to the complaint. This response alleged, *inter alia,* that Lannom's patent was invalid and not infringed.

Lannom and Diamond Sports on October 3, 1984 a joint motion to terminate the investigation as to Diamond Sports and its U.S. distributors, on the basis that Lannom had granted Diamond a license under the '295 patent. On October 19, 1984 the Administrative Law Judge ("ALJ") terminated the investigation as to Diamond but did not terminate the investigation as to Diamond's distributors because of the absence of sublicense or consent agreements. Although their status is unclear on the record, the distributors took no part either in the proceedings before the Commission or in this appeal.

Lannom also asserted that it no longer considered sales to Diamond Sports by the Taiwan manufacturers Success Chemical, Complete Merchants, and Tusa to constitute unfair acts, but only sales to unlicensed importers.

The hearing began on October 30, 1984. Only Lannom and the Commission Investigative Attorney ("the Staff") appeared, the Staff participating in accordance with 19 C.F.R. § 210.4(b).[1] None of the remaining respondents appeared or defended. Lannom relied on the presumption of patent validity and asserted that patent validity was no longer at issue. Lannom requested that the remaining respondents be found in default and that adverse inferences be taken, as provided in 19 C.F.R. § 210.25. This request was rejected by the ALJ.

Evidence was adduced on the subjects of patent validity, patent infringement, and injury or tendency to injure. Among the witnesses were Jesse H. Heald, the inventor of the '295 Patent and an officer of Lannom; Charles Dale, general manager of Lannom's Ball Division; Frank Hardy, president of Diamond Sports; and Thomas Tuten of Flexible Products Co., a U.S. company that sells chemicals for forming the cores of the patented softballs. The depositions of James L. Muhlfelder, vice president of J. DeBeer & Son, a softball manufacturer and competitor of Lannom; and Lily Hsu, a Taiwan investigator hired by Lannom, were also submitted into evidence.

In its post-hearing brief the Staff discussed all the issues and concluded that claims 3, 4, and 5 of the '295 patent were valid, that the claims were infringed by the imported products, and that the evidence supported a finding of tendency to injure in terms of section 337. Lannom, of course, espoused the same conclusion. There was no proponent of a contrary result.

The ALJ, in his initial determination ("ID") on February 19, 1985, held all of the claims of the patent (not only claims 3, 4, and 5) invalid for failure to comply with 35 U.S.C. §§ 103 and 112; and in the alternative, if valid then infringed by some but not all of the imported polyurethane core softballs. The ALJ also held that there was neither substantial injury nor a tendency to substantially injure the domestic industry.

Lannom filed a petition for review of the ID by the full Commission. The Staff supported Lannom's position on the merits of the issues of validity, infringement, default, and tendency to injure, although the Staff did not agree with Lannom on the question of whether validity was properly at issue.

On April 16, 1985 the Commission affirmed the ALJ's determinations of patent invalidity under sections 103 and portions of section 112, and of absence of either the effect or tendency to substantially

[1] 19 C.F.R. § 210.4(b) calls the Staff a "party" whose role is defined in section 210.4(c) "to engage in investigatory activities with respect to the proceeding". As the Commission described it, "the [investigative attorney] has no 'client' although he represents the Commission. He does so only as an impartial investigator with no affirmative case to present." *In re Certain Card Data Imprinters and Components Thereof*, Inv. No. 337-TA-104, Commission Memorandum Opinion at 9 (Nov. 18, 1981).

injure the domestic industry. The Commission took no position on the issues of invalidity under section 112 based on "best mode", or infringement, and stated:

> By taking no position on those two issues, the Commission neither affirms nor reverses the ALJ as to them. Accordingly, the ID (except for the issues of best mode and infringement) has become the determination of the Commission pursuant to 19 C.F.R. § 210.53(h).

On this appeal from the Commission's final determination, none of the respondents named before the Commission has filed an appearance or participated in any way. The Commission itself is the only "respondent" before us.

I

Lannom asserts that the Commission erred in law in its decision of invalidity of the '295 patent, and appeals from that decision on its merits. Lannom also challenges the authority of the Commission to have determined the validity of the '295 patent, in view of the statutory presumption of validity, 35 U.S.C. § 282:

> A patent shall be presumed valid. Each claim of a patent * * * shall be presumed valid independently of the validity of other claims * * *. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.
>
> The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:
>
> * * *
>
> (2) Invalidity of the patent or any claim in suit * * *.

Lannom relies on the fact that none of the remaining respondents had raised the defense of invalidity, as they could have under 19 U.S.C. § 1337(c), and asserts that in the absence of such defense the presumption of 35 U.S.C. § 282 controls, and validity is not at issue.

A

Diamond Sports had initially pled the defense of invalidity, but entered into a settlement agreement with Lannom and withdrew before the hearing. Lannom refers to the requirement of section 282 that the defense of invalidity "shall be pleaded". It is not disputed that after Diamond was withdrawn the defense of invalidity was not raised.

Lannom also asserts that it was denied the procedural benefits of section 282 because the ALJ treated validity as if the burden were on Lannom to come forward and to present a *prima facie* case that the patent was valid, rather than determining whether a challenger had met its burden of proving invalidity by clear and convincing evidence. Although the ALJ quoted from *SSIH Equipment S.A.* v. *International Trade Commission*, 718 F.2d 365, 375, 218 USPQ 678,

687 (Fed. Cir. 1983), that "the presumption places the burden of going forward, as well as the burden of persuasion, upon the party asserting invalidity", the ALJ did not explain how this applied when no party disputed the validity of the patent.

Throughout the proceedings the Staff did not assert that the patent was invalid. Prior to the hearing the Staff expressly took no position on validity although it raised the possibility of an adverse position. Nonetheless after the hearing as well as after the issuance of the ALJ's ID the Staff position was consistently that the patent was valid.

The Commission asserts that it can and must determine patent validity, even if validity is not challenged by a party or by its own Staff, and that 35 U.S.C. § 282 does not prevent this determination on a full evidentiary record: "The presumption places no limitations on the introduction of evidence of validity or on who may introduce that evidence." The Commission gives as its reason that section 337 is a trade statute, not "merely" a patent statute, and that the public interest requires that the Commission investigate the validity of every patent brought before it for enforcement. The Commission refers to the Report of the Senate Committee on Finance:

> [B]efore ordering exclusion or issuing a cease and desist order, the Commission would be required to consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Committee feels that the public interest must be paramount in the administration of this statute.

S. Rep. No. 1298, 93d Cong., 2d Sess. 193 *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7326 [hereinafter "Senate Report"]. This public interest, however, has nothing to do with the presumption of validity accompanying the grant of a patent by the U.S. Patent and Trademark Office. Section 282 is based on the presumption of administrative correctness, a presumption derived from both public policy and pragmatic efficiency. This presumption assigns the burden of proof to the challenger, and thus necessarily requires that there be a challenger. The Commission's concern for public health and welfare and a competitive economy is not inimical to the public policy that undergirds 35 U.S.C. § 282.

The Commission position is that the complainant in a section 337 action must present a *prima facie* case of all issues, including patent validity, despite both the section 282 presumption and the absence of any challenge to validity. The Commission, in its discussion of its authority to determine validity despite such lack of challenge, asserts that in accordance with established practice and law a complainant is required to prove all the statutory elements of a section 337 case by "substantial, reliable, and probative evidence sufficient to establish a *prima facie* case of violation by respondents", *quoting In re Certain Window Shades and Components Thereof,* Inv. No.

337–TA–83, 216 USPQ 526, 528 (USITC 1981). The above quotation from *Window Shades*, when read in context, makes explicit that the quoted clause refers to infringement, not validity:

> Therefore, in order to evaluate whether the imported window shades infringe the patent, we must determine whether there is in the record substantial, reliable, and probative evidence which would be sufficient to support a finding of infringement; that is, we must look to see whether the complainant has established a *prima facie* case.

The Commission's decision in *Window Shades* is squarely contrary to that for which it was cited, and entirely in support of Lannom's position:

> By law, a patent duly issued by the U.S. Patent and Trademark Office is presumed to be valid. 35 U.S.C. 282. The ALJ found the patent to be valid, since no party had contested its validity. Since no evidence has been brought forth to rebut the presumption of validity, we concur with the ALJ's recommendation, and find the patent to be valid.

Id. at 528.

The Commission also refers to *In re Certain Food Slicers and Components Thereof*, Inv. No. 337–TA–76, 219 USPQ 176, 179 (USITC 1981), in which it held that even if there is no active respondent it is insufficient for the complainant merely to allege the components of the violation, "except where critical information cannot be obtained after a reasonable effort." In that case, as in *Window Shades*, the Commission was referring to evidence of infringement.

In response to the Commission's assertion that its obligations in administration of section 337 require it to review whether an unchallenged patent was correctly granted, Lannom states that this interpretation is unsupported by 19 U.S.C. § 1337, its legislative history, or judicial precedent. We look first at the statutory intent.

B

Prior to 1974 the Commission was barred, by judicial decision starting at least as early as 1930, from reviewing the validity of patents brought before it under section 337. The Trade Act of 1974 removed this bar, and expressly authorized the Commission to consider "all legal and equitable defenses" that theretofore could have been raised only in the courts. 19 U.S.C. § 1337(c). The position now espoused by the Commission requires the conclusion that Congress intended, by the 1974 amendments, to grant the Commission a greater authority to review patent validity than that which is available to the district courts. To test that conclusion against the statute from which this authority purportedly derives, we have reviewed the origins of the Act.

The substance of section 337 originated in the Tariff Act of 1922, ch. 356, Title III, § 316, 42 Stat. 943 (1922). Section 316, predecessor to section 337, provided:

> (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale * * * the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful * * *.

This restriction on unfair trade practices derived from the Revenue Act of 1916, ch. 463, Title VII, § 704, 39 Stat. 796 (1916), which authorized the Tariff Commission to investigate "conditions, causes, and effects relating to competition of foreign industries with those of the United States". Practices the Commission described as unfair included deceptive use of trademarks, deceptive imitation of goods, false labeling, and infringement of patents. *See* United States Tariff Commission, *Dumping and Unfair Competition in the United States* (1919). In the Twelfth Annual Report of the United States Tariff Commission 21 (1928), the Commission stated:

> Existing law, apart from section 316, is wholly inadequate to protect domestic owners of patents from violation of their patent rights through the importation and sale of infringing articles.

In the Commission's view:

> Stoppage of importation of infringing articles through an order of exclusion from entry is the only effectual remedy.

Id. It was early established that this remedy did not require or permit redetermination of patent validity. In *Frischer & Co.* v. *Bakelite Corp.*, 17 CCPA 494, 509, 39 F.2d 247, 258, *cert. denied*, 282 U.S. 852 (1930), the Court of Customs and Patent Appeals stated that the Commission was

> merely an administrative fact-finding body. It has no judicial powers. The right to pass upon the validity of a patent which has been issued by the Patent Office is a right possessed only by the courts of the United States given jurisdiction thereof by law.

Section 316 was reenacted as section 337 of the Tariff Act of 1930, ch. 497, Title III, § 337, 46 Stat. 703 (1930). Although other amendments to the statute were made at that time, the Commission was not granted the authority to review patent validity.

So it remained for forty-four years. In *In re Von Clemm*, 229 F.2d 441, 444, 108 USPQ 371, 373 (CCPA 1955), the CCPA reiterated that

> the validity of the patent or patents involved may not be questioned by the Tariff Commission nor by this court on appeal

> therefrom, but that a regularly issued patent must be considered valid unless and until a court of competent jurisdiction has held otherwise.

In 1974, in response to "the need to find cooperative solutions to common domestic and international economic problems" Congress enacted the Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978 (1975). Senate Report at 5, 1974 U.S. Code Cong. & Ad. News at 7187. The Tariff Commission was renamed the United States International Trade Commission. 19 U.S.C. § 2231. Remedies for violation of section 337 were strengthened, and the Commission was authorized to consider invalidity and other defenses:

> § 1337(c) * * * The Commission shall determine * * * whether or not there is a violation of this section. All legal and equitable defenses may be presented in all cases * * *.

The reasons for this change were discussed in the Senate Report at 196, 1974 U.S. Code Cong. & Ad. News at 7329:

> [T]he public policy recently enunciated by the Supreme Court in the field of patent law (cf., *Lear, Inc.* v. *Atkins* [sic], 395 U.S. 653 (1969) and the ultimate issue of the fairness of competition raised by section 337, necessitate that the Commission *review the validity and enforceability of patents, for the purposes of section 337, in accordance with contemporary legal standards when such issues are raised* and are adequately supported. The Committee believes the Commission may (and should when presented) under existing law review the validity and enforceability of patents, but Commission precedent and certain court decisions have led to the need for the language of amended section 337(c). The Commission is not, of course, empowered under existing law to set aside a patent as being invalid or to render it unenforceable, and the extent of the Commission's authority under this bill is *to take into consideration such defenses* and to make findings thereon for the purposes of determining whether section 337 is being violated. [emphasis added]

In authorizing the Commission to consider such defenses, Congress cautioned that:

> The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.

Id.

Although this legislation was the subject of extensive hearings, the proposed grant of authority to the Commission to consider defenses of patent invalidity and unenforceability for section 337 purposes did not occasion extensive controversy. A supporter stated "we do not believe that the statute's discrimination against the importer will be removed until the law requires the Tariff Commission

to consider and rule upon the same legal defenses that are available to defendants in patent infringement suits in federal courts". *Hearings on H.R. 10710 before the Senate Committee on Finance,* 93d Cong., 2d Sess. 1941 (1974) (statement of Noel Hemmendinger). There was no significant opposition. William D. Eberle, Special Representative for Trade Negotiations, testified that "changes in responses to unfair trade practices involving patent infringement provide for fairer procedures, a greater role by the Tariff Commission, and judicial review." *Id.* at 219.

Subsequent decisions implement this congressional intent that the Commission entertain the same legal defenses to charges of infringement as do the courts. In *In re Chain Door Locks,* Inv. No. 337-TA-5, 191 USPQ 272, 280 (USITC 1976), the Commission considered the defenses of patent invalidity raised by the respondents and the Staff and held, referring to the presumption of validity of 35 U.S.C. § 282, "that [respondent] and the investigative staff have failed to overcome this presumption". In *Solder Removal Co.* v. *U.S. International Trade Commission,* 582 F.2d 628, 633, 199 USPQ 129, 133 (CCPA 1978), our predecessor court stated that the presumption of validity requires that "the burden of persuasion is and remains always upon the party asserting invalidity, whether the most pertinent prior art was or was not considered by the examiner." In *Astra-Sjuco, A.B.* v. *U.S. International Trade Commission,* 629 F.2d 682, 688–90, 207 USPQ 1, 6–8 (CCPA 1980), the court held that the evidence before the Commission was insufficient under the clear and convincing standard to overcome the presumption of validity, the defense of invalidity having been asserted by respondents. *See also Aktiebolaget Karlstads Mekaniska Werkstad* v. *U.S. International Trade Commission,* 705 F.2d 1565, 217 USPQ 865 (Fed. Cir. 1983); *Stevenson* v. *U.S. International Trade Commission,* 612 F.2d 546, 204 USPQ 276 (CCPA 1979). In all of these cases the respondent asserted the invalidity, and the Commission consistently afforded the patent the presumption of validity, subject to rebuttal by clear and convincing evidence.

In *In re Certain Trolley Wheel Assemblies,* Inv. No. 337-TA-161, USITC Pub. No. 1605 (November 1984), the validity of the patent was not challenged by any party and the patent was presumed valid. Similarly in *In re Certain Miniature Plug-In Blade Fuses,* Inv. No. 337-TA-114, 221 USPQ 792, 798 (USITC 1983), the "complainant chose to rely on the statutory presumption that patents are valid" and "did not proffer evidence concerning the validity of the patents in issue" (procedures for which the Commission criticizes Lannom); the Commission held the patents valid in the absence of rebuttal evidence and noted that the Staff "apparently did not find reason to challenge the validity". *See also In re Certain Molded-In Sandwich Panel Inserts,* Inv. No. 337-TA-99, 218 USPQ 832, 836 (USITC 1982), *aff'd sub nom. The Young Engineers, Inc.* v. *U.S. International Trade Commission,* 721 F.2d 1305, 219 USPQ 1142 (Fed.

Cir. 1983). In *In re Certain Caulking Guns*, Inv. No. 337-TA-139, 223 USPQ 338 (USITC 1984), where only the Staff asserted invalidity, the presumption of validity was nonetheless held to be unrebutted by clear and convincing evidence.

In actions before the Commission as in the courts, the presumption of validity is not lost. As this court has often said, a patent is "born valid" when it is granted by the Patent and Trademark Office. *Datascope Corp.* v. *SMEC, Inc.*, 776 F.2d 320, 323, 227 USPQ 838, 840 (Fed. Cir. 1985); *Roper Corp.* v. *Litton Systems, Inc.*, 757 F.2d 1266, 1270, 225 USPQ 345, 347 (Fed. Cir. 1985). It is presumptively valid, and its validity need not be re-established if validity is not raised as a defense in a section 337 action.

C

It is beyond cavil that a district court does not have authority to invalidate a patent at its own initiative if validity is not challenged by a party. The Commission argues that it has a public responsibility to verify the validity of any patent brought before it under section 337.

In support of its position that the Commission has authority *sua sponte* to determine validity, the Commission cites *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), and *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. of New York, Inc.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). In these cases the courts required the Federal Power Commission to develop the facts concerning, and give full consideration to, such issues as the environmental and developmental impact of the proposed power generators, because the Federal Power Act requires such inquiry incident to the grant of federal licenses. By analogy, the Commission argues, the Trade Act requires the Commission to review patent validity. The analogy is strained. There is no statutory presumption before the Federal Power Commission, and while the Federal Power Act assigned this specific duty of inquiry to the regulatory agency, the Trade Act is explicit in referring to "defenses". Other cases cited by the Commission also relate to the need for the regulatory agency to develop a complete record in order to fulfill its regulatory assignment, *see, e.g., Confederated Tribes and Bands of the Yakima Indian Nation* v. *Federal Energy Regulatory Commission*, 746 F.2d 466 (9th Cir. 1984), holding that the FERC was required by the Federal Power Act to examine fishery issues and issue an environmental impact statement before issuing a license. The situations, the controlling statutes, and the public policies, are not comparable.

Patent invalidity is a statutory defense, not a regulatory duty. In *Young Engineers*, 721 F.2d at 1315, 219 USPQ at 1152, this court observed that "any determination of unfair acts is dependent upon the private rights between parties in the position of complainant

and respondent", and that the 1974 amendment of section 337 permitting the presentation of all legal and equitable defenses reflected recognition by Congress that "essentially private rights are being enforced in the proceeding."

The Commission argues that "great mischief" can result if an "unworthy" patent could avoid scrutiny when, as here, the only respondent (Diamond Sports) who challenged patent validity was removed from the action by settlement. The Commission does not explain why a patent duly examined by the Patent and Trademark Office must be presumed "unworthy" to the point that, if not challenged, the examination must nevertheless be repeated by the International Trade Commission. Spontaneous administrative duplication of the work of one agency by another, to avoid "mischief" if the first agency erred, shall not be inferred or implied.

As stated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), in connection with an agency's construction of the statute it administers, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." The Court admonished that "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9 and cases cited therein.

The Court in *Chevron* observed that if a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (citing *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). Discussing the "principle of deference to administrative interpretations", *id.* at 844, the Court emphasized that such deference does not authorize contravening the intent of Congress. *Id.* at 844–845. Nor, of course, does it authorize an administrative agency to exceed the authority Congress granted it. *See, e.g., Cowan* v. *United States*, 710 F.2d 803, 805 (Fed. Cir. 1983). In the full sweep of legislative amendment, debate, and commentary related to section 337, we have found no suggestion that Congress intended to grant the Commission the initiative it now asserts.

The purpose of section 337 from its inception was to provide relief to United States industry from unfair acts, including infringement of United States patents by goods manufactured abroad. The statute authorizes the Commission to consider "all legal and equitable defenses", including that of patent invalidity, when, as the legislative history states, such issues are raised. The ultimate question is "one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law". *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). The Supreme Court has frequently observed that when Congress intends to grant a right of action, it does so clearly and unambiguously. In *Middlesex County Sewerage Authority* v. *National Sea Clammers*

Association, 453 U.S. 1, 15 (1981), dealing with an asserted private right of action, the Court stated "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

We conclude, therefore, that Congress did not authorize the Commission to redetermine patent validity when no defense of invalidity has been raised. The Commission's holding that the '295 patent is invalid is vacated.

II

The ALJ determined that the claims, if valid, were infringed by some of the imported softballs, and the ID contains extensive findings pertinent to the issue. The Commission refused either to adopt or reject the ALJ's determinations on infringement, while adopting his injury determination. Thus the issue of infringement is not before this court, no final determination thereof having been made.

Although infringement and injury are separate components of a section 337 determination, in this case it would not be possible to review the injury determination in isolation. The Commission argues that it did not have to decide infringement "because tendency to injure is not dependent on infringement" but is a "separate statutory criterion requiring independent proof". In *Textron, Inc.* v. *U.S. International Trade Commission*, 753 F.2d 1019, 224 USPQ 625 (Fed. Cir. 1985), cited by the Commission, the Commission first determined the asserted unfair acts of false advertising and trademark infringement, and then determined whether the unfair acts that they found caused injury. Section 337 indeed requires independent proof of injury, but it is the injury caused by the infringing acts that must be determined.

We agree that there may be circumstances wherein no injury will be shown even if all doubt as to infringement is resolved in favor of the complainant. The case at bar is not so simple, however, because the ALJ did not direct his analysis of injury to that caused by infringing goods to the corresponding domestic industry. Thus the determination of which goods are covered by the patent claims is essential to the ensuing determination of injury, and we cannot review the latter without first reviewing the former.

Lannom argues that the Commission by implication adopted the ALJ's findings on infringement because it affirmed the ALJ's decision on tendency to injure, and therefore that the infringement issue is properly before us for appellate review. But in this case the Commission was not silent: the Commission expressly stated that it "neither affirms nor reverses the ALJ as to [infringement]". In view of this statement we can not assume, or infer, that the findings on infringement were affirmed by the Commission. These findings can not receive appellate review absent determination thereof by the Commission.

Section 337 investigations focus on injury to the domestic industry by infringing imports. *See, e.g., In re Certain Molded-in Sandwich Panel Inserts,* 218 USPQ at 836–37; *In re Certain Caulking Guns,* 223 USPQ at 428. In the case at bar the ALJ made a complex series of findings concerning infringement, to the effect that some of the Diamond imports having a certain coefficient of rebound, and certain cores produced by the Taiwan company Mansui Chemplas, were outside the scope of the patent claims as the ALJ interpreted them. Lannom assigned error to these findings in its petition to the Commission, as did the Staff. If these findings are indeed in error, the injury determination would be based on different figures than if these findings are correct. By declining either to accept or reject the ALJ's findings on infringement, the Commission had an inadequate basis on which to review the ALJ's findings on injury.

The Commission decision that expressly "neither affirms nor reverses the ALJ" on infringement thus inhibited expeditious resolution of the matters before it, as required by 19 U.S.C. § 1337(b)(1). In *Beloit Corp.* v. *Valmet OY,* 742 F.2d 1421, 1422–23, 223 USPQ 193, 194 (Fed. Cir. 1984), *cert. denied,* 105 S. Ct. 2706 (1985), this court commented that section 210.53(h) is "ambiguous" as to whether it authorized the Commission to refuse to take a position on an issue decided by the ALJ. In *Beloit,* however, that refusal had no adverse consequences; the Commission did take a position on the asserted unfair act, its holding of noninfringement was reviewed on appeal, and its affirmance was dispositive of the section 337 question.

In Lannom's case the Commission neither decided if unfair acts existed, nor brought the matter to sufficient finality to enable appellate review of this threshold question. Therefore we vacate the decision of absence of tendency to injure, and remand to the Commission for determination of infringement and redetermination of injury based on articles that are found to infringe the patent.

VACATED AND REMANDED

(Appeal No. 85–2632)

CORNING GLASS WORKS, APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, SUMITOMO ELECTRIC INDUSTRIES, LTD., SUMITOMO ELECTRIC U.S.A., INC., INTERVENORS

Kenneth B. Herman and *Lars I. Kulleseid,* of Fish & Neave, New York, New York, argued for appellant. With them on the brief were *Daniel M. Gantt* and *Thomas J. Vetter. Alfred L. Michaelsen,* Corning Glass Works, Corning, New York, of counsel.

Wayne W. Herrington, Office of the General Counsel of Washington, D.C., argued for appellee. With him on the brief were *Lyn M. Schlitt,* General Counsel and *Michael P. Mabile,* Assistant General Counsel.

Italo H. Ablondi, of Ablondi & Foster, P.C., Washington, D.C., and *George T. Mobille,* of Cushman, Darby & Cushman, Washington, D.C. argued for intervenors.

With them on the brief were *F. David Foster* and *Sturgis M. Sobin*, of Ablondi & Foster, P.C. and *Robert W. Adams*, of Cushman, Darby & Cushman.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85–2632)

CORNING GLASS WORKS, APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, SUMITOMO ELECTRIC INDUSTRIES, LTD., SUMITOMO ELECTRIC U.S.A., INC., INTERVENORS

(Decided August 27, 1986)

Before NIES, BISSELL and ARCHER, *Circuit Judges*. NIES, *Circuit Judge*.

Corning Glass Works appeals from the International Trade Commission's determination that the importation and sale of certain optical waveguide fibers manufactured in Japan by Sumitomo Electric Industries, Ltd. (SEI) and sold in the United States by Sumitomo Electric U.S.A., Inc. (SEUSA) (collectively Sumitomo) did not violate section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (1982).[1] Although the subject imports were found to infringe Corning's U.S. Patent No. 3,659,915 covering certain optical waveguide fibers and to have been made abroad using a process claimed in Corning's U.S. Patent No. 3,933,454 covering a flame hydrolysis method for making optical waveguide fibers, the Commission found no effect or tendency to substantially injure a domestic industry within the meaning of section 337 because the quantity of imports had been, and were likely to remain, *de minimis*. Corning asserts that the Commission has misinterpreted the statutory injury requirement and erred in its findings of facts on this issue. Our jurisdiction over the appeal is found in 19 U.S.C. § 1337(c) (1982) and 28 U.S.C. § 1295(a)(6) (1982). We affirm. In view of our disposition of the appeal on the issues related to the determination of no injury, resolution of the patent issues is not necessary to this decision and we do not address them. That part of the decision below is vacated.

I

PROCEDURAL BACKGROUND

The Commission instituted the investigation at issue on April 5, 1984, on the basis of a complaint by Corning. Corning alleged that Sumitomo was engaged in an unfair method of competition in the importation and sale of certain optical waveguide fibers. In particular, Corning charged Sumitomo with direct infringement of claims 1

[1] 19 U.S.C. § 1337 (a) provides:

(a) *Unfair methods of competition declared unlawful.*

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the *effect or tendency of which is to destroy or substantially injure an industry*, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section. (Emphasis added.)

and 2 of Corning's U. S. Patent No. 3,659,915, which claims certain optical waveguide fibers, and with unauthorized importation and sale of fibers manufactured abroad using a process claimed in claims 1, 3 and 8 of Corning's U. S. Patent No. 3,933,454, which claims a method for making optical waveguide fibers.[2]

The Commission referred the case to an administrative law judge for an evidentiary hearing and initial determination. On January 22, 1985, the ALJ issued his initial determination. He found that both patents were not proved to be invalid, or unenforceable, and were infringed by Sumitomo. The parties stipulated that the domestic industries operating under each patent were efficiently and economically operated. However, the ALJ found no effect or tendency to destroy or substantially injure the relevant industries. In this connection, he found that the optical waveguide fiber market in the United States had been expanding, and would continue to expand, faster than the capacity of the domestic industry to meet the demand. He also found that Sumitomo's imports had had no appreciable effect on the sales or prices of domestic producers and that such imports were likely to diminish in the years ahead.

Both Corning and Sumitomo petitioned the Commission for review of various portions of the initial determination. On March 8, 1985, the Commission ordered review of the initial determination, but only with respect to the issue of whether Sumitomo's importation or sales had the *tendency* to substantially injure an industry in the United States.

On April 18, 1985, the Commission completed its review, determined that there was no violation of section 337, and terminated the investigation. 50 Fed. Reg. 16,171 (1985). The Commission subsequently issued a written opinion. *In re Certain Optical Waveguide Fibers*, No. 337-TA-189 (May 20, 1985). In that opinion, the Commission affirmed the portion of the initial determination finding no tendency to substantially injure the relevant industries. The effect of the Commssion's March, 1985 order and May, 1985 opinion was specifically declared to affirm the ALJ's initial determination in its entirety. 19 C.F.R. § 210.53(h).

II

The Commission Decision

The Commission's decision holds that there are two domestic industries, corresponding to the subject matter of each of Corning's patents. The industry under the '915 patent, that is, the patent claiming optical waveguide fibers, was found to consist of Corning and its licensees, AT&T, ITT and SpecTran; the industry under the '454 patent for a process for making the fibers solely of Corning. Although licensed under the '454 process, AT&T, ITT and SpecTran

[2] Corning later dropped its allegation with respect to claim 3 of the '454 patent. The practice of a process abroad does not constitute infringement of a U.S. patent. However, the activity is declared by 19 U.S.C. § 1337a to provide grounds for exclusion of imports made by the process. For convenience, the term "infringement" will be used herein with respect to the '454 patent as well as the '915 patent.

do not produce their fiber by the patented process. With respect to members of either domestic industry, the Commission refused to include Northern Telecom, Inc. (NTI), which sells fiber in the United States imported from its parent Northern Telecom, Ltd. (NTL) which manufacturers the fiber in Canada under a license from Corning. The Commission also excluded American Fiberoptics and Lightwave Technologies Co., alleged by Corning to be infringers of its patents, and Valtec Corporation, an alleged infringer which has become a licensee.

Optical waveguide fiber is sold in both cabled and uncabled form. Uncabled fiber is sold to firms which cable the fiber for use in telecommunications and other applications. Corning makes and sells uncabled fiber only. AT&T sells only cabled fiber. ITT makes both uncabled and cabled fiber, but its license contains restrictions on its sale of uncabled fiber. SpecTran sells only uncabled fiber. Sumitomo sells both cabled and uncabled fiber, competing with Corning in sales of uncabled fiber.

In 1980, Sumitomo began importing and selling optical waveguide fiber in the United States. The U.S. market for optical waveguide fiber has grown with increasing rapidity since 1982 and is expected to double in size from 1985 to 1988. Detailed findings were made concerning the domestic producers' failed attempts to expand their production capacity to supply the burgeoning market. Corning itself has had to import fiber from overseas to meet its needs, as have other domestic manufacturers. Demand has outstripped supply across the industry. Corning's licensees and some of the cablers who sell Corning fiber testified that they are unaware of any business lost to Sumitomo. Sumitomo's sales efforts have been hampered by a lack of adequate product support service and marketing, and by an inability to offer quick delivery. The record indicates that its market share from imports has remained well under 1%.[3]

Sumitomo's inability to gain a significant share of the United States market was a principal reason behind Sumitomo's decision to build a facility in this country for research, development and production of optical waveguide fiber and cable. Sumitomo began construction of its United States facility, Sumitomo Electric Research Triangle (SERT), in October, 1983, with production projected to begin in late 1985. It was found that SERT is intended to serve as Sumitomo's principal source of fiber and cable for the United States market. In conjunction with the start-up of SERT, Sumitomo intends to develop a sales, marketing and field engineering staff.

The Commission determined that the record does not establish that Sumitomo's importation and sale of the accused optical waveguide fibers have "the effect or tendency to destroy or substantially

[3] Throughout this opinion, the court has, as much as possible, avoided disclosing materials marked confidential. The court itself has, however, reviewed these materials, much of which appears to be non-confidential in nature. In any event, "well under 1%" is the court's characterization of Sumitomo's market share.

injure" the domestic industries, as required for exclusion under section 337. It rejected Corning's argument that sales activities related to Sumitomo's manufacture of fibers in the United States are relevant in determining injury. Rather, the Commission limited the injury inquiry to Sumitomo's sales of imported fibers. Finally, the Commission concluded that it would be speculative to find both that Sumitomo intended to substantially increase sales of imported fiber *and* that the domestic industry would be able to meet the rapidly expanding market on the evidence of record. While a lower quantum of proof of injury or tendency to injure is permitted in a patent-based section 337 case, per the Commission, mere speculation is not permitted.

III

THE STANDARD OF APPELLATE REVIEW

Corning states the issues in this appeal in the following terms:

> 1. Was the Commission wrong in determining that SEI and SEUSA's importation and sale of optical waveguide fiber, held by the Commission to infringe Corning's valid patents, had no effect of substantially injuring an efficiently and economically operated United States industry?
>
> 2. Was the Commission wrong in determining that SEI and SEUSA's continued importation and sale of such optical waveguide fiber will have no tendency to injure substantially an efficiently and economically operated United States industry?

These statements of the issues misdirect the focus of the appeal. Like numerous other appellants, Corning essentially argues its case to this court as it did to the tribunal from which the appeal was taken. We are asked to decide the original issues of the case as if they had not already been decided.

The appellate function is not to determine whether the findings and conclusions of the Commission were right or wrong, in the sense that the judges of this court would or would not reach the same result if they were to decide the matter in the first instance. Issues should be framed and addressed by parties to the appeal in the terms mandated by the standard of review. In this case, the standard of review is statutory. 19 U.S.C. § 1337(c) provides: "Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) may appeal such determination to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of title 5, United States Code * * *"[4]

[4] 5 U.S.C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

Continued

Under the above standard of review, a reviewing court "shall decide all relevant questions of law." 5 U.S.C. § 706; *see SSIH Equipment S.A.* v. *United States*, 718 F.2d 365, 371–72, 218 USPQ 678, 684 (Fed. Cir. 1983). Thus, this court is not bound by the Commission's interpretation of statutory provisions. However, even though an issue may be denominated one of law, the court is not free simply to substitute its view for that of the Commission. Deference must be given to an interpretation of a statute by the agency charged with its administration. *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985). With respect to the meaning of the statutory requirements that an unfair method of competition must have "the effect or tendency * * * to destroy or substantially injure a domestic industry * * * in the United States." it is particularly within the province and expertise of the Commission to define those phrases.[5] Our function then becomes to decide whether the Commission's definitions or standards are *reasonable* in light of the language, policies and legislative history of the statute. *Id.; NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 402–03 (1983); *see Bally/Midway Manufacturing Co.* v. *U. S. International Trade Commission*, 714 F.2d 1117, 1121–22, 219 USPQ 97, 100 (Fed. Cir. 1983) (Commission's interpretation overturned because of "anomalous results" and "bizarre effect").

In contrast, with respect to issues of fact, our scope of review is narrowly limited. We may only overturn a factual finding which is unsupported by substantial evidence. 5 U.S.C. § 706(2)(E); *American Hospital Supply Corp.* v. *Travenol Laboratories, Inc.*, 745 F.2d 1, 9, 223 USPQ 577, 583 (Fed. Cir. 1984); *General Motors Corp.* v. *U.S. International Trade Commission*, 687 F.2d 476, 479–80, 215 USPQ 484, 487–88 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983). This is the same as the stringent standard applicable to a trial court in taking a case from a jury or in review of a jury verdict on a JNOV. As stated in *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619–20 (1966):

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Colombian Enameling & Stamping Co.*, 306 U.S. 292, 300. This

(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance or procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

[5] In contrast, the Commission is not charged with administration of the patent statute, 35 U.S.C. § 1 *et seq.* Thus we do not defer to its interpretation of patent law. *See, e.g., SSIH*, 718 F.2d at 374–75, 218 USPQ at 686–87; *Aktiebolaget Karlstads Mekaniska Werkstad* v. *U.S. International Trade Commission*, 705 F.2d 1565, 1574–77, 217 USPQ 865, 873–75 (Fed. Cir. 1983).

> is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

383 U.S. at 620; *see also Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *SSIH*, 718 F.2d at 381, 218 USPQ at 691 (additional views of Judge Nies); *Bally/Midway*, 714 F.2d at 1125, 219 USPQ at 103 (uncontradicted evidence established injury).

With these considerations in mind, we turn to Corning's arguments which, it asserts, warrant overturning the ITC's determination that Sumitomo's imports have no effect or tendency to substantially injure the domestic industries operating under Corning's patents.

IV

Section 337
Standard of Injury

A

Corning argues that the Commission erred, as a matter of law, in interpreting the statutory injury requirement. The test for determining injury in a patent-based section 337 action, per Corning, is whether the acts of the infringer have resulted or will result in "conceivable losses of sales." The argument made by Corning here is a familiar refrain. A similar argument was made, for example, in *Textron, Inc.* v. *U.S. International Trade Commission*, 753 F.2d 1019, 224 USPQ 625 (Fed. Cir. 1985), where, despite a finding of infringement of a registered trademark in the importation and sale of certain goods, no exclusion order was issued because of a negative injury determination. In essence, owners of rights in patents, trademarks and copyrights have argued, as Corning does, that infringement of such rights inevitably has the effect or tendency to substantially injure its business by reason of loss of sales or lower profits since its rights are exclusive, and that no further inquiry into the statutory requirement for injury is necessary or appropriate.

In affirming the Commission's interpretation that satisfaction of the statutory injury requirement did not automatically follow from proof of infringement of rights in intellectual property, this court held in *Textron:*

> Contrary to Textron's assertion, section 337 does not function merely as the international extension of our patent, trademark and copyright laws. *See In-the-Ear Hearing Aids,* Tariff Commission Pub. No. 182 at 28 (July 1966). Instead, section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof. *Id.* Congress may well have included this separate requirement in the original 1930 version of section 337 to insure that the extreme and internationally provocative remedy contemplated therein—exclusion of imports from particular countries—would be implemented only when

this is compelled by strong economic reasons. *See, e.g.,* S. Rep. No. 93–1298, 93rd Cong., 2d Sess. 199 (1974); *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 7186, 7331. Although the contemplated range of remedies was expanded by the Trade Act of 1974 to include "softer" sanctions such as cease-and-desist orders, Congress has never altered the statute's injury requirement. In fact, Congress expressly rejected a Nixon Administration attempt to eliminate the injury requirement in its proposed Trade Reform Act of 1973. *See* H. Kaye, *et al., International Trade Practice* § 6.05 n. 1 (1984).

753 F.2d at 1028–29, 224 USPQ at 631–32; *accord Warner Brothers, Inc.* v. *U.S. International Trade Commission,* 787 F.2d 562, 564, 229 USPQ 126, 127 (Fed. Cir. 1986) (no injury found notwithstanding copyright infringement).

Because section 337 does not function merely as an international extension of private rights under the patent statute, the statements of this court on the showing of injury required for the grant of an injunction in a patent infringement suit cannot be taken out of context and applied to the issuance of an exclusion order in a section 337 proceeding. Upon a patentee's proof of continuing infringement of a valid enforceable patent, "immediate irreparable harm is presumed" in connection with a request to a district court for injunctive relief. *Smith International, Inc.* v. *Hughes Tool Co.,* 718 F.2d 1573, 1581, 219 USPQ 686, 692–93 (Fed. Cir.), *cert. denied,* 464 U.S. 996 (1983). Congress has, however, required more for an exclusion order against imports, as recognized by this court unequivocally in *Textron.* The Commission is, thus, correct in its statement, "[S]ection 337 has elements in addition to the establishment of the existence of unfair practices such as patent infringement which must be satisfied before relief [i.e., an exclusion order] can be granted." *In re Certain Optical Waveguide Fibers,* slip op. at 21.

Corning cannot be faulted in its analysis that a patentee is entitled to benefit from all sales in the United States of products covered by its patent and that diversion of any sales by an infringer without payments of royalties is legally and in fact an economic loss to the patentee. However, a section 337 proceeding is not designed simply to protect a patent owner from loss. That truism is readily apparent from the statutory scheme which provides no protection for a patent owner in the absence of a domestic industry. The patentee in that situation suffers a real loss from infringing imports, at least to the extent of the loss of possible royalties, but is relegated to private remedies.

There is no question here that there is a domestic industry. However, to accept proof of a conceivable or actual loss of sales or profits of any amount by the patentee as sufficient proof of an effect or tendency to *substantially* injure the domestic industry would eliminate the "independent proof" of the "distinct injury requirement"

held to be necessary in *Textron*. Even if one equates the patent owner with the domestic industry, the statutory injury provision speaks not of *any* injury but of an effect or tendency "to destroy or substantially injure." Clearly, Corning's argument that, as a matter of law, proof of even a single lost sale of a patented item establishes a sufficient level of injury must be rejected. Congress has directed that the remedy of section 337, involving as it does the act of the sovereign in closing our borders to certain imports, be exercised only in those instances where at least there is proof of a tendency to *substantially* injure the subject industry.

In *In re Von Clemm*, 229 F.2d 441, 444–45, 108 USPQ 371, 373–74 (CCPA 1955), the Court of Customs and Patent Appeals, a predecessor of this court,[6] approved the Commission's interpretation that a section 337 violation could be found based solely on the likelihood of future injury, that is, despite a finding that imports had had no "effect" on the industry at the time of the investigation. Thus, the Commission was correct in making a separate inquiry in this case with respect to the likelihood of future injury even though the record did not support a finding of past injury. A patent owner need not suffer actual past injury from infringing imports before pursuing the relief afforded by section 337. On the other hand, where the asserted injury is based on projections of future injury, *i.e.*, on a "tendency" to substantially injure, the record must establish the existence of relevant conditions or circumstances from which probable future substantial injury can reasonably be inferred. In *Von Clemm*, the Commission found such circumstances on the record before it and the court affirmed that finding under the substantial evidence standard. *Id.* at 443, 108 USPQ at 372. The significance of the case is the approval of the dual injury inquiry. No legal standard with respect to the threshold of injury required to establish a "tendency" to substantially injure is set forth.[7]

The argument is made here that in *Bally/Midway*, this court adopted the standard that unfair methods or acts that result in even "conceivable losses of sales" establish injury to the domestic industry.[8] That precise argument was also made in *Textron* and firmly rejected. *Textron*, 753 F.2d at 1028, 224 USPQ at 631. Even if this panel had the inclination to accept Corning's argument, we are bound by the court's holding in *Textron*. *See Kimberly-Clark Corp.* v. *Fort Howard Paper Co.*, 772 F.2d 860, 863, 227 USPQ 36, 37 (Fed. Cir. 1985).

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[6] The decisions of our predecessor courts are binding precedent. *See South Corp.* v. *United States*, 690 F.2d 1368, 1370, 215 USPQ 657 (Fed. Cir. 1982).

[7] The phase "conceivable losses of sales" appears in the House Report on the 1973 amendments to other parts of § 337 and makes references to the *Von Clemm* decision. House Comm. on Ways and Means, Trade Reform Act of 1973, H.R. Rep. No. 571, 93d Cong., 1st Sess. 78 (1973). The words do not appear in *Von Clemm*. Congress's characterization of the recognition in *Von Clemm* of future injury as "conceivable losses of sales" cannot be faulted but it cannot be construed to mean that Congress eliminated the separate injury inquiry in § 337 cases based on patent infringement. A loss of sales in the future is "conceivable" only if supported by evidence on that issue in the record, as in *Von Clemm*.

[8] In *Bally/Midway*, the Commission had before it evidence that the foreign markets were saturated, the foreign manufacturers had both a large surplus inventory and a substantial capacity to produce more infringing games, and that the foreign manufacturers had sent numerous solicitations to potential U.S. customers. 714 F.2d at 1124–25, 219 USPQ at 102–03. That evidence established the existence of relevant conditions or circumstances from which probable future substantial injury could reasonable be inferred.

B

While Corning's proposed "test" for injury may be easily rejected as statutorily impermissible, it would be difficult to articulate positively what quantum of injury is legally required. Indeed, the question of quantum of injury is not one on which it would be appropriate for this court to put forth a legal standard. The statement in *Textron* that "the infringer holds, or threatens to hold, a significant share of the domestic market in the covered articles or has made a significant amount of sales of the articles" gives guidance, but it is not definitive of the considerations relevant to the injury inquiry.

In any event, determination of injury is precisely the type of question for which the Commission has the expertise and has been given the responsibility to answer. Moreover, the determination of injury necessarily must be based upon the particular facts of each case.[9] In view of these considerations, the appropriate function of this court is to review an injury determination to decide whether substantial evidence supports the facts relied on and whether the Commissioner's determination, on the record, is arbitrary, capricious, or an abuse of discretion. In other words, we must decide "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Part, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgement for that of the agency." *Id.*

V

Turning to Corning's arguments that past injury was proved,[10] Corning asserts that Sumitomo's past sales have caused substantial injury because the amount of Sumitomo's sales has totalled several million dollars. Corning asserts that this amount *ipso facto* meets the "test" of *Textron* that an injury is shown where sales are of a "significant amount." As indicated above, the amount of sales is highly relevant to the injury determination; however, whether the amount is "significant" cannot be determined by the dollar amount *in vacuo.* "Significant" requires some further inquiry once the amount of sales is found. Corning's comparison of the dollar amount of Sumitomo's sales to SpecTran's investment in its plant and to ITT's profit figures is unpersuasive as a basis for deciding whether the amount of the infringing sales is "significant." Conversely, the ALJ's comparison of Sumitomo's sales with the total sales of fiber in the U.S. market, as well as with the volume of sales of Corning and its domestic licensees, is meaningful and the conclusion that Sumitomo's sales were *de minimis* in those contexts is rational.

[9] Corning's argument that the ITC decision here is inconsistent with precedent in the ITC with respect to the required threshold of injury does not stand up under scrutiny. As indicated, injury determinations are highly fact specific. None vitiates the separate injury inquiry.

[10] The Commission adopted the ALJ's findings and conclusions on past injury. We will therefore refer to the ALJ and his decision in this part of the opinion.

Thus, there is no basis for holding that this part of the Commission's decision is arbitrary or capricious.

Corning asserts that a more lenient standard of injury or a lesser quantum of proof should be required for "newly emerging, high technology industries" than for stable, mature industries. In such new industries, "excess demand over supply" and "declining prices" are normal growth patterns, per Corning, and should not give Sumitomo "a right to take advantage of rising demand to make inroads into the U.S. markets and to establish customer/supplier relationships which ultimately enable Sumitomo to seize a bigger share of the market as that market matures." Also, Corning argues, lost sales retard the patentee's growth, the patentee's recoupment of research and development costs and its achievement of full efficient operation. These are, of course, valid propositions, but they do not answer the question whether the sales by Sumitomo were so significant that they have had any of those effects. In this connection, the ALJ found not only that the domestic industry did not decline but also that Corning and its licensees could not satisfy demand for the product, despite increasing their capacities; that they had put customers on allocation; and, indeed, that they were themselves importing fiber in order to fill orders. Thus, the ALJ could not say that a sale by Sumitomo represented a lost sale to the domestic industry. In addition, the presence of non-licensed United States producers of fiber and of a licensed foreign producer (NTL) whose products were permitted by Corning to be sold in the United States by its subsidiary (NTI), also tended to negate Corning's position that Sumitomo's sales and market share were gained at the expense of the *domestic* industry. Thus, the evidence, per the ALJ, did not establish a nexus between Sumitomo's sales and any past injury to the domestic industry.

Corning argues that NTI/NTL were placed on the wrong side of the injury equation—that their licensed sales are part of the domestic industry even though the product is manufactured abroad. The Commission's interpretation that only operations within the United States constitute the domestic industry is reasonable and is supported by the precedent of this court.[11] *Schaper Manufacturing Co.* v. *U. S. International Trade Commission*, 717 F.2d 1368, 1370, 219 USPQ 665, 667 (Fed. Cir. 1983) and cases cited therein. Any other view would mean that a patent owner could merely license the importation of products from abroad and claim injury within the meaning of section 337 to exclude unlicensed imports, despite having contributed little or nothing in the way of opportunities for employment of our industrial workers, one of the stated objectives of the Tariff Act of 1930. Tariff Act of 1930, ch. 497, preamble, Title III, 46 Stat. 590 (1930) ("An Act To * * * encourage the industries of the United States, to protect American labor * * * .") Moreover, we

[11] The Commission would have taken the U.S. distributor's operations into consideration as part of the domestic industry but for lack of evidence of the value added by the importer to the products.

reject Corning's argument that *Schaper* is distinguishable on the ground that the foreign manufacturer and U.S. distributor would constitute only part, not the entirety of the domestic industry. The Commission held otherwise and the distinction appears to us to be a difference without significance. Thus, we uphold the Commission's refusal to include the capacity of the licensed Canadian manufacturer in considering the ability of the *domestic industry* to meet demand or the loss of sales of imported goods by NTI.

Corning argues that competitors who allegedly infringe its patents also constitute part of the domestic industry operating under its patents, and, thus, their loss of sales should have been taken into account in determining past injury. However, the Commission is not in a position to try a multiplicity of infringement actions against *domestic* producers as part of an investigation into unfair trade practices in the importation of goods. On the record here, its decision to exclude the alleged domestic infringers from the domestic industry operating *under* the patent is not arbitrary of capricious. Nor has this factor, which "complicated" the evaluation of injury, been shown to be decisive in any way.

Similarly, other factors specifically mentioned by the ALJ, *e.g.*, the aggressive pricing policy of other, much larger, licensed competitors, were seen as the cause of the reduction of domestic prices of optical fiber. While noting three isolated instances in which Sumitomo had underbid a cable competitor on a particular contract, (Sumitomo was not uniformly the low bidder), the ALJ found that such isolated instances would not have caused the massive nationwide, across-the-board price reductions in the domestic industry. That finding is supported by substantial evidence.

Corning also claims injury by loss of royalties from Sumitomo. This is rather a transparent attempt to clothe in different garb the argument that patent infringement *per se* constitutes injury. Also, we must note that the damage here, assuming infringement, is not a total loss of royalties but deferment of payment. The record indicates that Corning is pursuing an infringement action against Sumitomo. Civil Action No. 84 Civ. 9155 (S.D.N.Y.).[12] Corning's coffers will be justly enriched by damages no less than a reasonable royalty if it is successful in that action. 35 U.S.C. § 284 (1982).

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[12] The action has been stayed pending resolution of this appeal. We question this practice which appears to cause unnecessary delay in resolution of the basic dispute between the parties. Here, non-patent issues are dispositive of this case. Moreover, the ITC takes the position that its decisions have no *res judicata* effect in such litigation. *Accord Union Mfg. Co. v. Han Back Trading Co.*, 763 F.2d 42, 226 USPQ 12 (2d Cir. 1985). Although this question has not been addressed by this court, the legislative history of the Trade Reform Act of 1974 supports the Commission's position:

> The Commission is not, of course, empowered under existing law to set aside a patent as being invalid or to render it unenforceable, and the extent of the Commission's authority under this bill is to take into consideration such defenses and to make findings thereon for the purposes of determining whether section 337 is being violated.
> * * *
> The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.

S. Rep. No. 1298, 93d Cong., 2d Sess. 196 (1974).

VI

With respect to Sumitomo's sales having a tendency to substantially injure the domestic industry in the future, the only projected major change in circumstances foreseen by the Commission was Sumitomo's expected production of optical fiber in the United States at its SERT facility in North Carolina beginning in mid-to-late 1985.[13] The expected capacity from that plant is projected to exceed five times the amount sold by Sumitomo between 1980–1984. Corning argues first that SERT and Sumitomo's imports will have a "synergistic relationship—imports spurring SERT sales and SERT increasing imports." Corning also points to evidence of an "understanding" between SERT and a prospective purchaser of cabled fiber which it claims would not have come about had Sumitomo "not proven itself to [the customer] through past sales." Finally, it is argued that, as a result of Sumitomo's sales and marketing efforts in the United States to date, Sumitomo has unfairly gained a "toehold" in the domestic market from which it can more easily increase its share in the future.

The Commission considered the first argument unsupported by evidence and Corning merely urges us to adopt its view, which we decline to do. The Commission refused to consider the evidence of prospective sales by SERT, holding that "only sales of imports * * * can be taken into account in finding a tendency to substantially injure." We find this interpretation of the statutory injury requirement reasonable. Further, no error is shown in the findings that any increase in Sumitomo's market share would be largely attributable to Sumitomo's SERT facility.

VII

Numerous additional disagreements with the Commission's factual findings appear in appellant's brief with citations to evidence to the contrary in the record. No attempt is made, however, by Corning's counsel, to meet its burden on appeal of showing that a particular finding is unsupported by substantial evidence, that is, that no reasonable person could make the particular finding considering the evidence offered by *both* sides.[14] Rather than dismiss these factual challenges out of hand because of the inadequacies of their presentation, the court has attempted to review the voluminous record on its own. Not only does it impose on the time of the court

[13] Corning brings to our attention that Sumitomo's target dates have not been met.

[14] In addition, statements are made by Corning as facts, citing some evidence of record but failing to indicate whether the Commission accepted the evidence as establishing the fact or disagreed with it. In this case, the ALJ made 718 numbered findings, many of which are paragraphs of sub-findings; his opinion covers 295 pages. The Commission's opinion (reviewing only tendency to injure) is 21 pages. The court experienced great difficulty in determining what facts Corning actually challenged since challenged factual findings were presented, in many instances, in the same manner as unchallenged factual findings.

to have to engage in this exercise, but also the chances of a successful appeal are diminished. The court cannot ever become as familiar with the record as counsel for the parties.[15]

In any event, the factual challenge of Corning not specifically addressed herein have been considered and are affirmed, appellant not having carried its burden on appeal of persuading this court that any findings are unsupported by substantial evidence.

Finally, Corning's assertion of procedural error in that the Commission refused to consider post-hearing evidence is meritless.

VIII

CONCLUSION

The factors considered by the Commission in its determination of no injury in this investigation are relevant. Its findings are supported by substantial evidence. None of the usual indices of injury, *e.g.*, declines in sales, production, investment, profits, or employment, are present. Similarly, its evaluation of the future levels of imports and their likely effect is amply supported by the record.

As the Commission stated, its decision here does not sanction the infringement of U.S. patents by importers, nor does the affirmance by this court. This court, which hears all appeals in both civil infringement actions and section 337 investigations, cannot ignore that Congress established different standards for injunctions and for exclusion orders.

The determination of the International Trade Commission that no violation of section 337 resulted from the importation from Japan and sale in this country of certain optical waveguide fibers by Sumitomo is affirmed. The patent issues being mooted by affirmance on the grounds of no injury, we vacate the portion of the Commission's decision dealing with those issues.

AFFIRMED IN PART; VACATED IN PART

[15] The confidential appendix consists of 16 volumes, 3 of which are in Japanese. The non-confidential appendix consisting of 5 volumes and the non-confidential briefs served absolutely no purpose in this case since they are incomprehensible due to deletions. The court rules do not require such waste.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–85)

DOW CHEMICAL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Before DICARLO, *Judge*

Court No. 83–4–00634

[Judgment for defendant.]

(Decided August 19, 1986)

Barnes, Richardson & Colburn (Robert E. Burke, Thomas M. Keating, Lynn S. Baker), for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Saul Davis),* for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of pyrolysis gasoline imported from Spain (merchandise).

The merchandise was entered in May, 1980 and classified under item 403.90, Tariff Schedules of the United States (TSUS), as a mixture in part of products provided for in Schedule 4, Part 1, Subpart B, covering TSUS items 403.02 through 403.90. Plaintiff seeks classification in Schedule 4, Part 1, Subpart A under item 401.44, TSUS, as "light oil," or under item 401.30, TSUS, as a mixture of Subpart A products, or, alternatively, in Schedule 4, Part 10 under item 475. 35, TSUS, as naphtha, or under item 475.65, TSUS, as a mixture of hydrocarbons not specially provided for. Plaintiff also says that classification under item 475.35, TSUS is required by an established and uniform practice under 19 U.S.C. § 1315(d) (1982) or by a uniform practice under 19 C.F.R. § 177.10(b) (1985).

The Court holds that the merchandise is properly classified under item 403.90, TSUS.

I. PLAINTIFF'S CLAIMED CLASSIFICATIONS UNDER SCHEDULE 4, PART 1, SUBPART A

Plaintiff proposes two alternative classifications under Schedule 4, Part 1, Subpart A, providing as follows:

> Coal tar, crude (including crude blast-furnace tar, crude oil-gas tar, and crude water-gas tar), and *organic chemical products found naturally in coal tar,* whether produced or obtained from coal tar or other source [emphasis added]:
>
> * * *
>
> 401.44 Light oil ..... Free
>
> * * *
>
> 401.80 Mixtures consisting wholly of two or more of the foregoing named products ..... Free

The proposed classifications raise the questions (1) whether item 401.44, TSUS is an *eo nomine* provision covering light oil which contains products not found naturally in coal tar, and (2) whether item 401.80, TSUS, covering mixtures "wholly of" products named in Schedule 4, Part 1, Subpart A, applies to merchandise consisting in part of products not listed in Subpart A.

The Court finds that the following products have not been shown to be found naturally in coal tar light oil: styrene, ethylbenzene, alkylbenzenes other than toluene and xylene, cyclopentadeine, piperylene, isoprene and pentene. These products comprise over 12% of the merchandise by weight. Plaintiff argues that item 401.44, TSUS is an *eo nomine* provision for light oil, contending that the superior heading to Subpart A should "be interpretated as *expanding* the scope of the subpart to include * * * sources of the products set forth therein beyond those chemical products found naturally in coal tar." Reply Brief for Plaintiff at 10 (emphasis in original). The Court does not agree.

General Interpretative Rule 10(c)(i), TSUS, reads:

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:
>
> (i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby

Applying this rule, an article is classifiable under item 401.44, TSUS only if it meets all the requirements of the superior heading. *See United States* v. *The Carbonundum Co.,* 63 CCPA 98, 100–101, C.A.D. 1172, 536 F.2d 373, 376–77 (1976). A product is classifiable as "light oil" under item 401.44 only if it is light oil "found naturally in coal tar, whether produced or obtained from coal tar or other source." If Congress intended to give the "light oil" provision unlimited *eo nomine* scope, Congress would have provided for it without any limiting superior heading.

The Court holds that the merchandise is not classifiable as "light oil" within item 401.44, TSUS, since it contains products not "found naturally in coal tar" within the meaning of the superior heading.

Moreover, plaintiff failed to establish that the merchandise comes within the commercial meaning of "light oil." Nothing in the record shows the term "light oil" applied to the merchandise except one

article written by plaintiff's expert witness. The same witness testified that the term "light oil" does not cover products derived other than by distillation, which he defined as "the heating up of a material such that the more volatile components vaporize and are separated from the heavier materials." (R. 525–26). The witness stated that distillation normally does *not* involve chemical and molecular changes in either the feedstock or the final product. *Id.* The parties stipulated, however, that the pyrolysis process, through which the merchandise was obtained, involved significant changes in the molecular structure of the feedstock and the final product. *See* Pretrial Order, Schedule C I.

Further, if the tariff provision for "light oil" were interpreted to encompass any hydrocarbon mixture that possesses a boiling range of up to 210–220°C, as plaintiff also argues, the provision would cover virtually all naphthas and motor fuels and many kerosenes. That interpretation would render items 475.25 475.35, TSUS superfluous and result in a partial nullification of item 475.30, TSUS. It is axiomatic that "Congress is presumed not to have used superfluous words in a statute." *Ameliotex, Inc.* v. *United States*, 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 674, 677 (1977).

Plaintiff's claim under item 401.80, TSUS also fails. Item 401.80, TSUS provides for:

> Mixtures consisting wholly of two or more of the foregoing products [those provided for in Subpart A].

General Headnote 9(f)(ii), TSUS defines "wholly of" as follows:

> "wholly of" means that the article is, except for negligible or insignificant quantities of some other material or materials, composed completely of the named material

Plaintiff's Exhibit 2 shows that the merchandise consists of 62.5% Subpart A compounds and 37.5% non-Subpart A compounds. The non-Subpart A compounds are present in sufficient quantity so that the merchandise cannot be said to be composed completely wholly of Subpart A materials within the meaning of General Headnote 9(f)(ii).

II. Plaintiff's Claimed Classifications Under Schedule 4, Part 10

Plaintiff claims that the merchandise is classifiable in Schedule 4, Part 10, under item 475.35, TSUS, as naphtha, or alternatively under item 475.65, TSUS, as a mixture of hydrocarbons not specially provided for. The merchandise is described by the term "naphtha" under item 475.35, TSUS, and is classifiable under that provision unless it is also described under Schedule 4, Part 1, and classifiable thereunder by operation of headnote 1 to Schedule 4, Part 10, which states:

> Any product described in this part and also in part 1 of this schedule is classifiable in said part 1, except fuel oils, motor fuel, and lubricating oils an greases, containing by weight not over 25 percent of any product described in said part 1.

The questions to be decided are (1) whether headnote 1 applies to products containing benzenoids which are not "added," but are created during synthesis of the petroleum feedstock, and (2) whether the merchandise is described in part 1.

The *Tariff Classification Study* states that "products described in part 10 would be classified in part 1 if they contained any *'benzenoid' additives."* 6 *Tariff Classification Study,* 167 (1960) (emphasis added). Since it has been stipulated that the benzenoids were created during the cracking process and were not added to the merchandise, plaintiff argues that headnote 1 to Part 10 does not require classification of its merchandise in Part 1 if it is described under that part.

The Court does not agree that the *Tariff Classification Study* requires that benzenoid compounds be "additives" to be described within Part 1, and governed by headnote 1 to Part 10. Headnote 1 to Part 1 states that unless there is a conflicting headnote elsewhere in Schedule 4, "all products described in this Part shall be classified hereunder even if more specifically described elsewhere in this schedule." Headnote 1 to Subpart B of Part 1 states that Schedule B applies to "products having a benzenoid, quinoid, or modified benzenoid structure artificially produced by synthesis * * *."

Since the headnotes, taken together, show that benzenoids produced by synthesis are classifiable in Part 1, Subpart B, products containing benzenoids produced by synthesis are classified in Part 1, rather than Part 10. Where the language of a statute is clear, an allegation of ambiguity will not transform the statute into an ambiguous provision. *See United States* v. *James,* 54 U.S.L.W. 5030, 5033 (U.S. June 24, 1986); *Amoco, Oil Co.* v. *United States,* 749 F.2d 1576, 1579 (Fed. Cir. 1984).

The Court must now decide whether the merchandise is "described * * * in Part 1" within headnote 1 to Part 10. The merchandise was classified in Part 1, Subpart B, under item 403.90, TSUS, which covers:

> Cyclic organic chemical products in any physical form a benzenoid, quinoid, or modified benzenoid structure, not provided for in subpart A or C of this part:
>
> | | | |
> |---|---|---|
> | 403.90 | Mixtures in whole or in part of any of the products provided for in this subpart ..... | 1.7c per lb. + 12.5% ad val. |

Plaintiff argues that item 403.90 does not encompass synthesized mixtures since the *Tariff Classification Study,* Schedule 4, at 21, says that item 403.90, TSUS was "based on" Paragraphs 27(a)(4)

and 27(b) of the Tariff Act of 1930, and Paragraph 27(a)(5) says that these products cannot be synthetic. As stated above, headnote 1 to Subpart B says that products are described in items 403.02 through 403.60 if they are derived by synthesis. Since item 403.90, TSUS by its terms covers mixtures of the products provided for in TSUS items 403.02 through 403.60, the Court will not look behind the plain meaning of statute. The Court holds that item 403.90 includes products produced by synthesis.

Plaintiff also dispute that the merchandise is a mixture "in part of any of the products provided for in" Subpart B and classifiable under item 403.90, TSUS, since these products "are not commercially recoverable from the mixtures themselves." Reply Brief for Plaintiff at 35.

General Headnote 9(f)(iv) states that " 'in part of' * * * mean[s] that the article contains a significant quantity of the named material." Whether the Subpart B compounds make up a significant quantity of the merchandise depends upon whether the compounds exist in a quantity sufficient to perform a useful function or part of the primary function of the merchandise. *See Northam Warren Corp.* v. *United States*, 60 CCPA 117, C.A.D. 1092, 475 F.2d 647 (1973); *United States* v. *Cavalier Shipping Co.*, 60 CCPA 152, C.A.D. 1103, 478 F.2d 1256 (1973).

The principal compounds present in the merchandise are benzene (32.5%), toluene (18.2%), and xylenes (7%). The toluene and xylenes were converted into benzene. The following Subpart B compounds are also present in the merchandise: ethylbenzene, vinyl toluene, styrene, alkylbenzenes, and alpha methyl styrene. Pretrial Order, Schedule C. I. L. Two laboratory analyses submitted by the parties disclose that these Subpart B compounds comprise either 13.34% or 15.5% of the merchandise by weight. Pretrial Order, Schedule C I., L., M.

Plaintiff sought to obtain from the merchandise as much benzene as possible. The toluene and xylenes were converted into benzenes and Subpart B compounds were also used for that purpose. Ethylbenzene and some alkylbenzenes were processed into benzene. Styrene was processed into ethylbenzene, then into benzene and fuel gases. The Court finds that these compounds are used to recover benzene, and that they have the same function as the bulk of the merchandise.

Vinyl toluene, a subpart B compound contained in the merchandise, was not used to obtain benzene. However, it was processed to become resin oil, which plaintiff offered for sale. Pretrial Order, Schedule C I., O (4), (12). The Court finds that vinyl toluene performed a significant and useful function.

Plaintiff argues without authority that each Subpart B product must be measured separately to determine if each separate product is present in commercially significant amounts. The Court disagrees and holds that the merchandise may be deemed a mixture "in part

of" the products set forth in Subpart B if the products, taken cumulatively, satisfy the rule set forth in General Headnote 9(f)(iv).

In conclusion, the Court finds that the Subpart B compounds, comprising from 13.3% to 15.5% of the imported merchandise, are "present in a quantity sufficient to perform a useful function," *Northam Warren Corp.*, 60 CCPA at 120, 475 F.2d at 650, or "are present in sufficient quantity to perform a part in the primary function of the article," *United States* v. *Cavalier Shipping Co.*, 60 CCPA at 156, 478 F.2d at 1259 (1973). The Court holds that the merchandise is a mixture that is "in part" of the products provided for in Subpart B. As such, it is classifiable in item 403.90, TSUS, and headnote 1 to Part 1 and headnote 1 to Part 10 preclude classification under TSUS items 475.35 or 475.65.

III. Plaintiff's Claim That Customs Practices Require Classification Under Item 475.35, TSUS

Plaintiff says that even assuming that the merchandise is described by item 403.90, TSUS, it should nevertheless be classified under item 475.35, TSUS since Customs had an established and uniform practice of classifying the merchandise under that provision. Section 315(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1315(d) (1982) provides in part:

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling * * *.

Plaintiff learned through the discovery process of facts which it contends show that at the time of entry only petroleum products containing benzenoids which were physically added were classified under Part 1 of Schedule 4 rather than under Part 10. According to plaintiff, since Customs disregarded this established and uniform practice when it classified the merchandise under Part 1, and no notice of a change in practice was published in the Federal Register, Customs classification is erroneous.

Defendant asserts that the Court may not consider plaintiff's arguments regarding an established and uniform practice because it lacks jurisdiction to do so. Defendant says that in order for plaintiff to claim classification based upon an established and uniform practice, it must have raised the alleged practice in its protest and cannot do so now. The Court disagrees.

New grounds may be raised in actions brought before the Court under 28 U.S.C. § 2638 (1982) which provides:

> In any action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the Court by rule may consider any new ground in support of the civil action so long as the new ground—
>
> (1) applies to the same merchandise that was the subject of the protest; and
> (2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 [19 U.S.C. § 1514] that was contested in the protest.

The established and uniform practice claim relates to the same merchandise that was the subject of the protest. This new ground is also "related to the same administrative decision" under section 1514 that was contested in plaintiff's protest, since the protest challenged the classification of the merchandise under section 1514(a)(2), and the merchandise would be classified differently if the claimed established and uniform practice is found to exist.

The Court finds without merit defendant's argument that an established and uniform practice "only tangentially effects [sic] the classification and rate of duty," brief for defendant at 43, and relates solely to the liquidation of the merchandise—a matter listed in 19 U.S.C. § 1514(a)(5). Its argument is based on cases discussing whether merchandise was properly or improperly liquidated in accordance with established and uniform practices. *See Rank Precision Instruments, Inc.* v. *United States*, 68 CCPA 78, C.A.D. 1269, 660 F.2d 476 (1981); *Asiatic Petroleum Corp.* v. *United States*, 59 CCPA 20, C.A.D. 1029, 449 F.2d 1309 (1971).

Aside from the fact that these cases have nothing to do with raising new grounds under section 2638, each contains ample language demonstrating the relationship between established and uniform practices and the classification of merchandise. Any relationship between the established and uniform practice and the liquidation of the merchandise presents no barrier to plaintiff's raising the new ground under section 2638 provided the new ground is related to the decision under section 1514 which is challenged in the protest. In *Pagoda Trading Co.* v. *United States*, 9 CIT ——, Slip Op. 85–87 (August 27, 1985) *appeal docketed*, No. 86–750 (Fed. Cir. Dec. 18, 1985), the Court held that a claim that merchandise was deemed liquidated by operation of law related to the classification, appraisement and liquidation of the merchandise—three separate decisions under 19 U.S.C. § 1514(a):

> The fact that plaintiff's new ground for protest also falls within category (3) of § 1514(a), as a challenge to the validity of the February 26, 1982, liquidation is not dispositive. The essential fact is that the new "ground" relates to the original protest of the classification and appraisement decisions.

Slip Op. at 6.

In this case, the fact that the new ground relates to the liquidation does not bar its consideration since the claimed established and uniform practice relates to the classification decision. *See* 19 U.S.C. § 1514(a)(2).

Defendant's argument also fails to acknowledge that plaintiff did not challenge the liquidation decision when it protested the classification of its merchandise:

> all decisions of the collector involved in the ascertaining and fixing the rate and amount of duties chargeable against imported merchandise entered for consumption are merged in and become a part of a legal liquidation, and it is a legal liquidation only * * * against which a protest will lie.

Dart Export Corp. v. *United States*, 43 CCPA 64, 73, C.A.D. 610 (1956), *cert. denied*, 352 U.S. 824 (1956) (quoting *United States* v. *B. Holman Inc.*, 29 CCPA 3, 14, C.A.D. 164 (1941)). Since a classification decision is merged in and becomes a part of a liquidation, an importer protesting classification of merchandise thereby protests the liquidation.

The Court also does not find that any limitation is placed on the jurisdiction of the Court by the holding in *Silvine Industries, Inc.* v. *United States*, 59 Cust. Ct. 355, C.D. 3168 (1967). In that case, decided when the protest served as the importer's pleading in the Customs Court, plaintiff had failed to plead "in its protests or by amendment" an alleged change in an established and uniform practice. *Id.* at 357. Without discussing 28 U.S.C. § 2642 (1964) (repealed 1970), a predecessor to section 2638 which gave the Customs Court discretion whether to allow amendments to protests, the Court held that the failure to plead or amend placed the claim beyond the scope of judicial review.

Other cases cited by defendant are inapposite. In *Audiovox Corp.* v. *United States*, 764 F.2d 848 (Fed. Cir. 1985), *aff'g* 8 CIT 233, 598 F. Supp. 387 (1984), plaintiff's first protests did not request duty-free treatment under the Generalized System of Preferences (GSP), and plaintiff filed new protests contesting the refusal to grant GSP treatment. Since plaintiff filed a second protest rather than an action challenging denial of the first protests, the Court lacked jurisdiction over plaintiff's claim. *Computime, Inc.* v. *United States*, 772 F.2d 874 (Fed. Cir. 1985), *aff'g* 8 CIT 259, 601 F. Supp. 1029 (1984), involved entries of watches and watches which were classified under separate provisions. Plaintiff's protest contesting the classification of the watches was granted by Customs. After reliquidation plaintiff filed a second protest contesting the classification of the watch bands. The Court held the second protest invalid since an importer cannot reserve for later protest a separate aspect of the same entry.

None of the authorities cited by defendant hold that a plaintiff may not raise under section 2638 the existence of an established

and uniform practice concerning the merchandise that is the subject of its protest. The Court holds that under section 2638 it may consider plaintiff's argument that an established and uniform practice requires classification of the merchandise under item 475.34, TSUS.

Plaintiff argues that an established and uniform practice required that benzenoid products must be physically added to require classification in Part 1 rather than in Part 10. Plaintiff first says there was a finding by the Secretary of the Treasury (Secretary) under section 1315(d) that an established and uniform practice existed by virtue of several memoranda written by a National Import Specialist in New York. The National Import Specialist is responsible for advising Customs officials throughout the country on the classification of naphthas.

Plaintiff argues that an established and uniform practice required that benzenoid products must be physically added to require classification in Part 1 rather than in Part 10. Plaintiff first says there was a finding by the Secretary of the Treasury (Secretary) under section 1315(d) that an established and uniform practice existed by virtue of several memoranda written by a National Import Specialist in New York. The National Import Specialist is responsible for advising Customs officials throughout the country on the classification of naphthas.

No court has held, and plaintiff presents no authority, that a National Import Specialist was authorized to make findings on behalf of the Secretary. *Compare Washington Handle Co.* v. United States, 34 CCPA 80, 87, C.A.D. 346 (1946) (collectors at two Seattle ports unauthorized to making section 1315(d) findings), with *Petroleum Corp.* v. *United States*, 59 CCPA 20, 449 F.2d 1309 (1971) (Acting Commissioner of Customs authorized), and *Rank Precision Industries, Inc.* v. *United States*, 68 Cust. Ct. 78, C.A.D. 1269, 660 F.2d 476 (1981) (Director, Classification and Value Division authorized). The National Import Specialist testified that statements and recommendations of National Import Specialists are not binding on Customs Headquarters, nor on other ports throughout the nation. The Court holds that the National Import Specialist did not have authority to make a finding on behalf of the Secretary under section 1315(d).

Plaintiff also argues that an established and uniform practice exists by virtue of C.S.D. 79–476, a ruling by the Director of the Classification and Value Division published in the Customs Bulletin. That ruling revoked an earlier ruling, C.S.D. 79–119, which concerned a product called VM & P naphtha, consisting of 48.5% paraffins, 41.7% naphthas, and a total of 9.8% aromatics. The earlier ruling held that VM & P naphtha containing a significant amount of benzenoid components could not be classified in Part 10 of Schedule 4

due to the wording of Headnote 1 to Part 10. In C.S.D. 79–476, however, Customs held that VM & P naphtha, which contains incidentally synthesized benzenoid compounds in relatively small percentages, could be classified separately from petroleum naphthas to which synthesized petroleum naphthas have been added. The ruling stated:

> *The petroleum naphtha described herein,* not containing any added synthetic benzenoid components, is classifiable as petroleum naphtha in item 475.35, TSUS [emphasis added].

Defendant says that the merchandise in this case is not identical to VM & P naphtha, and therefore C.S.D. 79–476 has no application to the merchandise. The National Import Specialist testified that the ruling covered only so-called "straight-run naphthas" not produced by synthesis, and therefore did not cover the merchandise.

Plaintiff argues that regardless whether C.S.D. 79–476 involved straight-run naphthas as opposed to pyrolyzed naphthas, the Customs ruling applies to "the classification of all naphthas containing benzenoids and no distinction is made with respect to the methods of their production." Reply Brief for Plaintiff at 46. The Court disagrees.

A finding constituting an established an uniform practice is applicable only where it clearly describes the subject merchandise. *Rank Precision Industries,* v. *United States,* 68 CCPA 78, 83, C.A.D. 1269, 660 F.2d 476, 480 (1981). Merchandise will not be classified in accordance with an established and uniform practice if plaintiff fails to prove that its merchandise is identical to that covered by a finding under section 1315(d). *Ditbro Pearl Co.* v. *United States,* 62 CCPA 95, 99, C.A.D. 1152, 515 F.2d 1157, 1161 (1975) (Miller, J., concurring).

Since plaintiff has failed to prove that its merchandise is the same as the VM & P naphtha discussed in C.S.D. 79–476, that Customs ruling does not constitute a finding under section 1315(d) that plaintiff's merchandise is classifiable under item 475.35, TSUS based on an established and uniform practice.

Plaintiff also argues that under 19 C.F.R. § 177.10(b) (1985) "any ruling regarding a rate of duty which is published in the Customs Bulletin will establish a uniform practice." Brief for Plaintiff at 51. Section 177.9(b)(2) of Customs Regulations states:

> Each ruling letter setting forth the proper classification of an article under the provisions of the Tariff Schedules of the United States will be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.

Based on the Court's finding that plaintiff failed to prove that its merchandise is identical to that discussed in C.S.D. 79–476, the

Court need not determine whether C.S.D. 79–476 constitutes a "uniform practice" under 19 C.F.R. § 177.10(b).

Finally, plaintiff argues that even if there is no finding of an established and uniform practice under 19 U.S.C § 1315(d), the Court may make a finding as to whether a uniform and established practice existed concerning the merchandise at the time of entry.

In *Heraeus-Amersil, Inc.* v. *United States*, Nos. 86–602/650 (Fed. Cir. July 8, 1986), our appellate court held that this court can find that an established and uniform practice exists in the absence of a "finding" by the Secretary when the Secretary fails to act on a request for such a finding. In *Heraeus-Amersil* the Court said that the protest, which challenged Customs classification on the basis of an alleged established and uniform practice effectively served as a request that the Secretary to make a finding. The Court interpreted the denial of plaintiff's protest as a failure on the part of the Secretary to act on the request to make a finding of an established and uniform practice. The Court said that "where the Secretary fails to respond to a request that he find the existence of an established and uniform practice, the courts can make that finding in his stead." Slip Op. at 12.

In the present case plaintiff did not request that the Secretary make a finding that there is an established and uniform practice concerning the classification of the merchandise. Nor is there anything in the protest which can be construed as such a request. Under the circumstances, there is no authority under *Heraeus-Amersil* for the Court to make a finding in place of the Secretary as to the existence of an established and uniform practice. Since plaintiff has failed to show a finding of or a request for an established and uniform practice under section 1315(d), or a publication of a uniform practice regarding the merchandise under 19 C.F.R. § 177.10(b), the Court holds that the merchandise is properly classified under item 403.90, TSUS.

Judgment will be entered accordingly. So ordered.

(Slip Op. 86–86)

CR INDUSTRIES, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–2–00244

Before TSOUCALAS, *Judge.*

OPINION AND ORDER

[Defendant's motion to dismiss for lack of jurisdiction granted in part; plaintiff's motion for summary judgment granted in part and denied in part; defendant's cross-motion for summary judgment granted.]

(Dated August 19, 1986)

Schnader, Harrison, Segal and Lewis (*Saul L. Sherman* and *Dennis A. Adelson*) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice (*Saul Davis*) for the defendant.

TSOUCALAS, *Judge*: This action is before the Court, pursuant to Rule 56, on plaintiff's motion for summary judgment. The dispute arises over the classification of plaintiff's merchandise, a thin-walled wear sleeve and accompanying protective metal cup. Plaintiff argues that the proper classification is as an entirety under

Schedule 6, Part 6, Subpart B

Chassis, bodies (including cabs), and parts of the foregoing motor vehicles:

692.32* Other ..... 3.9% ad val.

*previously 692.27 ..... 4.0% ad val.

Customs classified the components of the merchandise as follows:

Wear Sleeve:

Schedule 6, Part 4

681.39* Machinery parts not containing electrical features and not specially provided for ..... 9.0% ad val.

*previously 680.90 ..... 9.5% ad val.

Cup:

Schedule 6, Part 3

Hand tools (including table, kitchen, and household implements of the character of hand tools) not specially provided for, and metal parts thereof:

651.47 Other:
Of iron or steel:
Other ..... 8.1% ad val.

STATEMENT OF FACTS

Plaintiff, CR Industries ("CR"), is the exclusive importer of merchandise, known as Speedi-Sleeve kits (or simply Speedi-Sleeve), consisting of a thin stainless steel wear sleeve and a carbon steel cup which fits over the sleeve. The sleeves are used to repair worn shafts on various types of vehicles. The cups are packaged with the sleeves and serve a dual purpose: they protect the sleeves while in transit and are used as tools to install the sleeves on the shafts. After use in installation, the cups are discarded.

Plaintiff, through the affidavit of its customs broker, asserts that it was the sole importer of the merchandise which was liquidated almost exclusively at the Port of Blaine, Washington, from 1969

through 1980.[1] During that time, plaintiff alleges that the Speedi-Sleeve kits were uniformly classified[2] as entireties under the provision for "parts of the foregoing motor vehicles" as stated in item 692.32, TSUS. On July 23, 1980, the import specialist at Blaine issued a notice of rate advance reclassifying the sleeve under "machinery parts not containing electrical features and n.s.p.f." and classifying the cup as "other hand tools of iron or steel." Plaintiff sought a ruling from Customs Headquarters and on October 27, 1981, the Director of the Classification and Value Division affirmed the classification made at Blaine. Customs also declined to rule on plaintiff's claim that a uniform existing practice ("UEP") was in effect with regard to the merchandise claiming that insufficient data was presented to adequately address the issue. Plaintiff filed timely protests as to the classification of the sleeve and cup components as entireties and upon their denial commenced this action against the defendant, the United States.

Issues Presented

I. Does this Court have jurisdiction over

A. plaintiff's claim concerning the classification of the cup and sleeve components of the importations; and

B. plaintiff's claim, pursuant to 19 U.S.C. § 1315(d), concerning the existence of a uniform existing practice, established by virtue of consistent liquidation of Speedi-Sleeve from 1969 to 1980?

II. Does the Speedi-Sleeve kit, as a matter of law, constitute an entirety within the meaning of the tariff laws?

III. Is the merchandise, as a matter of law, properly classified as "parts of foregoing motor vehicles" under item 692.32, TSUS?

Discussion of Law

I. *Jurisdiction*

A. This Court has jurisdiction over plaintiff's claims regarding both the cup and sleeve components.

It is fundamental that the existence of a jurisdictional predicate is a threshold inquiry in which plaintiff bears the burden of proof. *See McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *S.S. Kresge Co.* v. *United States*, 68 Cust. Ct. 367, 370 C.R.D. 72–8, 340 F. Supp. 1404, 1407 (1972). Pursuant to 19 U.S.C. § 1514(c)(2) and 28 U.S.C. § 1581(a), in order for this Court to acquire jurisdiction, the importer must file the requisite protest within 90 days of notice of liquidation. Section 1514(c)(1)[3] regulates the

[1] Plaintiff also admits that a "few urgent air shipments" entered at the port of Seattle and Chicago. *Plaintiff's Reply Memorandum* at 23.

[2] Plaintiff claims not to have actual records of the entries made during the years in question and relies on the statement of its affiant. Defendant, through the affidavit of its attorney, claims to be unable to secure the relevant records from Customs. *Defendant's Memorandum*, Davis Affidavit at 2.

[3] Section 1514(c)(1) provides in pertinent part that a protest should set forth "distinctly and specifically each decision described in subsection (a) of this section as to which protest is made; each category of merchandise affected by each such decision as to which protest is made; and the nature of each objection and reasons therefor." 19 U.S.C. § 1514(c)(1) (1982).

form and content of that document. It requires, *inter alia*, particularized reference to the decision contested and the nature of each objection. In this action, the jurisdictional issues center on the sufficiency of plaintiff's protest.

It is often written that "at the time he makes his protest the importer must have in mind the objection afterwards made at the trial." *Mattel, Inc.* v. *United States*, 72 Cust. Ct. 257, 260–61, C.D. 4547, 377 F. Supp. 955, 959 (1974) quoting *United States* v. *Sheldon & Co.*, 5 Ct. Cust. Apps. 427, 429, T.D. 34946 (1914). Further, the protests do not require technical precision, *National Carloading Corp.* v. *United States*, 44 Cust. Ct. 493, Abs. 64258 (1960), and need only "when fairly construed * * * show * * * that it was sufficient to notify the collector of its true nature and character * * *." *American Mail Line, Ltd.* v. *United States*, 34 CCPA 1, 6, C.A.D. 335 (1946) quoting *Davies* v. *Arthur*, 96 U.S. 148, 151 (1878).

In this action, the defendant contends that plaintiff's protests are jurisdictionally defective as to the cup because they fail to expressly raise the issue of the classification of that component. Plaintiff's protests refer to the "classification of the sleeve repair kits" or in some cases to simply "classification of the sleeves."[4] It is fairly clear that plaintiff must have envisioned the objection now asserted before the Court at the time of the protest because plaintiff had previously raised the issue in its communications with Customs in 1981 when it claimed the entire kit was dutiable as an entirety under the provision for motor vehicle parts.

The only remaining question is whether the protest can be said to fairly apprise Customs of the claimed objection. I hold that plaintiff's protests, fairly read, do adequately inform Customs of the objection made. *See J. Ray McDermott & Co.* v. *United States*, 69 Cust. Ct. 197, 201–02, C.D. 4394, 354 F. Supp. 280, 283 (1972), *appeal dismissed*, 60 CCPA 185 (1973) (protest as to oilwell platform jacket encompasses entity consisting of jacket and girder). In any event, it must be noted that plaintiff has never offered an alternative classification for the cup at any stage from the filing of its protests through the recent oral argument on the motion for summary judgment. Presumably, it accepts the idea that if the cup and sleeve do not form an entirety, then the cup is separately dutiable as a hand tool. Nevertheless, plaintiff is bound by that determination, if it is incorrect on the entireties issue, since it has failed to prove that the cup is properly classifiable in any other tariff provision. *See* 28 U.S.C. § 2639(a)(1) (1982).

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[4] *See, e.g.*:
Protest No. 30042
Entry No. CE 80-185443-9 of 6/25/80
We herewith protest the classification of the sleeves under TSUS 681.30. The proper classification should be 692.32 as the articles are chiefly used as parts of vehicles.
Further information will be supplied at a later date.
Protest No. 30042
Entry No. CE 80-187432-5 of 9/24/80
We herewith protest the classification of the sleeve repair kits under TSUS 681.30. The proper classification should be 692.32 @ 3.9% since the kits are chiefly used as parts of vehicles.
Supplemental information will be supplied at a later date.

B. This Court does not have jurisdiction over plaintiff's claim of the existence of a uniform existing practice (UEP).

There is no need to recite the legal principles enunciated in Part A. It is sufficient to note that there is no possible way to read the language of plaintiff's protest so as to conclude that plaintiff was raising this claim. *See Silvine Importers, Inc.* v. *United States*, 59 Cust. Ct. 355, 357, C.D. 3168 (1967). Protest as to classification, such as that in the instant case, does not, by itself, constitute protest as to the UEP. *See Beck Distributing Corp.* v. *United States*, 77 Cust. Ct. 158, 160, C.R.D. 76–7 (1976); *Bauer Alphabets, Inc.* v. *United States*, 54 Cust. Ct. 255, 263, C.D. 2540 (1965).

This Court is unwilling to vitiate the protest requirements mandated by Congress, *see* 19 U.S.C. § 1514(c)(1), in the guise of endorsing a liberal construction of protests. *See Audiovox Corp.* v. *United States*, 8 CIT 233, 235 n.6, 598 F. Supp. 387, 389 n.6 (1984), *aff'd on opinion below*, 764 F.2d 848 (Fed. Cir. 1985). *See also Gray Tool Co.* v. *United States*, 6 CIT 333, 334 (1983) (under § 1514(a) protest as to appraisement is not protest as to classification). This position is in accord with that of a recent decision of the Federal Circuit which, while acknowledging the principle that protests are to be liberally construed, explained:

> This does not, however, mean that protests are akin to notice pleadings and merely have to set forth factual allegations without providing any underlying reasoning * * *. "A protest must be sufficiently distinct and specific to enable the Customs Service to know what is in the mind of the protestant." (citation omitted)

Computime, Inc. v. *United States*, 8 CIT 259, 601 F. Supp. 1029 (1984) *aff'd*, 772 F.2d 874, 878–79 (Fed. Cir. 1985).

Plaintiff may not take advantage of 28 U.S.C. § 2638 (1982) because the UEP claim is not a "new ground" being asserted for the first time before this Court. Instead, plaintiff argues that the protest regarding classification encompasses the claimed UEP. Alternatively, it contends that since Customs was made aware of the issue in connection with the internal advice ruling, it may not disclaim knowledge of the alleged UEP, and the Court may assert jurisdiction despite any deficiency in the protest. However, even if this argument were to otherwise command support in the law, to now allow the UEP claim to be asserted given that Customs specifically informed plaintiff that it declined to decide the issue due to insufficient information would both drain the protest requirements of meaning and be prejudicial to defendant. Plaintiff's approach would thwart the scheme of orderly claim assessment envisaged by § 1514 since Customs was deprived of a chance to review the UEP issue prior to the denial of the protest. *Cf. Old Republic Insurance*

Co. v. *United States*, 8 CIT 1, 3 (1984). The lack of notice in the protest may have led Customs to believe that the issue had been abandoned. Moreover, knowledge that the claim was being actively asserted may have allowed Customs to more adequately investigate any evidence of actual importing practice. Therefore, not having raised the issue in a timely protest, plaintiff is now precluded from raising it before this Court. *Cf. United States* v. *Parksmith Corp.*, 62 CCPA 76, 82, C.A.D. 1149, 514 F.2d 1052, 1057 (1975).

II. The cup and sleeve components of the Speedi-Sleeve kit do not form an entirety for tariff classification purposes.

The doctrine of entireties allows an item consisting of several components, which may or may not be susceptible of use in individual pieces, to be dutiable at one rate. *See Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, 14–15, C.A.D. 894 (1966). It is a concept that seeks to make tariff classifications responsive to the realities of commercial practice. *See Donalds, Ltd.* v. *United States*, 32 Cust. Ct. 310, 314, C.D. 1619 (1954).

In order to label importations an entirety, the components must together form a complete article of commerce and the identity of individual parts must be subordinated to that of the whole. *See E.M. Stevens Corp.* v. *United States*, 56 Cust. Ct. 494, 499–500, C.D. 2687, *appeal dismissed*, 53 CCPA 155 (1966). The mere fact that the components are imported together and a portion of the merchandise serves a protective function with respect to another portion, does not, under prior case law, compel the finding that the merchandise is dutiable as an entirety. *See United States* v. *Hensel, Bruckmann & Lorbacher, Inc.*, 22 CCPA 281, T.D. 47330 (1934) (leather carrying cases and binoculars not entireties); *United States* v. *E. Leitz, Inc.*, 22 CCPA 277, T.D. 47329 (1934) (wood and paper cases and microscopes not entireties). The key is that the components of the entirety should be designed to be or be capable of assembly so that the resulting article is new with a different character or use. *Hensel*, 22 CCPA at 285. The components of the entirety should function together; it is not enough that one component merely enhances the value of another. *See Lafayette Radio Electronics Corp.* v. *United States*, 57 CCPA 62, 65–66, C.A.D. 977, 421 F.2d 751, 753–54 (1970). In *Lafayette*, the Court held that a leather carrying case and the radio it was designed to accommodate was an entirety because the radio was designed to function and actually did function in the case. *Lafayette*, 57 CCPA at 66; 421 F.2d at 754. The fact that the radio could be operated without the case did not prevent the importation from being termed an entirety. At the same time, the fact that the case protected the radio unit was itself insufficient to create an entirety. *Id.*

This stands in distinction to the merchandise in the instant case. The cup component serves a protective function during transport of the sleeve, and serves as a tool to install the sleeve on worn shafts. Nevertheless, it is discarded prior to the actual use on the sleeve

and never operates in conjunction with the sleeve. *Cf. United States* v. *Kronfeld, Saunders, Inc.*, 20 CCPA 57, 60, T.D. 45679 (1932) (bracelet mountings and diamonds actually used to form a new article—a bracelet—constitute an entirety). The fact that the two components are actually imported together, and that the cup is unlikely to be used alone, is certainly relevant to the entireties question. Notwithstanding those factors, it remains true that the two components are never affixed or attached together nor do either of them lose their individual identities in favor of a new article. *See United States* v. *Altray Co.*, 54 CCPA 107, 110, C.A.D. 919 (1967); *E.M. Stevens Corp.* v. *United States*, 49 Cust. Ct. 203, 204, Abs. 66971, *reh'g denied*, 49 Cust. Ct. 270, Abs. 67137 (1962).

The parties and the Court agree that there is no material factual issue as to the components of the merchandise or to the manner in which they function in relation to each other. This makes the entireties question ripe for determination by way of summary judgment. *See Amorient Petroleum Co.* v. *United States*, 9 CIT ——, 607 F. Supp. 1484, 1487 (1985); *Cf. S.S. Kresge Co.* v. *United States*, 77 Cust. Ct. 154, 155, C.R.D. 76-6 (1976) (summary judgment denied where issues existed as to identity of the components and so as to their use together). Therefore, it is the holding of this Court that the merchandise cannot constitute an entirety for tariff classification purposes, since the cup is discarded after installation of the sleeve and never operates in conjunction with the sleeve.

III. There is no material issue of fact as to whether the importations belong to the class or kind of wear sleeves and as to whether the chief use of the class or kind is in the vehicles referred to by item 692.32, TSUS.

The principal substantive issue is whether the Court may hold, as a matter of law, that the sleeve component is properly classifiable in a given parts provision.[5] In this regard, the tariff schedules offer the following guidance:

General Interpretative Rule 10(ij):

> (ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

General Interpretative Rule 10(e)(i):

> (i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

[5] At the hearing on the motion for summary judgment, defendant withdrew its argument that, as a matter of law, the sleeve compound was classifiable as "parts of non-electrical machinery" in item 681.39, TSUS, based on Schedule 6, part 4, headnote 1(vi):

1. This part does not cover—
(vi) articles and parts of articles specifically provided for elsewhere in the schedules.

The inquiry can be distilled into two issues:

A. ascertaining the class or kind into which the importations belong; and

B. ascertaining the chief use in the United States of the class or kind at the time of importation.

The plaintiff proposes that the relevant class be termed all thin-walled wear sleeves or at least all wear sleeves, i.e., all cylindrical metal products whose function it is to restore worn shafts. In contrast, defendant would define the class as all shaft seals, i.e., all products whose function it is to effect a seal around a shaft. The correct choice of class, wear sleeves versus shaft seals, is important, for that choice will affect the later determination of chief use.

The parties correctly direct this Court to the decision in *United States* v. *Carborundum Co.*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373, *cert. denied*, 429 U.S. 979 (1976) as the starting point in the analysis. The *Carborundum* factors for determining class or kind include:

(a) general physical characteristics of the merchandise;
(b) recognition of use of the class in the trade;
(c) channels of trade in which the merchandise moves;
(d) environment of sale; and,
(e) expectation of ultimate purchasers.

Carborundum, 63 CCPA at 102; 536 F.2d at 377.

The plaintiff explains that a wear sleeve is a repair device for worn shafts. Its function is to provide a new, smooth surface upon which an oil seal can make proper contact. The defendant argues that the wear sleeve and oil seal (along with other shaft seals) should be placed in the same category due to three broad contentions it advances. Firstly, the oil seal and wear sleeve both perform a "sealing" function in conjunction with a rotary shaft. In other words, the oil seal forms a "seal" with the shaft to keep in lubricants and to keep out unwanted dirt and moisture. Similarly, the defendant argues, the wear sleeve forms a "seal" with the shaft it is repairing. Secondly, replacement of the wear sleeve has traditionally also meant that the user would replace the oil seal. Thirdly, in trade literature, seals and sleeves often appear together. Thus, seals and wear sleeves, in defendant's view, are marketed to the same consumers in similar channels of commerce.

In spite of defendant's attempt to use the term "sealing" in multiple contexts, there are basic differences between sleeves and seals which cannot be obscured.[6] The wear sleeve is generally fixed to the shaft, which rotates in relation to the seal. The seal is a more complex structure, sometimes containing non-metal parts, and often not attached directly to a shaft. While defendant chooses to term the function of both articles as "sealing," the function of the sleeve is best understood as rebuilding the worn surface of a shaft to allow the seal to properly perform its "sealing" role. When this is clear, it

[6] This is demonstrated in Plaintiff's Exhibit F, entitled CR Speedi-Sleeve/Seal Kits. The sleeve and seal each have a different appearance, and are packaged separately.

becomes obvious why, as part of its marketing strategy, plaintiff promotes thin-walled wear sleeves in conjunction with oil seals. Sale of a wear sleeve will also give plaintiff an opportunity to sell an oil seal since the oil seal is often replaced when a wear sleeve is installed.[7] This, however, does not support the contention that the two articles are of the same class. References to wear sleeves and oil seals juxtaposed in marketing literature are designed as consumer aids to assist in matching sizes of the two products whenever both are purchased.[8] In its instructional materials, plaintiff lists seals and wear sleeves separately.[9] The two may both be used in conjunction with a shaft but are different articles and are promoted as such.

On the matter of trade usage, in its lone affidavit, defendant relies on the fact that plaintiff is listed as a maker of seals in the Thomas Register, a recognized trade directory. Plaintiff explains that it is listed as a maker of seals since it prefers to be listed under the category representing its principal business. Wear sleeve sellers are in fact listed under a separate heading entitled "shaft sleeves." For example, another corporation, Federal Mogul, which markets wear sleeves purchased from CR Industries, is listed under the category of shaft sleeves. Indeed, the current edition of the Register has a separate listing for wear sleeves cross-indexed to the listing for "sleeves: shaft." Thus, no matter how plaintiff is listed, the Thomas Register does recognize a category termed wear sleeves.

In sum, the Court is unconvinced that there exists a material issue as to the class to which the importations belong. At best, defendant has demonstrated that wear sleeves and shaft seals are sometimes listed together in the same literature. This does nothing to negate the substantial differences in appearance, function, and use, which unequivocally separate the two groups. Similarly, there is no bona fide dispute as to chief use. Plaintiff's unrebutted averment is that approximately 90% of all wear sleeves are used in on-highway motor vehicles. Defendant does not contest that proposition; it only alleges that shaft seals do not have the requisite chief use. That would only be significant if the relevant class were shaft seals which, as discussed previously, it is not.

Plaintiff has sustained its burden of proving the correct classification of the subject merchandise, and because there is no material fact question as to either the class to which Speedi-Sleeve belongs

[7] It should be noted that use of Speedi-Sleeve, plaintiff's patented thin-walled wear sleeve, as opposed to use of a traditional thick-walled sleeve, allows the shaft to be repaired without change of an oil seal. Use of the wear sleeve is not equivalent to replacing an oil seal, it is an alternative to refinishing the worn surface of the shaft.

[8] *See Plaintiff's Exhibit O*, 1981 CR Industries Automotive Program, explains the relation of the Speedi-Sleeve wear sleeve to the oil seal.

> Repairing a worn shaft with a Speedi-Sleeve is more than just economical and fast * * * And a sleeved shaft will even accept the same size seal as the original shaft—which makes it convenient.
>
> To make it even more convenient, the appropriate Speedi-Sleeve size is listed in every CR seal catalog next to each seal listing.

[9] *See Plaintiff's Exhibit B*, CR Handbook of Seals, which lists seals in Section One and then places wear sleeves in Section Two with subsections for thin-walled (Speedi Sleeve) and large diameter wear sleeves.

See Plaintiff's Exhibit C, CR Industries Shaft Seals: A Self-Study Program, Heavy-Duty Fleet Edition includes CR Scotseal and Speedi-Sleeve.

In this manual, plaintiff devotes the first seven chapters to a discussion of seals and then presents a separate chapter on wear sleeves.

nor to the chief use of that class, summary judgment is granted in plaintiff's favor on this issue.

CONCLUSION

For the foregoing reasons, the Court holds as follows:

(a) there is no jurisdiction over plaintiff's uniform existing practice claim and therefore it is dismissed;

(b) as a matter of law, the merchandise cannot constitute an entirety and therefore defendant's cross-motion for summary judgment is granted as to that issue;

(c) as a matter of law, the cup component is properly classified as "other hand tools of iron or steel" pursuant to item 651.47, TSUS, and therefore defendant's cross-motion for summary judgment is granted as to that issue;

(d) as a matter of law, the sleeve component is properly classified as "parts of the foregoing motor vehicles" pursuant to item 692.32, TSUS, since it belongs to the class or kind of wear sleeves whose chief use is in on-highway motor vehicles. Therefore, plaintiff's motion for summary judgment is granted as to that issue. SO ORDERED.

(Slip Op. 86–87)

GENERAL MOTORS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Before RE, *Chief Judge.*

Court No. 77–11–04746

MEMORANDUM OPINION AND ORDER

Plaintiff challenges the assessment of "diversion" duties upon automotive radios imported from Canada. The Customs Service, pursuant to Schedule 6, Part 6B, Headnote 2, found that the merchandise was not "used in the manufacture in the United States of motor vehicles."

Held: The Court of International Trade has jurisdiction to review a challenge to the assessment of "diversion" duties. Also, the Customs Service properly imposed duty upon the automotive radios, since the radios were not "used in the manufacture in the United States of motor vehicles."

[Defendant's cross-motion for summary judgment granted.]

(Decided August 20, 1986)

Barnes, Richardson & Colburn (James S. O'Kelly, on the motion), for plaintiff.

Richard K. Willard, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office *(Saul Davis,* on the motion), for defendant.

Re, *Chief Judge:* In this action, plaintiff, General Motors Corporation, challenges the imposition of "diversion" duties upon certain merchandise imported from Canada, and described as "dealer radio packs." The "dealer radio packs" consist of fabricated radio components which, after importation, are assembled into automotive radios.

Upon entry into the United States, since plaintiff claimed that the radios were "intended for use as original equipment in the manufacture in the United States of a motor vehicle," the Customs Service classified the merchandise under item 685.55 of the Tariff Schedules of the United States (TSUS), as original motor vehicle equipment from Canada. Consequently, it was entered and liquidated free of duty.

After importation, plaintiff notified the Customs Service that the "dealer radio packs" were not being installed during the factory assembly of the automobiles. Instead, the radio packs were installed at the retail level by dealers. Accordingly, the Customs Service, by letter ruling, determined that the imported merchandise was "diverted" from its intended use "in the manufacture in the United States of motor vehicles." Therefore, pursuant to Headnote 2(d)(ii) of Schedule 6, Part 6B, TSUS, the Customs Service assessed "diversion" duties, and required plaintiff to pay "an amount equal to the duty which would have been payable at the time of entry if the Canadian article had not been entered as original motor-vehicle equipment."

Plaintiff protests the assessment and seeks to recover its payment. It contends that, although the radio packs were not installed during the factory assembly of the automobiles, but at the retail level by dealers, they are nevertheless properly classifiable as "original motor-vehicle equipment," free of duty, under item 685.55 of the tariff schedules.

Defendant contends that the Court lacks subject-matter jurisdiction over this action under 28 U.S.C. § 1582 (1976). In the alternative, defendant contends that diversion duty was properly imposed on the merchandise, and that summary judgment should be granted in its favor. Since the question presented pertains to the proper classification of the imported merchandise, it is the determination of this Court that defendant's motion to dismiss for lack of jurisdiction is denied. *See John V. Carr & Son, Inc.* v. *United States*, 76 Cust. Ct. 162, 163–64, C.D. 4652, 414 F. Supp. 620, 622 (1976). Plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

The pertinent statutory provisions of the Tariff Schedules are as follows:

Schedule 6, Part 5:

685.55	Any article described in the foregoing items 685.11 to 685.50, inclusive, if Canadian article and original motor-vehicle equipment (see headnote 2, Part 6B, Schedule 6)	Free.

Schedule 6, Part 6, Subpart B, Headnote 2 (emphasis added):

> 2. *Motor Vehicles and Original Equipment Therefor of Canadian Origin.*

> (a) The term *"original motor-vehicle equipment"*, as used in the schedules with reference to a Canadian article* * *means such a Canadian article which has been obtained from a supplier in Canada under or pursuant to a written order, contract, or letter of intent of a bona fide motor-vehicle manufacturer in the United States, and which *is a fabricated component intended for use as original equipment in the manufacture in the United States of a motor vehicle* * *.
>
> * * *
>
> (d) If any Canadian article accorded the status of original motor-vehicle equipment is not so used in the manufacture in the United States of motor vehicles, such Canadian article or its value* * *shall be subject to forfeiture, unless at the time of the diversion of the Canadian article the United States Customs Service is notified in writing, and, pursuant to arrangements made with the Service—
>
> (i) the Canadian article is, under customs supervision, destroyed or exported, or
>
> (ii) duty is paid to the United States Government in an amount equal to the duty which would have been payable at the time of entry if the Canadian article had not been entered as original motor-vehicle equipment

The following facts are not in dispute. Plaintiff is a "bona fide motor vehicle manufacturer in the United States," and is the importer of record of merchandise that was entered and liquidated duty-free under item 685.55, TSUS. The imported merchandise consists of various fabricated radio components which, after importation, are assembled into automotive or "dealer" radio packs. A radio pack is a fully assembled, individually packaged radio, which is designed to be installed at the retail level by the dealer, rather than at the factory.

After liquidation of the merchandise, plaintiff notified the Customs Service that the radio packs were to be installed by plaintiff's franchised retail dealers as original equipment in new cars, and requested a ruling on the status of the radio packs. The Customs Service, in a letter ruling issued by the Director of the Classification and Value Division, ruled that the radio packs were not used as original motor-vehicle equipment, but had been "diverted" within the meaning of Schedule 6, Part 6B, Headnote 2(d), TSUS, which codifies section 404(d) of the Automotive Products Trade Act of 1965 (APTA), Pub. L. 89–283, 79 Stat. 1016, 1022–23. Hence, plaintiff paid an amount equal to the duty which would have been payable at the time of entry if the Canadian articles had not been entered as original motor-vehicle equipment. Plaintiff protested the payment and, by this action, seeks to recover the diversion duties.

Plaintiff contends that this Court has jurisdiction under 28 U.S.C. § 1582(a)(2) and (3) (1976). It also maintains that the decision of Customs, which held that the merchandise was diverted within the meaning of Schedule 6, Part 6B, Headnote 2(d)(ii), is erroneous.

Two questions are presented. The first, a question of first impression for the Court of International Trade, is whether the Court has jurisdiction over plaintiff's protest of the imposition of "diversion" duty. The second is whether, within the meaning of the relevant tariff schedules, the dealer-installed radios fall within the statutory definition of original motor-vehicle equipment.

JURISDICTION

This action was originally filed in the United States Customs Court, predecessor of the United States Court of International Trade. The jurisdictional provisions applicable at the time the action was commenced provided:

> exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision * * * involves: * * * (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury.

Customs Court Act of 1970 § 110, 28 U.S.C. § 1582(a) (1976) (amended 1980 & 1984). A protest of a decision, order, or finding must be filed within 90 days after, but not before, notice of liquidation or the date of the decision to which protest is made. Tariff Act of 1930 § 514, 19 U.S.C. § 1514(c)(2) (1982).

In its complaint, plaintiff alleges that a challenge to the validity of diversion duties is within the jurisdiction of this Court pursuant to 28 U.S.C. § 1582(a)(2) and (3). Defendant, however, contends that this Court lacks jurisdiction over the present case because: (1) the payment of diversion duties is not a cognizable cause of action under either section 1582 or section 1514, (2) the payment of diversion duties by the plaintiff is not a charge or exaction, (3) the action protested by plaintiff was the result of a settlement between plaintiff and defendant, (4) plaintiff failed to file a timely protest, and (5) plaintiff failed to notify Customs in writing at the time of the diversion as required under Headnote 2 to Section 6, Part 6B.

It is established that, when a jurisdictional issue is raised, plaintiff has the burden to prove that jurisdiction exists. *See, e.g., Lowa, Ltd.* v. *United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984). It is also established that there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *see also Suwannee Steamship Co.* v. *United States*, 70 Cust. Ct. 327, 329, 354 F. Supp. 1361, 1363 (1973). Indeed, it may be said that judicial review of administrative action "is the rule, and nonreviewability an exception which must be demonstrated." *Barlow* v. *Collins*, 397 U.S. 159, 166–67 (1970).

Defendant contends that plaintiff's payment of diversion duties does not give rise to a cognizable cause of action within the jurisdiction of this Court because the payment of duties is not a protestable "decision of the appropriate customs officer," within the meaning of section 1514(a). Rather, defendant contends that "Customs does not assess diversion duties, it merely accepts or rejects tender offers." Defendant reasons that the payment of the diversion duty is "voluntary" and, therefore, cannot be considered a "charge" or "exaction" within the meaning of section 1514(a)(3). This argument is without merit.

In other contexts, "charges" and "exactions" have been defined as "actual assessments of specific sums of money," other than ordinary customs duties. *See e.g., Alberta Gas Chemicals, Inc.* v. *Blumenthal*, 82 Cust. Ct. 77, 81–82, 467 F. Supp. 1245, 1249–50 (1979). The relevant statutory provision in this case provides that, if the merchandise has been diverted, duty must be paid in an amount "equal to the duty which would have been payable at the time of entry if the Canadian article had not been entered as original motor-vehicle equipment." This unique provision, which provides for payment of duty if the merchandise is diverted from its intended use as original equipment, is a variant of the "actual use" provisions in the TSUS. *See* United States Tariff Commission, *Report to the Committee on Ways and Means on H.R. 6960, 89th Congress, The Automotive Products Trade Act of 1965* 45 (1965). As a substitute for proof of "actual use," headnote 2(d) provides Customs with an enforcement procedure to ensure that the merchandise is used as original motor-vehicle equipment. *Id.* at 46. That is, the merchandise is subject to forfeiture unless Customs is notified in writing of the "diversion," and, pursuant to arrangements made with the Service, the article is destroyed or exported, or the appropriate duty is paid. *See* Schedule 6, Part 6B, headnote 2(d), TSUS. It is significant to note that, in an informational newsletter, the Customs Service had stated its intent to consider the payment of diversion duty an "exaction," protestable under Section 514 of the Tariff Act. *See* United States Customs Service, *Customhouse Brokers' Pipeline* No. 47, at 2 (1978). In the *Customhouse Brokers' Pipeline*, the Customs Service stated that "[i]f there is a disagreement with Customs over the amount due, the broker/manufacturer may file a protest under the provisions of Section 514, Tariff Act 1930; the duties paid will be considered an exaction." Nevertheless, defendant now asserts that diversion duty is not an exaction.

Defendant maintains that plaintiff's payment of diversion duties was a result of a "settlement" between plaintiff and Customs. It asserts that plaintiff's complaint is an impermissible collateral attack upon the "settlement." Relying on *ITT Semiconductors* v. *United States*, 6 CIT 231, 576 F. Supp. 641 (1983), defendant contends that the payment of diversion duty is a voluntary payment which is not

subject to review by this Court. Defendant's contention is unrealistic and without merit.

In the *ITT Semiconductors* case, plaintiff protested Custom's refusal to refund $48,153.04, which plaintiff had paid as part of a settlement in mitigation of penalties under 19 U.S.C. § 1592. Plaintiff claimed that the payment was a charge or exaction protestable under 19 U.S.C. § 1514(a)(3) because the payment was made under duress. Plaintiff sought to avoid "referral to the United States Attorney and the initiation of a claim for forfeiture in excess of ten million dollars." 6 CIT at 233, 576 F. Supp. at 643. Defendant claimed that plaintiff acted voluntarily, and that the denial of the refund was not subject to protest. The Court concluded that "[t]he amount paid by ITT was a settlement amount arrived at and agreed upon by the parties." 6 CIT at 236, 576 F. Supp. at 645. Consequently, in the *ITT Semiconductors* case, the Court held that the payment was voluntary, and was not a charge or exaction under 19 U.S.C. § 1514(a)(3). Hence, defendant's motion to dismiss for lack of subject matter jurisdiction was granted.

In this case, plaintiff did not "settle" its claim with the Customs Service. Instead, it paid those duties which it was required to pay, pursuant to a specific provision of the Tariff Schedules. The payment of the diversion duty was neither voluntary nor the equivalent of a "settlement."

It is clear that the provisions of Headnote 2, Schedule 6, Part 6B, *require* plaintiff to pay diversion duties, pursuant to arrangements made with Customs, in an amount equal to the "duties which would have been payable at the date of entry if the articles had not been entered as original motor vehicle equipment." *See* H.R. Rep. No. 537, 89th Cong., 1st Sess. 13, 28 (1965). The diversion duties were not the result of negotiation between the parties, but were paid in fulfillment of plaintiff's statutory obligation. Surely, plaintiff's compliance with a statutory obligation requiring the payment of duties cannot be viewed as a voluntary act. Hence, the Court holds that the assessment of "diversion" duty is an "exaction" within the meaning of 19 U.S.C. § 1514 (a)(3).

Finally, defendant contends that plaintiff failed to file a timely protest. Defendant asserts that the plaintiff's filing of the protest within 90 days after the *payment* of the diversion duties, rather than within 90 days of the *diversion*, precludes judicial review by this Court. While Headnote 2(d) states that a diversion report must be filed "at the time of the diversion," the established practice of Customs shows that diversion reports were required to be filed on a periodic basis, but no less frequently than annually. Furthermore, it should be noted that the plaintiff disputes that the merchandise was diverted. In addition, in connection with an independent forfeiture investigation under the Automotive Products Trade Act of 1965 (APTA), Customs stated that plaintiff was not obligated to file these reports until the position of Customs was clarified, since

"[w]hether or not the radio parts in question qualified under APTA was open to legal interpretation * * *." Once Customs indicated to plaintiff that it considered the merchandise diverted, plaintiff filed the appropriate diversion reports. Hence, the Court finds that plaintiff timely filed diversion reports within 90 days of the assessment of the diversion duty.

In view of the foregoing, the Court holds that it has jurisdiction over this action. Hence, the Court now must determine whether the installation of the radio packs by retail dealers was a diversion which required the payment of duty.

THE APTA'S DEFINITION OF ORIGINAL MOTOR-VEHICLE EQUIPMENT

Should the imported radio packs be denied duty-free status because they were installed by plaintiff's franchised dealers, rather than at plaintiff's assembly plants? Defendant asserts that the language of the statute and the legislative history indicate that dealer-installed radios were not intended to be protected by the modifications to the Tariff Schedules implemented by the Automotive Products Trade Act of 1965 (APTA). In its initial ruling on the status of the imported merchandise under the APTA, the Customs Service stated that it would be "a strained construction to hold that a dealer when installing a radio pack was engaged in the production of automobiles in this country." Plaintiff contends that "[t]he fact that the subject radio parts were installed as completed radio packs at the dealer's premises, rather than at the assembly plant, is not a bar to free entry under APTA."

It is a well-established "canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *See, e.g., Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *See Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). If a statute is silent or ambiguous with respect to a particular issue, it is appropriate for the court to accord due deference to the agency's construction of a statute, if it is reasonable and consistent with the congressional will. *See Japan Whaling Ass'n* v. *American Cetacean Society*, 106 S. Ct. 2860, 2868 (1986); *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985); *Chevron U.S.A., Inc.*, 467 U.S. at 844.

The APTA authorized the President to modify the TSUS to permit the duty-free entry of Canadian articles intended to be used as original motor-vehicle equipment. 19 U.S.C. § 2011 (1982). One of the stated purposes of the Act was to provide for the implementation of the Agreement Concerning Automotive Products Between the Government of the United States and the Government of Canada, January 16, 1965, 17 U.S.T. 1372, TIAS No. 6093. *See* Automotive Products Trade Act of 1965 § 102, 19 U.S.C. § 2001 (1982). A purpose of the agreement was to "strengthen the economic relations and expand trade in automotive products between the United

States and Canada." *Id.* The APTA defines "original motor-vehicle equipment" as "a Canadian article which has been obtained from a supplier in Canada under or pursuant to a written order, contract, or letter of intent of a bona fide motor vehicle manufacturer in the United States, and which is *a fabricated component intended for use* as original equipment *in the manufacture* in the United States of a motor vehicle * * *." Automotive Products Trade Act of 1965 § 404, Schedule 6, Part 6B, Headnote 2, TSUS (emphasis added).

To insure that any fabricated components admitted into the United States as "intended for use as original equipment" would be used as intended, headnote 2 established an enforcement procedure. *See* H.R. Rep. No. 537, 89th Cong., 1st Sess. 28 (1965). That is, if the merchandise is diverted from its intended use, it is subject to forfeiture unless, pursuant to arrangements made with the Customs Service, the Canadian article is either 1) destroyed or exported under Customs supervision, or 2) the appropriate duty is paid. *See id.*; Schedule 6, Part 6B, Headnote 2(d), TSUS. The legislative history of the APTA makes clear that the phrase "intended for use as original equipment in the manufacture in the United States of a motor vehicle" was meant by Congress to exclude from duty-free status those items which were not used in the *manufacture* of automobiles. *See* S. Rep. No. 782, 89th Cong., 1st Sess. 19, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3670, 3687–88.

It has been recognized that the "Automotive Products Trade Act is a statute enacted to meet a special and unique problem arising between the United States and Canada." *United Shoe Workers of America* v. *Bedell*, 506 F.2d 174, 190 (D.C. Cir. 1974). The Act was intended to enable domestic manufacturers "to make the most efficient use of their *plants*." *Id.* (emphasis added). The legislative history confirms that producers of automobiles and parts, not retail sellers of automobiles, would be the affected industry. *See* S. Rep. No. 782, 89th Cong., 1st Sess. 4–5, *reprinted in* 1965 U.S. Code Cong. & Ad. News at 3673–74; 111 Cong. Rec. 22,371 (1965). Also, although not conclusive of legislative intent, statements in the *Congressional Record* indicate that parts sent to dealers would not be considered original equipment. *See* 111 Cong. Rec. 25,518 (1965). This view is implicit in the statements made by the representative of the United States, who requested a waiver pursuant to article XXV of the GATT. *See* GATT, *United States—Imports of Automotive Products*, Basic Instruments and Selected Documents 181, 188–89, GATT Doc. L/2500 (14th Supp. 1966). The representative noted that only vehicles and "original parts, that is, parts for assembly into new vehicles," would be entitled to duty-free treatment. *Id.* at 188.

The legislative history, and the contemporaneous statements of reliable officials, show that the APTA was understood to allow imports of original parts only if the imported parts were used in the manufacture and assembly of motor vehicles. In view of the foregoing, it cannot be said that it is contrary to the legislative intent for

Customs to interpret the APTA as requiring installation of the radios to take place at the factory. Plaintiff's interpretation of the statute would not promote the fundamental goal of the APTA, and would permit widespread importation of fabricated components which could not be documented or verified as being used in the manufacture of motor vehicles. In sum, under the APTA, the Court can find no support for plaintiff's contention that a retail dealer who installs a radio uses the radio in the manufacture of an automobile.

The Court holds that the installation of radio packs at the retail level by dealers, rather than at the manufacturing plant, is not the manufacture of an automobile in the United States within the meaning of Headnote 2, Schedule 6, Part 6B, TSUS. Accordingly, defendant's motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted is denied. Plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/159	Newman, S.J. August 20, 1986	C.J. Tower & Sons of Buffalo Inc	82-3-00272	Item 682.25 various rates	Item 682.30 5.6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/160	Newman, S.J. August 20, 1986	Novatronics of Canada, Ltd.	82-4-00518	Item 682.25 various rates	Item 682.30 5.6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/161	Newman, S.J. August 20, 1986	Novatronics of Canada, Ltd.	84-3-00315	Item 682.25 various rates	Item 682.30 5.1%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/162	Carman, J. August 21, 1986	Abbeville Press, Inc.	84-11-001557	Item 274.60 $0.06 per lb.	Item 270.25 Free of duty	Agreed statement of facts	New York Books
C86/163	Restani, J. August 26, 1986	Algoma Tube Corp.	85-3-00346	Item 610.42 or 610.43 7.5% or 11%	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings
C86/164	Restani, J. August 26, 1986	Algoma Tube Corp.	85-10-01391	Item 610.42 or 610.43 7.5% or 11%	Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oilwell casings

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Third Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, October 24, 1986, at The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The Conference will be composed of the Judges of the United States Court of International Trade; officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests. The theme of the Conference is "Judicial Oversight—Relations Between the Court and the Agencies."

Sir Roy Denman, Head of the Delegation, Delegation of the Commission of the European Communities, is the Conference Luncheon Speaker.

Senator Dennis DeConcini, United States Senator from Arizona, and co-sponsor of the Customs Courts Act of 1980, will receive the Court's Annual Award for his outstanding contributions to the administration of justice in international law.

Last year, the Second Annual Judicial Conference was attended by over 400 conferees from 16 states, the District of Columbia, Puerto Rico, and Japan.

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Wednesday, October 1, 1986.

For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

JOSEPH E. LOMBARDI,
Clerk of Court.

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This issue contains:

U.S. Customs Service
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 111, 171, and 178

(T.D. 86–161)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO CUSTOMS BROKERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In F.R. Doc. 86–19256, published as T.D. 86–161 on August 26, 1986 (51 FR 30336), Parts 111, 171, and 178, Customs Regulations (19 CFR Parts 111, 171, 178), were extensively revised to implement the statutory changes made by the Trade and Tariff Act of 1984 relating to the regulations of customs brokers. Under the heading "Cancellation, Suspension or Revocation of License" on page 30339 of the document, top of the second column, it states that Customs has drafted guidelines for determining the maximum penalties for certain types of violations by brokers based upon the degree of culpability and seriousness of the violation, and that such guidelines are attached to the document to be incorporated as Appendix C of Part 171, Customs Regulations. However, these guidelines were inadvertently omitted from the document when it was published. Accordingly, this document further revises Part 171 to include the guidelines for the imposition of penalties for violation of 19 U.S.C. 1641, relating to brokers.

EFFECTIVE DATE: September 25, 1986.

FOR FURTHER INFORMATION CONTACT: Steven I. Pinter or Fred Burns O'Brien, Entry, Licensing and Restricted Merchandise Branch (202–566–5765).

AMENDMENT TO THE REGULATIONS

Part 171, Customs Regulations (19 CFR Part 171), as amended by T.D. 86–161, published in the Federal Register on August 26, 1986 (51 FR 30336), is further amended by adding the following on page 30346 in the third column preceding the amendments to Part 178, Customs Regulations (19 CFR Part 178).

4. Part 171 is amended by adding Appendix C to read as follows:

APPENDIX C TO PART 171, CUSTOMS REGULATIONS—GUIDELINES FOR THE IMPOSITION OF PENALTIES FOR VIOLATIONS OF 19 U.S.C. 1641

The Trade and Tariff Act of 1984 promulgated numerous changes to the current statute relating to customs brokers. Pursuant to the revised section 19 U.S.C. 1641, monetary penalties may be assessed against brokers or parties acting as brokers. The language of the new statute does not enumerate specific penalty amounts to be assessed for various transgressions. The following document attempts to define that conduct which is to be proscribed and to suggest penalty amounts to be assessed for such violations.

It should be noted that penalties for a violation or violations of the statute are limited to amounts not to exceed $30,000. EXCEPTION: Penalties incurred under section 1641(b)(6) are limited to $10,000 for each violation. Aggregate penalties under this section are limited to $30,000.

NOTE: Unless otherwise noted, the assessement of penalties is an alternative sanction to revocation or suspension of the broker's license. The imposition of these penalties is always done at the discretion of the district director.

Section 1641(b)(6).—Conducting customs business without a license.

A. Customs business, as defined in subsection 1641(a), includes all transactions relating to entry and admissibility of merchandise including classification and valuation and the payment of duties, taxes or other charges assessed or collected by Customs. It also includes transactions relating to refund, rebate or drawback. Customs business does not relate to those transactions relating solely to the exportation or transportation of goods.

B. This section provides for a monetary penalty not to exceed $10,000 to be imposed against "Any person who intentionally transacts customs business, other than solely on the behalf of that person, without holding a valid customs broker's license granted to that person under this subsection * * *". Separate penalties, each not exceeding $10,000 to a maximum aggregate of $30,000, may be imposed for each transaction occurring in violation of this provision. The $10,000 penalty also may be imposed for each violation of any other provision of section 1641.

C. Penalty amounts to be imposed for transacting customs business without a license are as follows:

1. No penalty action when importation is conducted on behalf of a family member. For purposes of this subsection "family member" is defined as a parent, child, spouse, sibling, grandparent, or grandchild.

2. No penalty action when *all* of the following are evident:

   a. First violation
   b. One time transaction

c. Non-commercial in nature (goods for personal use of another person other than a family member—not for resale)
d. Violator not remunerated for his action

NOTE: A letter of warning should be issued indicating that further like conduct will result in penalty action

3. $250 penalty for:

a. Each repeat violation made under conditions listed above under subsection (2), or
b. First violation when transaction is non-commercial in nature but is conducted on behalf of any business entity (including associations, corporations and partnerships), for example:

i. an importation of office supplies made on behalf of a business entity is a non-commercial importation that would fall under this category of violation because the supplies would be used by business entity and are not for resale
ii. an importation of raw material or parts of merchandise that is to be manufactured, refined, or assembled here before resale would not be a non-commercial entry because the merchandise eventually will be resold, albeit in another form than that which it was entered

c. First violation where the importation is commercial in nature (i.e., imported merchandise is for resale), *or* where the violator is compensated for his action

4. $1,000 penalty for each repeat violation involving:

a. Commercial importation
b. Non-commercial importation made on behalf of a business entity
c. Non-commercial importation for which compensation is received by the violator

5. $10,000 penalty when:

a. Violator falsely holds himself out as being a licensed customs broker
b. A continuing course of conduct can be shown (determined by frequency of violations and/or number of entries involved) which would indicate that the violator is entering merchandise for others on a regular commercial basis

e.g., if the violator has incurred numerous penalties under subsections (2) and (3) above, but the smaller penalties have had no deterrent effect, the $10,000 penalty under this subsection should be assessed in an action separate from those smaller penalties

D. IMPORTANT: As a general rule, a separate penalty should not be imposed for each unlawful Customs business transaction if numerous transactions occur contemporaneously. For example:

1. If an unlicensed individual files six commercial entries at one time, that should be treated as one violation. It should not be treat-

ed as six violations because the entries were presented contemporaneously.

2. However, if evidence exists to indicate that an unlicensed individual is filing numerous entries or is conducting numerous contemporaneous transactions so as to avoid multiple penalties, then the deciding official may, at his discretion, choose to impose multiple penalties.

3. If Customs discovers that an individual has conducted Customs business without a license on numerous occasions, but such individual acted without knowledge of the prohibition on such conduct, those numerous transactions should be treated as one violation for purposes of imposition of any penalty.

E. In no case involving a first violation should mitigation from the imposition of the penalty be granted, unless extraordinary mitigating circumstances can be shown.

F. Mitigation may be granted from penalties arising from a second or subsequent violation. For example, a significant lapse of time between violations would be considered a mitigating factor in the disposition of such penalties.

G. Intent to violate the law is not an element of this violation. Reference to "intentionally transacts customs business" in subsection 1641(b)(6) relates to the intentional transaction of the business itself, not to any intentional attempt to violate the terms of the statute.

Section 1641 (d)(1)(A).—Making a false or misleading statement or an omission as to material fact in any application for a license or a permit.

A. If the license would not have been issued but for the false statement, the proper sanction would be suspension or revocation of the license. If the false or misleading statement would not have absolutely resulted in the denial, revocation or suspension of a license, then penalty sanctions are proper.

B. Material facts include but are not limited to:

1. Facts as to identify.
2. Facts as to citizenship status of an individual.
3. Facts as to moral character of an individual which relate to his fitness to conduct Customs business.
4. The organization of any corporation, association, or partnership.
5. The status of the license of a license holder who is a corporate officer or partner.

C. $5,000 penalty for each false statement.

D. Mitigation may be granted in these cases.

Section 1641(d)(1)(B).—Conviction of a broker of certain felonies or misdemeanors subsequent to filing an application for a license.

A. As a general rule, license revocation is the standard sanction for these violations. If monetary penalties are assessed, the following criteria should be used.

B. Unlawful conduct must relate to:

1. Importation or exportation of merchandise.

2. Conduct of customs business (this shall include violations relating to taxes and duties and documents required to be filed with regard to such taxes and duties).

3. For example, relevant convictions would be:

a. 18 U.S.C. 1001—making a false statement to Customs or any other agency with regard to any relevant transaction
b. 18 U.S.C. 545—unlawful importation of merchandise
c. 18 U.S.C. 542—unlawful importation by means of a fraudulent act or omission
d. 22 U.S.C. 2778—illegal exportation of munitions

C. Monetary penalties may not be imposed in connection with convictions relating to conduct described in subsection 1641(d)(1)(B)(iii). Either suspension or revocation is the appropriate penalty for these infractions.

D. $15,000 penalty for each misdemeanor conviction.

E. $30,000 penalty for each felony conviction.

F. Any sanction to be imposed under this subsection must be approved by Headquarters.

Section 1641(d)(1)(C).—Violation of any law enforced by the Customs Service or the rules or regulations issued under any such provision.

A. As a general rule, no penalty will be issued under this subsection when a personal penalty (*not* a claim for liquidated damages) against the violator is provided for by the other law being enforced by Customs.

EXCEPTION: If the violation the other law enforced by Customs is intentional in nature, then penalties may be assessed under this subsection in addition to any sanctions provided by that other law.

e.g., a broker intentionally falsifies entry documents and presents them to Customs. He is found to have committed an intentional fraudulent violation under 19 U.S.C. 1592. He shall be liable for sanctions under this subsection in addition to any 1592 penalties. Had the 1592 violation been found to have resulted because of gross negligence or negligence, penalties pursuant to this subsection should not be imposed.

B. A penalty shall be imposed in situations where the other law violated only moves against property or the violator has demon-

strated a continuing course of illegal conduct or evidence exists which indicates repeated violations of other statutes or regulations.

C. If the other law violated moves only against property, the violator shall incur a monetary penalty equal to the domestic value of such property or $30,000, whichever is less.

> e.g., violations of 22 U.S.C. 401 for unlawful exportation of merchandise result in seizure and forfeiture of the violative merchandise. There are no penalty provisions which Customs enforces against parties responsible for the seizable offense. If brokers are recalcitrant and are constantly responsible for offenses which result in seizure of merchandise, a penalty equal to the domestic value of such merchandise (in no case to exceed $30,000) should be imposed.

D. If the evidence supports the finding of repeated statutory or regulatory violations or the intentional violation of any statute or regulation, penalties in addition to those provided for by the statute or regulation violated should be imposed as follows:

1. First violation involving a finding of a pattern of violations or a finding of an intentional violation—$1,000.
2. Second violation—$5,000 penalty.
3. Third and subsequent violations—$10,000.

E. Mitigation based on negligence standards is appropriate in these types of cases.

F. Examples of violations for which penalties described under subpart D are appropriate.

1. A broker continually submits incomplete entry summaries resulting in a high rejection rate. He incurs numerous claims for liquidated damages for late filing of entry summaries. Rather than revoke his ID privileges and place him on a cash only basis, the option is available to assess monetary penalties pursuant to this section for his continuing course of conduct in violating the Customs Regulations.

2. A broker consistently files entries claiming duty free entry of merchandise under GSP. He does not submit Forms A at the time of filing of the entry summary, relying on his bond assuring production of missing documents. The broker continually fails to submit the forms, resulting in liquidation of the entries as dutiable. Significant delay occurs between the filing of the original entry, payment of duties and liquidation. This consistent failure to comply with the Regulations with regard to filing of missing documents would warrant imposition of penalties under this subsection.

Section 1641(d)(1)(D).—Counseling, commanding, inducing, procuring or knowingly aiding and abetting violations by any other person of any law enforced by the Customs Service.

A. If the law violated by another moves only against property, a monetary penalty equal to the domestic value of such property or

$30,000, whichever is less, may be imposed against the broker who counsels, commands, aids or abets such violation.

B. If the law violated provides for only a personal penalty against the actual violator, a penalty may be imposed against the broker in an amount equal to that assessed against the violator, but in no case can the penalty exceed $30,000.

C. All penalties assessed under this subsection may be imposed in addition to any penalties that may be assessed against the broker under the provisions of title 19, United States Code, section 1595a(b).

D. Examples of violations of this subsection:

1. A broker counsels a client that certain gemstones are absolutely free of duty and need not be declared upon entry into the United States. The client arrives in the United States and fails to declare a quantity of gemstones worth $45,000. A penalty of $30,000 may be imposed against the broker for such counseling. The client would incur a personal penalty of $45,000 under the provisions of title 19, United States Code, section 1497, but the penalty against the broker cannot exceed $30,000.

2. A client imports $15,000 worth of merchandise by vessel. The merchandise is unladen at the wharf but Customs has not appraised or released it. The broker informs the client that the merchandise can be moved and delivered to the consignee. The broker assures his client that he will handle all the necessary paperwork. The merchandise is moved from the wharf. The broker is subject to a $15,000 penalty for counseling and inducing his client to violate the provisions of title 19, United States Code, section 1448.

E. All penalties imposed under this subsection are subject to mitigation.

Section 1641(d)(1)(E).—Knowingly employing or continuing to employ any person who has been convicted of a felony, without written approval of such employment from the Secretary of the Treasury.

Ordinarily revocation or suspension of the license would be the appropriate remedy for this violation. Should such sanctions not be pursued then the following penalties should be assessed:

A. $25,000 penalty for knowingly employing any convicted felon without seeking approval for employment.

B. $30,000 penalty for knowingly employing any convicted felon and continuing to employ same after approval has been denied.

C. $5,000 penalty for knowingly employing any convicted felon and failing to make application with the Secretary approving such employment within 30 days of the date of discovery of the felony conviction.

D. Example: If a broker unknowingly employs a convicted felon and 1 year after employment discovers the existence of such a conviction, the following actions would dictate imposition of penalties:

1. He has 30 days to seek approval of the Secretary for such employment. If he seeks the approval within such time, no penalty action would lie.

2. If he seeks approval at some time after 30 days from the date of discovery, a $5,000 penalty would lie.

3. If he does not seek approval until after Customs becomes aware of the violation, a $25,000 penalty would lie.

4. If he seeks approval but is denied, and continues to employ the convicted felon, a $30,000 penalty would lie.

E. Mitigation will only be permitted from the $5,000 penalty.

F. The age of the conviction will not be a factor which would obviate the imposition of any penalty. It will be a factor when considering the grant of approval of employment that would be made by the Secretary.

G. Violation of this section will be *prima facie* evidence of a violation of section 1641(b)(4) relating to responsible supervision of customs business.

Section 1641(d)(1)(F).—In the course of customs business, with intent to defraud, knowingly deceiving, misleading or threatening any client or prospective client.

Ordinarily, revocation or suspension of the license would be the appropriate remedy for this violation. Should such sanctions not be pursued then the following guidelines with regard to assessment of penalties should be followed:

A. An unsubstantiated accusation by a client is inadequate reason to assess any penalty under this section.

B. A $30,000 penalty should be imposed for any violation of this subsection.

C. Inasmuch as evidence of intent must be shown before a penalty can be imposed, no mitigation should be permitted if a violation is found to lie. A petition for mitigation could be entertained only on the issue of whether such violation did, in fact, occur.

Section 1641(b)(5).—The failure of a customs broker that is licensed as a corporation, association or partnership to have, for any continuous period of 120 days, at least one officer of the corporation or association or one member of the partnership validly licensed.

A. IMPORTANT: Violation of this section results in the revocation of the broker's license by operation of law.

B. A penalty of $10,000 pusuant to section 1641(b)(6) should be imposed because the revocation by operation of law results in the broker conducting Customs business without a license. No penalty liability would be incurred specifically under section 1641(b)(5).

Section 1641(c)(3).—Failure of a customs broker granted a permit to conduct business in a certain district to employ, for a continuous period of 180 days, at least one individual who is licensed within the district or region.

A. IMPORTANT: Violation of this section results in the revocation of the permit by operation of law.

B. The same parameters should be followed for imposition of penalties under this section as those established under section 1641(b)(5).

C. IMPORTANT: The new law as it pertains to permits (sections 1641(c)(1)(B) and 1641(c)(2)) does not take effect until October 12, 1987. Penalties or sanctions for violation of this section can only be issued if the violation occurs subsequent to that effective date.

Section 1641(b)(4).—Failure of a licensed broker to exercise responsible supervision and control over the business it conducts.

A. Standards of responsible supervision and control shall be issued by Commissioner of Customs. Regulatory authority to set such standards is provided by new section 1641(f).

B. The following penalty amounts shall be assessed against brokers who fail to exercise responsible supervision and control over business conducted at a district level:

1. A penalty of $1,000 against any broker employing an individual who violates any provision of section 1641. Such violation shall be *prima facie* evidence of a failure to exercise responsible control.

2. A penalty of $5,000 against any broker who, when requested, is unable to produce documents relating to specific Customs business.

3. A penalty of $5,000 against any broker who is unable to satisfy the deciding Customs official that he has a working knowledge of any operation for which he is licensed to do business. Failure to have such working knowledge shall be *prima facie* evidence of a lack of responsible supervision and control. Such working knowledge must include:

a. A working knowledge of all automated systems in use in the district including ABI, where applicable

b. A knowledge of the cash flow procedures in each district of operation

c. Retention of all surety bonds in the proper form and in sufficient dollar amounts

d. Continuous monitoring to ensure timely payment of all obligations including duties, taxes and refunds

e. Knowledge of backgrounds and performance of all employed personnel in the region (failure to perform this function could result in penalties assessed under 1641(d)(1)(E))

f. Knowledge of filing systems and document record storage in each district

g. Knowledge of any other ancillary operation of which the district director has reason to inquire

4. A penalty of $10,000 against any broker who is found to have failed to maintain satisfactory accounting records or records of documents filed with Customs on any matter.

C. Penalties issued in accordance with subsection (B) are subject to mitigation through use of a standard of culpability based on negligence.

D. The following factors shall be indicative of a lack of supervision or lack of working knowledge of Customs procedures (the list is not conclusive):

1. A high rate of entry rejections.
2. A high rate of late filing liquidated damages cases.
3. A high number of missing documents cases.
4. An inordinate number of entries for which free entry is claimed, but no documentation supporting such claim is submitted, resulting in liquidation of the entries as dutiable.
5. Inability to assist or failure to cooperate with an audit, including failure to provide all records and any other necessary information to assist auditors.
6. Incurrence of liquidated damages claims which exceed the amount of any term bonds.
7. Evidence to indicate that timely duty refunds to clients are not made and adequate records of same are not kept.
8. Employing a licensed individual for a minimal number of days each 120 or 180-day period (see, sections 1641(b)(5) and 1641(c)(3)) so as to avoid violation of the statute.

a. For purposes of imposition of penalties under this subsection, a minimal number of days shall be 10 working days per each 120-day period or 15 working days per each 180-day period

b. It shall be presumed that temporary employment of such a licensed individual is undertaken solely to avoid revocation of a license or permit. Such minimal employment shall be *prima facie* evidence of lack of supervision

E. The provisions of new section 1641(c)(2) do not take effect until 3 years from the date of enactment of the statute. As such, no penalties imposed in accordance with the preceding subsection (D) of this outline can be assessed until that time.

Monetary penalties are not appropriate for any violation involving the mere failure to file the triennial report as required by new section 1641(g); however, failure to file such a document could result in revocation or suspension of the broker's license.

Notwithstanding any current delegation of authority, authority to impose penalties under 19 U.S.C. 1641 shall be retained by the Commissioner until formal delegation occurs.

Dated: August 29, 1986.

MARVIN M. AMERNICK,
Director,
Regulations Control & Disclosure Law Division.

[Published in the Federal Register, September 10, 1986 (51 FR 32208)]

(T.D. 86-164)

FOREIGN CURRENCIES
DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 1, 1986	$.007380
Israel shekel:	
August 1, 1986	N/A
South Korean won:	
August 1, 1986	.001126
Taiwan N.T. dollar:	
August 1, 1986	.026274

(LIQ-03-01 S:COM CIE)

Dated: August 1, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-165)

FOREIGN CURRENCIES
DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 4, 1986	$.007413
August 5, 1986	.007345
August 6, 1986	.007396
August 7, 1986	.007438
August 8, 1986	.007413
Israel shekel:	
August 4–8, 1986	N/A
South Korean won:	
August 4–5, 1986	.001126
August 6, 1986	.001125
August 7, 1986	.001126
August 8, 1986	.001127
Taiwan N.T. dollar:	
August 4, 1986	.026330
August 5, 1986	.026413
August 6, 1986	.026455
August 7, 1986	.026490
August 8, 1986	.026490

(LIQ–03–01 S:COM CIE)

Dated: August 8, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–166)

FOREIGN CURRENCIES
DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 11, 1986	$.007452
August 12, 1986	.007377
August 13, 1986	.007410
August 14, 1986	.007429
August 15, 1986	.007418

Israel shekel:	
August 11–15, 1986.	N/A
South Korea won:	
August 11, 1986	.001126
August 12–13, 1986	.001127
August 14–15, 1986	.001128
Taiwan N.T. dollar:	
August 11, 1986	.026638
August 12, 1986	.026674
August 13, 1986	.026709
August 14, 1986	.026745
August 15, 1986	.026781

(LIQ–03–01 S:COM CIE)

Dated: August 15, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–167)

FOREIGN CURRENCIES
DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 18, 1986	$.007402
August 19, 1986	.007443
August 20, 1986	.007452
August 21, 1986	.007468
August 22, 1986	.007463
Israel shekel:	
August 18–22, 1986	N/A
South Korea won:	
August 18–19, 1986	.001128
August 20, 1986	.001129
August 21–22, 1986	.001130
Taiwan N.T. dollar:	
August 18, 1986	.026853
August 19, 1986	.026874

August 20, 1986	.026896
August 21, 1986	.026874
August 22, 1986	.026940

(LIQ-03-01 S:COM CIE)

Dated: August 22, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-168)

FOREIGN CURRENCIES
DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 25, 1986	$.007454
August 26, 1986	.007418
August 27, 1986	.007424
August 28, 1986	.007465
August 29, 1986	.007463
Israel shekel:	
August 25-29, 1986	N/A
South Korea won:	
August 25-27, 1986	.001131
August 28-29, 1986	.001130
Taiwan N.T. dollar:	
August 25, 1986	.026976
August 26, 1986	.026991
August 27, 1986	.026998
August 28, 1986	.027005
August 29, 1986	.027012

(LIQ-03-01 S:COM CIE)

Dated: August 29, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–169)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 1, 1986	$.60520
China, P.R. renminbi yuan:	
August 1, 1986	.269331
Japan yen:	
August 1, 1986	.006500
Switzerland franc:	
August 1, 1986	.598623

(LIQ–03–01 S:COM CIE)

Dated: August 1, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–170)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 4, 1986	$.60140
August 5, 1986	.61600
August 6, 1986	.62000
August 7, 1986	.61060
August 8, 1986	.60840
Austria schilling:	
August 7, 1986	.068705
August 8, 1986	.068729
China, P.R. renminbi yuan:	
August 4–8, 1986	.269331
Germany deutsche mark:	
August 7, 1986	.483793
August 8, 1986	.483092
Italy lira:	
August 7–8, 1986	.000702
Japan yen:	
August 4, 1986	.006494
August 5, 1986	.006454
August 6, 1986	.006477
August 7, 1986	.006502
August 8, 1986	.006487
Netherlands guilder:	
August 7, 1986	.429185
August 8, 1986	.428669
New Zewland dollar:	
August 8, 1986	.50650
Switzerland franc:	
August 4, 1986	.595948
August 5, 1986	.592593
August 6, 1986	.595948
August 7, 1986	.600060
August 8, 1986	.599161
United Kingdom pound:	
August 4, 1986	.14700

(LIQ–03–01 S:COM CIE)

Dated: August 8, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–171)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 11, 1986	$.60680
August 12, 1986	.60830
August 13, 1986	.61360
August 14, 1986	.62130
Austria schilling:	
August 11, 1986	.069013
August 13, 1986	.068681
August 14, 1986	.068918
August 15, 1986	.068966
China, P.R. renminbi yen:	
August 11–15, 1986	.269331
Gernamy deutsche mark:	
August 11, 1986	.485201
August 13, 1986	.482975
August 14, 1986	.484848
August 15, 1986	.484731
Italy lira:	
August 11, 1986	.000706
August 13, 1986	.000702
August 14–15, 1986	.000704
Japan yen:	
August 11, 1986	.006503
August 12, 1986	.006464
August 13, 1986	.006481
August 14, 1986	.006505
August 15, 1986	.006485
Netherlands guilder:	
August 11, 1986	.430849
August 13, 1986	.428541
August 14, 1986	.430256
August 15, 1986	.430293

New Zealand dollar:	
August 11, 1986	.49500
August 12, 1986	.49550
August 13, 1986	.50150
August 14, 1986	.50150
August 15, 1986	.49500
Switzerland franc:	
August 11, 1986	.604047
August 12, 1986	.595770
August 13, 1986	.598516
August 14, 1986	.601866
August 15, 1986	.601142

(LIQ-03-01 S:COM CIE)

Dated: August 15, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-172)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 20, 1986	$.61180
August 21, 1986	.61150
August 22, 1986	.60700
Austria schilling:	
August 18, 1986	.068634
August 19, 1986	.069109
August 20, 1986	.069369
August 21, 1986	.069638
August 22, 1986	.069541

Belgium franc:	
August 21, 1986	.023629
August 22, 1986	.023629
China, P.R. renminbi yuan:	
August 18–22, 1986	.269331
Germany deutsche mark:	
August 18, 1986	.482859
August 19, 1986	.485791
August 20, 1986	.488162
August 21, 1986	.489596
August 22, 1986	.489117
Italy lira:	
August 19, 1986	.000706
August 20–22, 1986	.000709
Japan yen:	
August 18, 1986	.006485
August 19, 1986	.006515
August 20, 1986	.006519
August 21, 1986	.006525
August 22, 1986	.006517
Netherlands guilder:	
August 18, 1986	.428633
August 19, 1986	.431034
August 20, 1986	.433088
August 21, 1986	.434122
August 22, 1986	.433745
New Zealand dollar:	
August 18, 1986	.49850
August 19, 1986	.50500
August 20, 1986	.50100
August 21, 1986	.48550
August 22, 1986	.48750
Switzerland franc:	
August 18, 1986	.596659
August 19, 1986	.602410
August 20, 1986	.606980
August 21, 1986	.607718
August 22, 1986	.605877

(LIQ–03–01 S:COM CIE)

Dated: August 22, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–173)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 25, 1986	$.60520
August 26, 1986	.60960
August 27, 1986	.60900
August 28, 1986	.60850
August 29, 1986	.60900
Austria schilling:	
August 25, 1986	.069589
August 26, 1986	.069348
August 27, 1986	.069061
August 28, 1986	.069348
August 29, 1986	.069808
Belgium franc:	
August 25, 1986	.023646
August 27, 1986	.023602
August 29, 1986	.023736
China, P.R. renminbi yuan:	
August 25–29, 1986	.269331
Denmark krone:	
August 29, 1986	.129870
Germany deutsche mark:	
August 25, 1986	.489596
August 26, 1986	.487805
August 27, 1986	.488878
August 28, 1986	.487805
August 29, 1986	.491280
Italy lira:	
August 25, 1986	.000710
August 26–27, 1986	.000708
August 28, 1986	.000707
August 29, 1986	.000712

Japan yen:	
August 25, 1986	.006500
August 26, 1986	.006454
August 27, 1986	.006465
August 29, 1986	.006470
Netherlands guilder:	
August 25, 1986	.433651
August 26, 1986	.432208
August 27, 1986	.433276
August 28, 1986	.432339
August 29, 1986	.435540
New Zealand dollar:	
August 25, 1986	.48550
August 26, 1986	.49000
August 27, 1986	.49450
August 28, 1986	.49500
August 29, 1986	.48650
Switzerland franc:	
August 25, 1986	.607718
August 26, 1986	.605327
August 27, 1986	.607718
August 28, 1986	.605510
August 29, 1986	.609385

(LIQ-03-01 S:COM CIE)

Dated: August 29, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

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19 CFR Part 6

(T.D. 86-174)

CUSTOMS REGULATIONS AMENDMENT CONCERNING ACCESS TO CUSTOMS SECURITY AREAS AT AIRPORTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to require the use and display of a Customs approved identification card, strip, or seal on existing identification cards worn by employees at airports accommodating international air commerce. The changes are necessitated by recent terrorist incidents at foreign airports, and in an effort to prevent similar incidents from occurring at U.S.

airports accommodating international arrivals and departures. All Federal, and uniformed State and local law enforcement personnel are excepted from the requirement. The additional identification is required for all non-exempt persons located at, operating out of, or employed by, affected airports, who require access to Customs security areas in order to perform functions associated with their employment. The amendment also requires that an authorized official of the employer attest, in writing, that a background check of employment history and references has been conducted on their affected employees.

EFFECTIVE DATE: October 14, 1986.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Charles P. Bartoldus (202–566–2140). Legal Aspects: Ellen McClain (202–566–2482).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Various provisions of the Tariff Act of 1930, as amended (19 U.S.C. 1202 *et seq.*), which are made applicable to aircraft by 19 U.S.C. 1644, (49 U.S.C. App. 1509), and § 6.10, Customs Regulations (19 CFR 6.10), provide the statutory authority for Customs officers to control the entry and clearance of aircraft arriving in the U.S. from foreign countries and the inspection of the crew, passengers, baggage, stores, and cargo carried aboard those aircraft. Section 1109 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1509), authorizes the Secretary of Treasury to designate airports as ports of entry for civil air navigation. Section 582, Tariff Act of 1930, as amended (19 U.S.C. 1582), authorizes the Secretary of the Treasury to prescribe regulations for the detention and search of persons and baggage. These regulations are set forth in Parts 6 and 162, Customs Regulations (19 CFR Parts 6 and 162). Implicit in the search and inspection authority and the right to designate airports is the right to maintain a controlled and secure Customs area which facilitates and insures the integrity of the authorized search and inspection.

Customs found it necessary to improve integrity and security in authorized inspection areas, due in large measure to the recent sharp increases in threats to airport security posed by terrorist organizations. Existing Part 6, Customs Regulations, was inadequate for controlling access to the Customs security areas to the extent necessary. The arrival of an aircraft from abroad necessitates the services of numerous persons representing various specialites, such as ground crews, refueling personnel, baggage handlers, and food service personnel, among others. While all of these persons may have legitimate business associated with the arrival of an international flight, Customs needed a method by which access to the aircraft and inspection areas could be restricted, as well as some assur-

ance that the service personnel themselves had been found trustworthy by their employers. While the Federal Aviation Administration (FAA) has general responsibility for security at airports, Customs determined that it was necessary to provide Customs with the needed authority and procedures to achieve these goals at the areas under the Customs jurisdiction.

Accordingly, Customs amended Part 6, Customs Regulations, on an interim basis by publication of T.D. 86–12 in the Federal Register on February 3, 1986 (51 FR 4161). The purpose of the amendment was to establish an identification system for all employees whose duties require access to Customs security areas at airports handling international air commerce, with the exception of Federal, and uniformed State, and local law enforcement personnel. Because of terrorist incidents at foreign airports, threats of violence at U.S. airports, and in an effort to improve the security of these areas by restricting access to authorized employees, Customs required that affected employees apply for a Customs approved identification card, or a strip or seal to be affixed to existing identification cards once an authorized official of the employer attested that background checks of employment history of the affected employees had been conducted. Since March 5, 1986, when the interim regulations became effective, Customs has issued the identification card, strip or seal once satisfied that the presence of the employee would neither endanger the revenue nor threaten the security of the entire security area (which may include the arriving airplane, ramp area, cargo area, and Customs baggage and passenger inspection facilities).

The requirement for a background investigation of employees was only for employees hired after November 1, 1984. For all employees hired before that date, the authorized official of the employer needed only attest to the fact that the employee was employed before November 1, 1984, and was considered trustworthy.

Further, the interim amendment provided identification of a "Customs security area" within which the previously described procedures would be enforced. This area could include the deplaning and ramp areas, as defined by the district director of Customs, as well as the baggage and passenger inspection areas. These areas are posted, to the extent possible, once designated. In airports with areas dedicated only to international arrivals, the posted areas are restricted at all times. In airports in which international and domestic flights share arrival facilities, the restriction times are posted to the extent they are identifiable.

The February 3, 1986 Federal Register notice solicited public comments on the new requirements. The comments received have been taken into consideration in formulating the final rule and are discussed in this document.

ANALYSIS OF COMMENTS

Fourteen comments were received in response to publication of the interim regulations. Several commenters, including associations representing the airline industry and airport operators, took exception to the November 1, 1984, cut-off date for conducting background investigation on persons requiring access to the Customs security area. Concern was expressed that the date should be consistent with the November 1, 1985, date which the FAA utilizes in administering related requirements. We believe that this comment has merit and have changed the date after which background checks must be conducted by employers to November 1, 1985.

Other commenters stated that the new requirements are merely duplicative of FAA security regulations. The FAA has the responsibility for overall security at U.S. airports. Customs has the responsibility to safely and efficiently process international passengers, baggage, and cargo. The new requirements merely enhance the security of high risk areas and, in that sense, act to enhance the FAA efforts. They are not duplicative of the FAA requirements and have been endorsed by that agency.

A point raised by several commenters was that the need for proceeding on an emergency interim basis was never adequately justified. At the time the regulations were prepared, we were unable to make specific references to threats received. Events surrounding the threats remain classified. However, it can be stated that specific threats were received that passengers arriving at U.S. airports, on foreign flights, would be the targets of terrorist actions. The terrorist events were to take place while passengers were being processed in or exiting from Customs areas. In coordinating security measures at several airports, it became apparent that immediate tighter controls on access to Customs areas were necessary. The interim amendment to the regulations was designed to meet these needs without undue and possibly dangerous delay.

One commenter asked for exception from the formal application process for law enforcement personnel. We have revised the regulations to reflect that law enforcement personnel need not make application nor submit to background checks for security area access.

Several commenters were concerned that the processing of part-time employees would be cumbersome. Customs representatives have discussed this with industry representatives and have determined that the concern was premature. Customs officers implementing the program are cognizant of the industry concern on this subject and are working locally to avoid over-burdening the industry. Therefore, no change in the regulation is warranted on this subject.

One commenter stated that he had been informed that the new requirements apply only to large airports. This is not the case. The

new requirements apply to all airports at which international flights arrive or depart.

One commenter urged severe penalties for violations of the new security requirements. At this time, Customs believes that existing penalty provisions are sufficient to administer these regulations.

After consideration of all the comments received, and following further review of the matter, it has been determined to adopt the interim regulations with the minor modifications discussed and several editorial changes.

E.O. 12291 and Regulatory Flexibility Act

Because the amendment does not meet the criteria for a "major rule" within the meaning of § 1(b) of E.O. 12291, Customs has not prepared a regulatory impact analysis.

It is certified under § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the regulations will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The regulations are subject to the Paperwork Reduction Act of 1930 (44 U.S.C. 3501). Accordingly, they were submitted to the Office of Management and Budget, approved, and assigned control number 1515–0152.

List of Subjects in 19 CFR Part 6

Air carriers, Air transportation, Aircraft, Airports.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Customs Headquarters. However, personnel from other offices participated in its developments.

Amendment to the Regulations

Part 6, Customs Regulations (19 CFR Part 6), is amended as set forth below:

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen Hdnote 11), 1624, 1644, 49 U.S.C. App. 1474, 1509.

2. Part 6 is amended by adding a new § 6.12a, to read as follows:

§ 6.12a. Access to Customs Security Areas.

(a) For the purposes of this section, the term "Customs security area" means the federal inspection services area (as provided for by § 6.12(e) of this part), designated for processing passengers, crew, their baggage and effects arriving from foreign countries, as well as the aircraft deplaning and ramp areas and other restricted areas

designated by the district director of Customs. These areas will be posted as restricted to the extent possible, and are established for the purpose of prohibiting unauthorized entries or contact with persons or objects.

(b) With the exception of all Federal, and uniformed State and local law enforcement personnel, all persons located at, operating out of, or employed by any airport accommodating international air commerce, or its tenants or contractors, including air carriers, who have unescorted access to the Customs security areas must openly display or produce upon demand, a Customs approved identification card, or strip or seal to be issued and affixed by Customs to existing airport identification cards. The approved identification card, strip or seal, shall be in the possession of the person in whose name it is issued at all times when the person is in the Customs security areas.

(c) An application for an approved identification card, strip or seal as required by this section, shall be filed by the applicant with the district director on Customs Form 3078. This requirement applies to all employees, regardless of the length of their employment. For employees hired on or after November 1, 1985, an authorized official of the employer shall attest in writing that a background check has been conducted on the applicant, to the extent allowable by law. The background check shall include, at a minimum, references and employment history, to the extent necessary to verify representations made by the applicant relating to employment in the preceeding 5 years. For any employee hired before November 1, 1985, the authorized official of the employer need only attest to the fact that the employee was hired before that date. The authorized official of the employer shall attest that to the best of his knowledge, the applicant meets the conditions necessary to perform functions associated with employment in the Customs security area. The fingerprints of the applicant may be required on Standard Form 87 at the time of the filing of the approved application. Proof of citizenship or authorized residency, and a photograph may also be required. In addition, the application may be investigated by Customs and a report prepared concerning the character of the applicant. Records of background investigations conducted by employers must be retained and made available upon request by the district director for a period of 1 year following cessation of employment by affected employees.

(d) Law enforcement officers and other Federal, State, or local officials requiring access to the Customs security area need only request from the district director the issuance of an approved identification card with strip or seal affixed thereto. They need not make application nor submit to background checks for security area access.

(e)(1) An approved identification card, strip, or seal shall not be issued to any person whose employment, if necessitating access to

the Customs security areas will, in the judgment of the district director, endanger the revenue or the security of the areas. Grounds for denial of access shall include, but are not limited to:

(i) Any cause which would justify suspension or revocation of the identification card under the provisions of paragraph (j) of this section; or

(ii) Evidence of a pending or past investigation which establishes criminal, or dishonest conduct, or a verified record of such conduct.

(2)(i) The district director shall give written notification to any person whose application for access to the Customs security areas has been denied, fully stating the reasons for denial and setting forth specific appeal procedures. The employer shall be notified in writing that the applicant has been denied access to the area and that detailed reasons for denial have been furnished to the applicant. Specific reasons for denial shall not be furnished directly to the employer.

(ii) The denial will be final unless the applicant files with the district director a written notice of appeal. The applicant's written notice must be filed within 10 calendar days following receipt of the notice of denial. The notice of appeal shall be filed in duplicate, and shall set forth the response of the applicant to the statement of the district director. The district director shall render his decision on the appeal to the applicant within 30 calendar days.

(iii) If the district director denies the application on appeal, the applicant may file a further written notice of appeal to the Commissioner of Customs within 10 calendar days of receipt of the district director's decision on the appeal. The further notice of appeal shall be filed in duplicate, and shall set forth the response of the applicant to the district director's decision. The Commissioner or his designee shall review the appeal, and render his decision, in writing. This final decision shall be transmitted to the district director and served by him on the applicant.

(f) An employee may obtain a new identification card, strip, or seal from the district director in the following circumstances, without completing a new application:

(1) A change in employee name or address;

(2) A change in the name or ownership of his employing company;

(3) A change in employer or airport authority identification card format; or

(4) Loss or theft of the identification card, strip, or seal.

(g) The identification strip or seal shall be removed from employee identification cards by the district director when, for security reasons, it is necessary to change the nature of the identification.

(h) The loss or theft of an identification card, with strip or seal affixed, shall be promptly reported, in writing, by the employee to the district director, and may be replaced as provided in paragraph (f) of this section.

(i) If an approved identification card is presented by a person other than the one to whom it was issued, the identification strip or seal shall be removed from the identification card by the district director and destroyed.

(j)(1) An approved identification card, strip or seal may be removed from an employee by any Customs officer designated by the district director. In addition, the district director may revoke or suspend access to the Customs security area for any of the following reasons:

(i) The approved identification card, strip, or seal was obtained through fraud or the misstatement of a material fact;

(ii) The employee is convicted of a felony, or convicted of a misdemeanor involving theft, smuggling, or any theft-connected crime;

(iii) The employee permits the approved identification card to be used by any other person, or refuses to openly display or produce it upon the proper demand of a Customs officer;

(iv) The continuation of privileges would, in the judgment of the district director, endanger the revenue or security of the area;

(v) The employee refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation; or

(vi) The employee no longer requires access to the Customs security area for an extended period of time at the airport of issuance. In this instance the employer shall notify the district director in writing, return the strip or seal, and give information regarding the disposition of the approved identification card which was issued to the employee who no longer requires access. If the employee returns to duties in the Customs security area at the airport within 1 year, a Customs Form 3078, as required by paragraph (d) of this section, need not be submitted.

(2) The district director shall suspend or revoke access to the Customs security area by giving notice of the proposed action in writing to the employee with a copy of the notice to the employer. The notice shall be in the form of a statement specifically setting forth the grounds for revocation or suspension of the privilege and shall be final and conclusive upon the employee unless he files with the district director a written notice of appeal as provided in paragraph (j)(3) of this section.

(3) The employee may file a written notice of appeal from the revocation or suspension within 10 calendar days following receipt of the notice of revocation or suspension. The notice of appeal shall be filed in duplicate, and shall set forth the response of the employee to the statement of the district director. The employee, in his notice of appeal, may request a hearing.

(4) If a hearing is requested, it shall be held before a hearing officer designated by the Commissioner or his designee within 30 calendar days following the request. The employee shall be notified of the time and place of the hearing at least 5 calendar days before the hearing.

(5) The employee may be represented by counsel at the revocation or suspension hearing. All evidence and testimony of witnesses in such proceeding, including substantiation of charges and the answer thereto, shall be presented with both parties having the right of cross-examination. A stenographic record of the proceedings shall be made and a copy furnished to the employee. At the conclusion of the proceedings or review of a written appeal, the hearing officer or the district director, as the case may be, shall promptly transmit all papers and the stenographic record of the hearing, if held, to the Commissioner of Customs or his designee, together with his recommendation for final action.

(6) Following a hearing and within 10 calendar days after delivery of a copy of the stenographic record, the employee may submit to the Commissioner of Customs or his designee, in writing, additional views and arguments on the basis of the record.

(7) If neither the employee nor his attorney appear for a scheduled hearing, the hearing officer shall conclude the hearing and promptly transmit all papers with his recommendation to the Commissioner or his designee.

(8) The Commissioner or his designee shall render his decision, in writing, stating his reasons therefor, with respect to the action proposed by the hearing officer or the district director. The decision shall be transmitted to the district director and served by him on the employee.

(k) When an approved identification card, strip, or seal is required under paragraph (b) of this section, and the district director determines that the application for the identification card, strip, or seal cannot be administratively processed in a reasonable period of time, an employer may, upon written request, be issued a temporary identification for his employee. The employer must satisfy the district director that a hardship to his business would result pending issuance of an approved identification card, strip, or seal.

(1) The temporary identification shall be valid for a period of 60 days. The district director may renew the temporary identification for additional 30-day periods if he determines that the circumstances under which the temporary identification was originally issued continue to exist. The temporary identification shall be destroyed by the district director when the permanent approved identification card, strip, or seal is issued, or the privileges granted thereby are withdrawn.

(2) The provisions of this paragraph shall also apply to temporary employees and official visitors requiring access to the Customs security area. In the case of temporary employees, the identification shall be valid for a period of 30 days. In the case of official visitors, the temporary identification shall be valid for the day of issuance only. Temporary employee and official visitor identification are renewable for periods equal to their original period of validity.

(3) The temporary identification may be revoked and access to the Customs security area denied at any time if, in the judgment of the district director, continuation of the privileges granted thereby would endanger the revenue or if the holder of the temporary identification refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: August 27, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 12, 1986 (51 FR 32448)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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Morgan Ford

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–88)

A.N. DERINGER, INC. A/C E–Z–EM CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–8–01192

Before TSOUCALAS, *Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff challenges the classification of imported barium sulfate under item 417.80, TSUS, as other barium compounds, claiming that the correct classification is natural ground barium sulfate under item 472.12, TSUS.

Held: The imported barium sulfate (barytes) subject to an acid leaching process are not so advanced in value or condition that they have become something other than natural ground barium sulfate within the meaning of that tariff term and thus, are properly classifiable under item 472.12, TSUS.

[Plaintiff's motion for summary judgment granted; defendant's cross-motion for summary judgment denied.]

(Decided September 3, 1986)

Siegel, Mandell and Davidson, P.C. (Allan H. Kamnitz, Michelle S. Benjamin and *Brian S. Goldstein),* for the plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice (*Michael P. Maxwell* and *Veronica A. Perry*) for the defendant.

TSOUCALAS, *Judge:* In this action, plaintiff challenges the classification by the Customs Service of certain imported barium sulfate. Plaintiff, A.N. Deringer, Inc., is the customshouse broker for plaintiff-importer, E–Z–EM Company, Inc., who uses the imported barium sulfate in the manufacture of x-ray preparations. Plaintiff claims that the merchandise is ground barium sulfate and should be classified under item 472.12, TSUS, as "Barium sulfate: Natural (barytes) * * * Ground" at a rate of $3.25 per ton. The Customs Service classified the merchandise under item 417.80, TSUS, as "Barium compounds: Other" at a rate of 4.5% or 4.7% *ad valorem* depending on the date of entry.

The issue as to the correct classification centers on the acid leaching process to which the barytes are subjected before importation. It is claimed by plaintiff that this acid wash is employed to remove residual impurities found in the barytes ore source. Defendant, how-

ever, claims that the acid wash is a process which upgrades the barium sulfate whereby it is advanced in value and condition beyond the ground stage.

Plaintiff has moved, pursuant to USCIT R. 56, for summary judgment and defendant has cross moved for summary judgment. Each party alleges that there is no genuine issue of fact to be tried. In reviewing the statements of material facts, this Court agrees that there is no genuine issue as to a material fact.

STATEMENT OF FACTS

The merchandise in question is ground barium sulfate approximately 98%–99% pure as imported. The merchandise is mined in rock form from an ore source in Canada containing natural barium sulfate (barytes, $BaSO_4$) and iron carbonate ($FeCO_3$) particles in approximately equal proportion. The mined rock is crushed to a sand consistency, resulting in crushed ore. This crused ore is then subjected to a process which separates the slurry from the sized fractions. These sized fractions then undergo a vibratory process which separates the heavy particles containing the barytes from the lighter unwanted debris. Substantial portions of iron carbonate and other debris are removed by subjecting the heavy particles to a wet magnetic separation process. While the barytes are now of a higher purity than when mined, they may still be stained with a thin film of iron carbonate or other acid soluble impurities which were in the ore. To cleanse the barytes of these impurities which were not removed by prior processes, they are subjected to a solution of 5 normal hydrochloric acid. The barytes crystals then seem whiter in appearance. The acid wash does not chemically change the barytes. The barytes are then washed in water to eliminate the acid. Wet grinding of the barytes is achieved with a small amount of sodium citrate as a grinding agent. There is no chemical reaction between the barytes and the sodium citrate and it does not impart any functional properties to the barytes. These barytes crystals are then spray-dried until they reach the consistency of free flowing powder. Completion of the aforementioned processes readies the merchandise for packing and shipment. The barytes do not form a new chemical composition as a result of these processes.

BACKGROUND

Plaintiff imported the barium sulfate from Canada. The merchandise entered the country through the port of Houlton, Maine, from May 27, 1981 through August 18, 1982, and was liquidated from October 20, 1981 through September 1, 1982. Plaintiff filed a protest on October 25, 1982 contesting classification of forty entries of the barium sulfate.[1] The protest was denied on March 23, 1983. Thereafter, plaintiff filed this action.

[1] Plaintiff has abandoned its claim regarding the merchandise under entry #82-230328 since the protest was not timely filed as to that entry, therefore, only 39 entries are within the protest under consideration.

The question presented to this Court is whether barium sulfate, which has been cleansed by an acid wash rendering it 98–99% pure, has been so advanced in value and condition that it is precluded from classification as natural ground barium sulfate under item 472.12, TSUS, and therefore, properly classified as other barium compounds under item 417.80.

Discussion

Plaintiff argues that the acid leaching is a cleansing process which does not advance the barium sulfate in value or condition beyond the ground stage. Plaintiff claims 472.12 is an *eo nomine* provision which covers all grades and qualities of the article embraced by the tariff description.[2] Finally, plaintiff alleges that 472.12 is a more specific provision than 417.80 and therefore, if plaintiff's merchandise can be regarded as ground barytes, as a matter of law, the merchandise should be classified under 472.12.

Conversely, defendant advances two arguments why the barium sulfate is processed to such a point whereby it is advanced in value and condition beyond the ground state. First, it has acquired a new name: bleached barytes; and second, it has acquired a new use: for medical preparation. Further, defendant argues that industry experts establish that the term natural ground barite is not used in the industry to describe acid leached barium sulfate. Defendant concludes that the merchandise is not within the scope of item 472.12, TSUS, rather it is properly classified under 417.80 and therefore summary judgment is appropriate. Alternatively, defendant claims that if this Court must ascertain the meaning of "natural ground barium sulfate" that is an issue of fact and summary judgment is not warranted.

On a motion for summary judgment the court may not resolve or try factual issues. *Standard Commodities Import & Export Corp.* v. *United States*, 9 CIT——, Slip Op. 85–124 at 4 (Dec. 5, 1985). The sole function of the court is to determine whether any factual dispute exists which is material to resolution of the action. Summary judgment cannot be granted if any triable issue is raised. *Id.* at 4–5.

In determining the applicability of item 472.12 versus item 417.80, this Court must be guided by the rule of relative specificity. If an "article is described in two or more tariff provisions, it is to be classified under the provision which describes it most specifically." *W & J Sloane, Inc.* v. *United States*, 76 Cust. Ct. 62, 69, C.D. 4636, 408 F. Supp. 1392, 1397 (1976). *See* TSUS, General Interpretative Rule 10(c).

[2] Before importation, plaintiff sought a prospective ruling as to the classification of the barium sulfate in question. The Customs Service issued Customs Headquarters Ruling #064210, which indicated two reasons that the merchandise would not be classified under item 472.12. Initially, Customs identified the chief use of ground barium sulfate as a weighting agent in oil well drilling mud, which does not require the purity level of plaintiff's barium sulfate. Therefore, the Customs Service determined that the ground barium sulfate, as contemplated by item 472.12, would not ordinarily undergo the chemical advancements of the product in question. Secondly, Customs concluded that where an article was advanced by process in addition to grinding, and was substantially fit for its ultimate use, it could not be included within the tariff classification of natural ground barium sulfate. Thus, Customs stated that the product would be classified under item 417.80.

It should further be noted that in cases involving provisions in Schedule 4, TSUS, the scientific and technical meaning ascribed to tariff terms is applicable rather than the common meaning of these terms. *National Polychemicals, Inc.* v. *United States*, 58 CCPA 37, 41 n. 2, C.A.D. 1001, 433 F.2d 1327, 1329 n.2 (1979), *See Tariff Classification Study*, Schedule 4 at 2 (November 15, 1960). It is therefore appropriate to look to technical literature to analyze the uses and characteristics of barium sulfate. Barium sulfate may be derived artificially by treating a solution of barium salt with sodium sulfate; as a byproduct in the manufacture of hydrogen peroxide; and it may occur in nature as the mineral barite (barytes). *The Condensed Chemical Dictionary* at 109 (Tenth Ed. 1981). Futhermore, barium sulfate may be divided into grades: technical, dry, pulp, bleached, ground, floated, natural; C.P. (chemically pure); U.S.P. (United States Pharmacopeia); x-ray. *Id.* at 109.

Commercial barite is marketed in several forms: (1) as crude barite, washed free of clay and picked to remove adhering impurities; (2) as ground barite, obtained by grinding and purifying crude ore;[3] and (3) as a barium compound. *McGraw-Hill Encyclopedia of Science & Technology*, Vol. 2 at 111 (1982). Before grinding, most barite is leached by the addition of sulfuric acid in lead lined tanks. Occasionally, sodium chloride and other chemical reagents are added. *Id.* at 111. A detailed list of known uses for barium sulfate includes: weighting mud in oil drilling; paper coatings; x-ray photography; and, as an opaque medium for gastrointestinal radiography. *The Condensed Chemical Dictionary, supra*, at 109. It is noted that in these references materials bleached barite is discussed within the topic *Barite*, while the analysis of distinct barium compounds follows in a separate discussion, nowhere mentioning bleached barite. *See McGraw-Hill Encyclopedia of Science and Technology*, Vol. 2 at 111 and *Encyclopedia of Chemical Technology*, Vol. 2 at 318 (1948).

The scientific and technical meaning of the tariff terms was recognized by Congress in revising the structure of the Tariff Schedules. The Tariff Commission reported to Congress that:

> Schedule 4 is primarily a classification system for chemicals and closely related chemical products. It places all chemicals and related products in a systematic, logical arrangement, using terminology which takes cognizance of the vast changes which have occurred in the chemical field since 1930, and eliminates anomalies and archaic and illogical classification.

Tariff Classification Study, Schedule 4 at 2 (Nov. 15, 1960).

An analysis of the tariff provisions in issue reflects this attempt to logically arrange chemical products. The barium compounds provided for under item 417.80, TSUS, are those not named or not more specifically provided for elsewhere in the TSUS, such as the compounds covered by items 417.70–78 and 472.02–.14. *Summaries*

[3] One source even further divides this class into (a) coarsely ground and (b) finely ground—bleached and treated. *See Encyclopedia of Chemical Technology*, Vol. 2 at 319 (1948).

of Trade and Tariff Information, Schedule 4, Vol. 2 at 179 (1968). The *Summaries* enumerate some of the compounds covered under item 417.80: barium sulfide, barium chlorate, barium flouride, barium iodide, and barium titanate. Each one of these compounds except barium titanate is water-soluble and poisonous. *Id.* at 179. The compound barium sulfate is both insoluble and non-poisonous. *Encyclopedia of Chemical Technology*, Vol. 2 at 318 (1948). Schedule 4, Part 9, Subpart B (under which barium sulfate is classified) "comprises insoluble coloring materials of mineral origin, * * *." *Tariff Classification Study, supra* at 151. In the Tariff Schedules, the headnote to Subpart B states:

> The term "*pigments*", as used in this subpart, means products consisting of fine solid particles or powder, in dry form, * * * or ground in or mixed with oil, water, or other vehicle, commonly known as pigments and *suitable for* [emphasis added] use in imparting color (including black and white) to paints, inks, rubber, plastics, linoleum, and other products.

It is noteworthy that precipitated barium sulfate (blanc fixe), which is listed in item 472.14 immediately following 472.12, is used for gastrointestinal x-ray work. *Chemicals of Commerce* at 93 (Snell & Snell, 2d Ed. 1952). Similarly, plaintiff's product is used in x-ray preparation.

It would seem classification of the imported barium sulfate under item 472.12 would avoid anomolies and illogical classifications, since scientific treatises describe barite by kind and grade. It is therefore appropriate to discern whether Congress intended item 472.12 to cover "grades or kinds" of natural ground barium sulfate and whether plaintiff's merchandise can properly be regarded within that context.

Where a provision in the Tariff Schedules is without stated limitation it may not be restricted by "implication to grades and kinds chiefly used for particular purposes, or suitable for such use." *Hayes-Sammons Chemical Co.; Hayes-Sammons Co.* v. *United States*, 56 Cust. Ct. 115, 122, C.D. 2618 (1966), *aff'd*, 55 CCPA 69, C.A.D. 935 (1968). In *Hayes-Sammons*, the issue was whether the term "barytes ore, crude" as used in paragraph 67 of the Tariff Act of 1930 referred only to material containing 90% or more of barium sulfate and used in the manufacture of lithopone, ground barytes, and barium chemicals. The testimony in that case revealed that before 1930 a barium sulfate content of over 90% was necessary for those uses. It seems that these were the chief commercial uses of barium sulfate before 1930 while the use for ground barytes in the oil drilling industry, requiring a lower barium sulfate content, developed after that time. 56 Cust. Ct. at 117–118. In *Hayes-Sammons*, the court declined to hold that the tariff term "crude barytes ore" impliedly

required a minimum barium sulfate content.[4] "Congress could have easily specified the barium sulfate content requisite for the imposition of a duty if it had wished to tax only the product dealt in, but it chose to use a general term which included more than that." *Id.* at 118–119 (citing *United States* v. *Virginia Gin Co., Inc., W.H. Morton*, 48 CCPA 33, 37, C.A.D. 759 (1960)).

Similarly, the defendant asks this Court to imply a maximum barium sulfate content when applying the term ground barytes. However, in item 472.12, TSUS, as in the tariff provision at issue in *Hayes-Sammons*, there is no provision limiting this classification to the purity level of the barytes. *Hayes-Sammons*, 56 Cust. Ct. at 121. Therefore, it would appear that the barytes which plaintiff has imported, albeit purified, are indeed a "grade" of ground barytes, which is in fact encompassed by item 472.12. Of significance, is that the imported barytes have not undergone a chemical reaction by virtue of the acid wash, as conceded by defendant. Chemically they remain barium sulfate. *Compare United States* v. *C.J. Tower and Sons*, 43 CCPA 49, C.A.D. 608 (1955) (imported mineral held not to be crude where it was the result of a substantial chemical change).

Defendant argues, however, that the imported barytes are so advanced in value and condition by virtue of the acid leaching that they are no longer specifically provided for in 472.12. Plaintiff contends that the imported barytes are still identifiable and recognizable as natural ground barium sulfate. Unless the identity of the barytes is destroyed or converted into something else by processing, it remains within an *eo nomine* provision as long as the merchandise is so named. *Enrique Garza* v. *United States*, 66 Cust. Ct. 212, 217, C.D. 4192, 324 F. Supp. 91, 95 (1971).

If plaintiff's merchandise can be classified as natural ground barite, then summary judgment should be granted in plaintiff's favor because "an *eo nomine* [provision] must prevail over words of general description which might otherwise include the article specially designated." *W & J Sloane, Inc.* v. *United States*, 76 Cust. Ct. 62, 69, C.D. 4636, 408 F. Supp. 1392, 1397 (1976) (citing *Chew Hing Lung* v. *Wise*, 176 U.S. 156, 160 (1900)). Central to this determination is whether the merchandise is advanced in value and condition from its ground state and whether the ultimate use of the article is relevant in this classification.

In *United States* v. *Sheldon & Co.*, 2 Ct. Cust. App. 485, T.D. 32245 (1912), the court concluded that gum resin was not advanced in value or condition from its crude state (oleoresin). This oleoresin (crude turpentine) was vaporized, permitting the turpentine to escape, whereupon the residue of the oleoresin was let off through strainers into a vat. This residue, the resin content, then passed through screens which removed the chips, barks, insects and dirt

[4] In its decision, the court relied on the reasoning in *United States* v. *Virginia Gin Co., Inc., W.H. Morton*, 48 CCPA 33, C.A.D. 759 (1960). The issue in both cases was essentially identical. In *Virginia Gin* the appellate court observed that technical references define crude barytes as containing 90% barium sulfate and therefore, recognize that there are commercial grades of crude barytes ore.

which accumulated in the reclamation of the oleoresin from the trunk of the tree. *Id.* at 487. There was no change in the resin per se, merely a restoration to its crude or natural condition. The court did not consider persuasive that crude turpentine as it exudes from the trees and "unstrained" resin are sometimes put on the market without undergoing the aforementioned process. The court stated:

> The record shows that a variety of grades of resin are produced. There is a consequent variety of prices dependent upon the grade of the article. Among the well recognized grades of resin are those dependent upon color. * * * By the slightest change in the process there would be produced a different grade.

Id. at 489. It can, therefore, be gleaned from this decision that a difference in market price and a difference in the item's color do not automatically determine classification. Thus, whether or not the "bleached barytes" are white in appearance and more costly, is not decisive in classification under 472.12.

There can be two grades of an article which differ only by the presence of impurities in one of the grades. It these impurities are no part of the article itself, and, can be removed without changing the character of the article per se, even if slightly adding to its value, this is not advancing the article in value or condition. *Id.* at 490–491. If this were not the case, then the term "not advanced in value or condition" would mean only an article "in its native state, in the bowels of the earth, in the heart of the tree, or in its other original place of discovery, wherefore no article the subject of commerce could respond to that definition." *Hampton, Jr., & Co.* v. *United States*, 6 Ct. Cust. App. 392, 395, T.D. 35926 (1915).[5]

Where, after processing, the imported material contains a greater percentage of a substance than did the ore when taken from the ground, this cannot be considered advancing the material in value or condition. *C.J. Tower & Sons* v. *United States*, 26 Cust. Ct. 48, C.D. 1297 (1951). In that case zirconium ore (zirkite), containing 75% zirconium oxide and the gangue comprising the other 25%, was processed to increase the zirconium oxide from 75% to 95% concentration. Removal of the undesirable constituents was accomplished by adding coke and iron borings to the zirconium ore, fusing the mixture, and then cooling it to remove the unwanted material. The court held that the imported merchandise "still consists of zirconium oxide, although in a more concentrated form. The process through which it has been placed has not advanced the ore in value from the condition as it is found in the earth. It has not acquired a new name or a new use." *Id.* at 54. Defendant, relying on *Tower*, claims that the acid leaching process produces a barium sulfate product with a new name and new use. Nevertheless, as mentioned, technical treatises recognize that barite may be bleached (thereby

[5] Imported molybdenite, freed from its natural rock or gangue formation by a process of crushing and flotation, was not itself crushed. The court held that this was a process necessary to produce the article from its native condition into its imported condition without affecting its per se character and did not constitute an advancement in value or condition.

acquiring the name "Bleached barytes") and may be used for x-ray preparation. Therefore, it does not appear that a new name has been acquired or a new use has been developed.

The affidavits of George Cable and John Sloan, submitted by defendant, do not contradict what has been cited from other scientific authorities. Mr. Cable stated that Pfizer, the company that employs him as a Technical Service Manager, produces bleached barytes called "No. 1 Barytes." These white barytes can be produced from naturally white barium sulfate ore, or by acid leaching barium sulfate ore which is darker in color. He further states that natural ground barite is used in applications where whiteness is not required. Mr. Cable's affidavit does nothing more than reinforce the principle that an article in nature may have different grades depending upon color. *See United States* v. *Sheldon, supra.*

John P. Sloan, Jr. is Manager of Quality Assurance at Magocbar, a producer of oil well drilling fluids materials. In his opinion, the term natural ground barite (barytes) would not normally be used to describe natural barium sulfate which has been so advanced in purity to be considered a medical grade. Nevertheless, how a product is usually offered in the trade does not prevent it being offered in less usual forms. *International Selling Corp.* v. *United States*, 62 Cust. Ct. 23, 27, C.D. 3669, 294 F. Supp. 642, 645 (1969). Mr. Sloan's exposure to barite has been mainly in the oil well drilling industry where the baryte application is of a 75%–92% barium sulfate content. References indicate that at least 90% of ground barite is used as a weighting agent in the oil well drilling industry now, *see Summaries, supra*, at 172, even though this use is not the only one recognized.

While the Tariff Schedules distinguish crude barium sulfate from ground barium sulfate, Congress did not provide for barium sulfate to be separately classified according to color, purity or ultimate use. Whether or not "natural ground barite" is of a medical grade and could be used for its ultimate purpose is not dispositive. The fact that an imported article is fit for its present use might be decisive in some cases, but is not a universal or safe test. *United States* v. *Sheldon & Co.*, 2 Ct. Cust. App. 485, 494 (1912) (citing *Littlejohn* v. *United States*, 119 Fed. Rep. 483, 484 (1902)). *See also International Selling Corp.* v. *United States*, 62 Cust. Ct. at 27, 294 F. Supp at 645 (absent a restriction in the Tariff Schedule to the contrary, an article ready for its final and ultimate use is still classified under the *eo nomine* designation.)

Plaintiff has submitted two affidavits, one from Irwin Rosenblum, a chemical engineer formerly employed by E–Z–EM, and one from Joseph Riina, a vice president at E–Z–EM. These affidavits indicate that the merchandise in issue is commercially sold and known as natural ground barite. Defendant has claimed in the alternative that a triable issue of fact has been raised by the conflicting statements of the affiants. However, defendant's affidavits do not dispute

that the barytes have not undergone a chemical reaction. What is in issue is the definition of the tariff term and this is a question of law. *Daw Industries, Inc.* v. *United States*, 714 F.2d 1140, 1141 (Fed. Cir. 1983).

Therefore, it must be concluded that plaintiff's imported barium sulfate is natural ground barite properly classifiable under item 472.12. This is an *eo nomine* provision without any stated limitation as to industrial or medical use. The acid leaching performed on the barytes does not cause a new product to be manufactured but rather a more pure grade of ground barite is achieved. This grade of barytes is not so advanced in value or condition as to remove it from the classification of natural ground barite. As defendant admits, the acid leaching does not act on the barytes itself but rather acts on the impurities. The cited authorities reveal that a form of cleansing acting to remove impurities which does not change the article itself, except perhaps to make it more pure or concentrated, does not advance the article in value or condition.

Therefore, in light of the above, plaintiff's motion for summary judgment classifying the imported merchandise as barium sulfate, natural, ground, under item 472.12, TSUS, is granted and defendant's cross-motion is denied.

Judgment will be entered accordingly. So ordered.

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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Decisions of the United States Court of International Trade

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(Slip Op. 86–89)

ROSS TRADING CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–5–00649

Before DICARLO, *Judge.*

Plaintiff challenges classification of wooden toilet seats under item 206.98 of the Tariff Schedules of the United States (TSUS). Plaintiff argues that the merchandise is a fixture or part of a fixture, precluding classification as a household utensil, and that the merchandise is properly classified as parts of furniture under item 727.40, TSUS, or alternatively as articles of wood not specially provided for, under item 207.00, TSUS. Plaintiff moves and defendant cross-moves for summary judgment.

Held: The merchandise is parts of fixtures and is not classifiable as household utensils under item 206.98, TSUS. The merchandise is not furniture and is not specifically described elsewhere in the tariff schedules. Therefore it is classifiable as articles of wood not specially provided for under item 207.00, TSUS.

[Plaintiff's motion is granted. Defendant's motion is denied.]

(Decided September 5, 1986)

Glad, White & Ferguson (Steven B. Lehat) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Kenneth N. Wolf*), for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of merchandise from Taiwan invoiced as "oak toilet seats with brass hardware," under item 206.98 of the Tariff Schedules of the United States (TSUS) as "Household utensils * * * not specially provided for, of wood: * * * Other." Plaintiff contends that the toilet seats are properly classifiable under item 727.40, TSUS, as "Furniture, and parts thereof, not specially provided for: Of wood: * * * Parts of furniture," or alternatively under item 207.00, TSUS, as "Articles not specially provided for, of wood."

Plaintiff moves and defendant cross-moves for summary judgment. Since there is no genuine issue as to any material fact, dispo-

sition by summary judgment is appropriate. Plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied.

The parties agree that toilet bowls are fixtures. Plaintiff says that since toilet seats are integral parts of toilet bowls, they also are fixtures and cannot be classified as household utensils since the court in *U. Fujita & Co.* v. *United States*, 26 CCPA 63, 65, T.D. 49611 (1938), held that the term "household utensils" does not include fixtures.

The question presented is whether wooden toilet seats are fixtures or parts of fixtures, and if so, whether that status precludes their classification as "household utensils" under item 206.98, TSUS.

The courts have long held that fixtures are not classifiable as utensils. In *Fensterer & Ruhe* v. *United States*, 5 Ct. Cust. App. 61, 61–62, T.D. 34096 (1914), the Court of Customs Appeals held that a gas burner was not a utensil since it was part of a fixture:

> Two things will be noted: First that this article before being susceptible of use must be fixed to a gas pipe; secondly, it is not complete in itself and forms no utensil or implement adapted to use * * *. *It is a part of a fixed device not complete in itself and which, when completed, would not be used as an implement or utensil in the ordinary sense in which those words are employed, but would be more in the nature of a fixture* [emphasis added] * * *.

In *Fujita, supra,* the Court of Customs and Patent Appeals held that door knockers were not utensils. The court stated:

> The term "utensil" might be said to be sufficiently broad to include door knobs. However, door knobs are designed to be, and, when in use, are, permanently attached to doors. They are, therefore, fixtures, and as such, a part of the house or realty.

26 CCPA at 66.

In a later case, the Court of Customs and Patent Appeals cited with favor the holding in *Fujita* but held that water mixers, articles which fit over hot and cold spigots and provide a single water outlet, were utensils and not fixtures. *Davies, Turner & Co* v. *United States*, 47 CCPA 129, C.A.D. 744 (1960). The Court reasoned that the articles "do not become permanently attached to" the sink, "but quite to the contrary, they are made to be attached and detached with ease and without skill." *Id.* at 130, 133.

Defendant cites *New York Merchandise Co.* v. *United States*, 62 Cust. Ct. 674, C.D. 3847 (1969), where articles such as tie racks, coat hangers, toilet paper holders, soap dishes and towel racks, bars and rings were held to be household utensils even though most of the articles required attachment to a wall or structure to fulfill their useful purpose. The Court said: "The mere fact * * * that an article cannot function by itself or without being attached to a fixture does

not preclude such article from being classified as a utensil." *Id.* at 678.

Defendant also relies on *Davies, Turner & Co.* v. *United States*, 55 Cust. Ct. 488, Abs. 69651 (1965), where sink strainers were held to be household utensils. The Court stated: "The fact that the sink strainers * * * function only when inserted in sinks does not preclude them from being household utensils." *Id.* at 491.

The authorities cited by defendant are inapposite. Articles such as tie racks in *New York Merchandise* may not be functional before their permanent attachment to walls, but walls are complete and functional before tie racks are affixed. Such devices are "articles of utility which, although attached to houses and used in the household only where attached, retain their status as personalty and are not to be regarded as a part of the realty." *Fujita*, 26 CCPA at 66. *Davies, Turner & Co.*, 55 Cust. Ct. 488, is distinguishable, since sink strainers are not permanently attached to the realty, but "are removed frequently in the course of their use." *Id.* at 488.

The Court finds that toilet seats, although removeable, "are designed to be, and, when in use, are, permanently attached to" the realty. *See Fujita, supra* at 66. They form an integral and necessary part of toilet bowl fixtures. Therefore the toilet seats are parts of fixtures and cannot be classified as household utensils.

Since the presumption of correctness of Customs classification has been overcome, the Court now must determine the correct classification of the merchandise. *Jarvis Clark Co.* v. *United States*, 773 F.2d 873 *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984).

Plaintiff's argument that the articles are "parts of furniture" is misplaced. In order for toilet seats to be parts of furniture, it is necessary for toilet bowls to be "furniture" under headnote 1 to Schedule 7, Part 4, Subpart A, which states in part:

> For the purposes of this subpart, the term "furniture" * * * does not include—
> * * *
> (ii) articles of concrete, of stone, or of ceramic ware (see parts 1 and 2 of schedule 5).

Plaintiff acknowledges:

> That [toilet bowls] are invariably in chief value of ceramic ware or metal, and *specifically* provided for as sanitary ware in Schedule 5, Part 2, and Schedule 6, Part 3, shows Congressional intent to exclude them from classification as furniture.

Plaintiff's memorandum at 4 (emphasis in original). Plaintiff offers no support for its argument that despite the exclusion of toilet bowls from classification as furniture, toilet seats of wood "when separately imported, properly remain furniture parts." Plaintiff's memorandum at 5. The Court holds that toilet bowls do not come within the meaning of the term "furniture" under Schedule 7, Part

4, Subpart A, and therefore the merchandise is not classifiable as "parts of furniture" under item 727.40, TSUS.

Plaintiff alternatively argues that the merchandise is classifiable under item 207.00, TSUS, as articles not specially provided for, of wood. Headnote 1 to Schedule 2, Part 1, Subpart F, which contains that provision, states: "This subpart covers all products of wood which are not provided for elsewhere in the tariff schedules." Defendant agrees that the toilet seats are described by item 207.00, TSUS, but says that provision controls only if the merchandise is not covered by items 206.98 or 727.40, TSUS, or any other tariff provision.

The Court has examined the tariff schedules and finds no provision for sanitary ware or parts thereof, of wood, or any other provision which more specifically describes the merchandise. Since the Court holds that the merchandise is not more specifically described under items 206.98 or 727.40, TSUS, or under any other provision in the tariff schedules, the Court holds that the merchandise is classifiable under item 207.00, TSUS. Judgment will be entered accordingly. So ordered.

(Slip Op. 86–90)

OLD REPUBLIC INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–10–01450

OPINION

[Plaintiff's motion for summary judgment denied. Defendant's cross-motion for summary judgment denied without prejudice.]

(Decided September 9, 1986)

Sandler & Travis, P.A. (Gilbert Lee Sandler, Mark D. Crames, Santiago G. Leon, Paul E. Linet) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office and *Barbara M. Epstein* and *Jerry P. Wiskin*, Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff Old Republic Insurance Company (Old Republic) acted as corporate surety in connection with two entries of diesel engines that were liquidated by Customs over a year after their entry dates.[1] Plaintiff makes four basic arguments in opposition to this suit on the bond to collect increased duties which were

[1] The suit originally involved both entries, the particulars of which are outlined below:

	Entry 532650	*Entry 163212*
Port of Entry:	New York	New York
Entry Date:	Aug. 9, 1979	Jan. 7, 1980
Notice of Extension to Importer:	July 19, 1980	Dec. 13, 1980
Liquidation by Customs:	Jan. 30, 1981	Feb. 20, 1981
Protest Number:	1001–1–007647	1001–1–007647
Protest Date:	June 29, 1981	June 29, 1981
Protest Denial Date:	April 22, 1983	April 22, 1983

At oral argument, counsel for plaintiff informed the court that the surety had obtained reimbursement for Entry 532650 and it was abandoning its claim as to that entry.

assessed upon liquidation. 1) Plaintiff contends that Customs failed to comply with its regulation that requires notice of extension of time for liquidation be provided the surety. 19 C.F.R. § 159.12(b) (1980). Plaintiff asserts that this regulation was incorporated into the bonds covering the subject entries, and that the failure of Customs to comply with its obligations discharged Old Republic's liability. Defendant contends that this court lacks jurisdiction over this claim. Defendant also contests the merits of plaintiff's claim. 2) Plaintiff contends that because it never received a notice of extension of time for liquidation the merchandise should be deemed liquidated by operation of law at the rate of duty asserted by the importer at the time of entry, 19 U.S.C. § 1504(a) (1982).[2] 3) Plaintiff asserts Customs Ruling C.S.D. 83–20, which recognized discharge of the surety in this situation, was revoked through improper procedures. 4) Finally, plaintiff argues that regardless of its legal obligations, Customs is equitably estopped from seeking increased duties from Old Republic. Both parties have moved for summary judgment.

Certain critical facts underlying plaintiff's motion for summary judgment are not in dispute. Most importantly, it is clear that the importer, but not the surety, received a notice of extension of time for liquidation of the entry at issue.[3] Following liquidation and in response to a memorandum from plaintiff, Customs issued a ruling, C.S.D. 83–20, in which it held, *inter alia*: (1) when Customs fails to properly notify a surety pursuant to regulation, that surety's liability for payment of any increased duties, charges, etc., is discharged; and (2) in those instances in which Customs fails to notify a surety of an extension, this failure to notify is not rectified by subsequent notification after the extension has commenced. A copy of this ruling was sent to plaintiff's counsel in a letter dated December 8, 1982. On March 24, 1983, Customs sent a second letter and opinion to plaintiff's counsel, advising him that Customs had reconsidered its original position and now considered the surety liable. On April 13, 1983, Customs issued C.S.D. 83–20, which was subsequently published on December 20, 1983. 17 Cust. Bull. 754. In the meantime, Customs published a notice in the Customs Bulletin regarding C.S.D. 83–20. The notice read as follows:

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[2] 19 U.S.C. § 1504(a) (1982) reads as follows:

> (a) Liquidation.—Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:
>
> (1) the date of entry of such merchandise;
> (2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; or
> (3) the date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse;
>
> shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

In 1984, the words "importer, his consignee, or agent" were amended to read "importer of record." Pub. L. 98-573, § 191(d)(1), 98 Stat. 2971 (1984) (codified as amended at 19 U.S.C. § 1504(a) (1982 & Supp. II 1984)). The amendments to § 1504 apply to articles entered on or after the 15th day after October 30, 1984, *see* Pub. L. 98-573, § 195(a), 98 Stat. 2972 (1984), and are thus inapplicable to the case at bar. *See infra* note 4 for the text of § 1504(b).

[3] The importer of record of the merchandise was Lind Samskar

NOTICE

C.S.D. 83–20, initially published in the Customs Bulletin Volume 17, No. 15, page 39, was published inadvertently. The ruling letter dated December 20, 1982 has been reversed in part by Headquarters ruling dated March 24, 1983, which reversed holdings (1) and (2) of the ruling. Accordingly, holdings (1) and (2) of C.S.D. 83–20 are reversed. Holding (3) of the ruling remains valid.

17 Cust. Bull. No. 19 at 8 (May 11, 1983).

Although these facts are not in dispute, there is disagreement between the parties on a number of legal issues, most importantly on the issue of how the basic statutory and regulatory provisions should be construed in relation to each other. That is, the Secretary may avoid liquidation, pursuant to § 1504(a), in the amounts asserted at the time of entry, even if liquidation occurs more than one year after entry. During the relevant time period this could be accomplished by extending the one-year liquidation period by giving notice to "the importer, his consignee, or agent." 19 U.S.C. § 1504(b)(1)–(3) (1982).[4] The Customs regulation, on the other hand, states: "If the district director extends the time for liquidation * * * he promptly shall notify the importer or the consignee and his agent and surety * * *." 19 C.F.R. § 159.12(b) (1980).

I. Equitable Estoppel

The first issue to be addressed is whether Customs is equitably estopped from claiming the increased duties. Defendant argues that: (1) plaintiff cannot estop the government from recovering the duties because plaintiff already tendered the duties voluntarily in order to commence the action; (2) equitable estoppel is not available against the government in its sovereign role of collecting or refunding import duties; and (3) even if estoppel is available against the government, plaintiff has failed to demonstrate that the elements of estoppel are met.

As to defendant's first point, neither this court nor the Court of Appeals for the Federal Circuit has considered whether a plaintiff must forfeit an estoppel claim if it has tendered duties as a prerequisite to a 19 U.S.C. § 1581(a) suit. For the reasons outlined *infra*, however, the court does not need to answer this question today.

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[4] During the time of the importation and liquidation of the merchandise involved in this case, 19 U.S.C. § 1504(b) read as follows:

> (b) Extension
> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if—
> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
> (2) liquidation is suspended as required by statute or court order; or
> (3) the importer, consignee, or his agent requests such extension and shows good cause therefor.

Pursuant to a 1984 amendment, the language critical to this case, "the importer, his consignee, or agent," now reads "the importer of record." Pub. L. 98–573, § 191(d)(2), 98 Stat. 2971 (1984) (codified as amended at 19 U.S.C. § 1504(b) (1982 & Supp. II 1984)). As noted *supra* at note 2, the amendments to § 1504 do not apply directly to the case at bar. All subsequent references to § 1504 in the context of the entry at issue will be to the 1982 version of the statute except where otherwise indicated.

The Federal Circuit has clearly stated that equitable estoppel is only available against the government if the government is acting in its proprietary, rather than its sovereign, capacity. *United States* v. *Bar Bea Truck Leasing Co.*, 1 Fed. Cir. 151, 155, 713 F.2d 1563, 1567 (1983); *Air-Sea Brokers, Inc.* v. *United States*, 66 CCPA 64, 68, 596 F.2d 1008, 1011 (1979) Thus, in *Air-Sea Brokers*, the court held that "equitable estoppel, even if available in cases involving the Government in its proprietary capacity, is not available against the Government in cases involving the collection or refund of duties on imports."[5] *Air-Sea Brokers*, 66 CCPA at 68, 596 F.2d at 1011. This position has been reiterated on numerous occasions by both the Federal Circuit and this court. *United States* v. *Reliable Chemical Co.*, 66 CCPA 123, 128, 605 F.2d 1179, 1184 (1979); *Wally Packaging, Inc.* v. *United States*, 7 CIT 19, 21, 578 F. Supp. 1408, 1410–11 (1984); *Spearhead Industries, Inc.* v. *United States*, 6 CIT 176, 180 (1983), *aff'd*, 738 F.2d 454 (1984); *American Motorists Insurance Co.* v. *United States*, 5 CIT 33, 41 (1983); *Bethlehem Steel Corp.* v. *United States*, 4 CIT 229, 232, 551 F. Supp. 1148, 1150 (1982).

The most recent Court of International Trade case on the subject, which is also the basis of plaintiff's estoppel claim, finds an exception to the aforementioned rule. *United States* v. *Federal Insurance Co.*, 9 CIT ——, 605 F. Supp. 298 (1985), *appeal docketed*, No. 85–2343 (Fed. Cir. May 16, 1985).[6] This exception applies in cases in which the plaintiff can demonstrate affirmative misconduct on the part of the government, as well as establish the standard elements of estoppel.[7] *Id.* at ——, 605 F. Supp. at 303.

Whether or not affirmative misconduct exists here, plaintiff first must establish the elements of estoppel. Those elements are traditionally stated as follows:

> (1) the party to be estopped must know the facts; (2) he must intend that is conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts and (4) he must rely on the former's conduct to his injury.

Federal Insurance, 9 CIT at ——, 605 F. Supp. at 303 (citing *United States* v. *Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979)).

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[5] The court notes that, without making a proprietary/sovereign distinction, the Supreme Court has explicitly left open the issue of whether estoppel may run against the government under some circumstances. *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 & n.12 (1984), *reh'd denied*, 106 S. Ct. 1289 (1986).

[6] In *Federal Insurance* the court found that Customs had breached its own regulations and the statutory scheme regarding oversight of importers and protection of sureties in "blatant disregard for the public interest." *Federal Insurance*, 9 CIT ——, 605 F. Supp. at 304. *Federal Insurance* is, thus, factually distinguishable from both the present case and other equitable estoppel cases in the Customs area.

[7] The Eleventh Circuit has rejected the argument that there is an "affirmative misconduct" exception to the general rule that the United States is not subject to estoppel when it acts in its sovereign capacity. *United States* v. *Context-Marks Corp.*, 729 F.2d 1294, 1297 n.4 (11th Cir. 1984).

Other Circuits have adopted affirmative misconduct as a fifth requirement in cases involving estoppel against the government, without explicit limitation. *See Free Enterprise Canoe Renters Ass'n* v. *Watt*, 711 F.2d 852, 857 (8th Cir. 1983); *Pratte* v. *NLRB*, 683 F.2d 1038, 1041 (7th Cir. 1982); *Akbarin* v. *INS*, 669 F.2d 839, 842 (1st Cir. 1982); *TRW, Inc.* v. *FTC*, 647 F.2d 942, 951 (9th Cir. 1981); *Yang* v. *INS*, 574 F.2d 171, 175 (3d Cir. 1978). *Compare Azar* v. *United States Postal Service*, 590 F. Supp. 948, 954–55, (N.D. Ind. 1984), *aff'd*, 777 F.2d 1265 (7th Cir. 1985) (requirement of affirmative misconduct only applies in cases in which government is acting in its sovereign capacity).

First, in this case, the government "knew" that the liquidation period had been extended. It can also be assumed that it "knew" of the regulation requiring the district director to give plaintiff notice of any extension and that it had failed to provide such notice. Second, with regard to intent, this case is governed by this court's ruling in *Federal Insurance* that "[t]he government's mechanism for collecting duties is in its nature intended to encourage reliance on its regularity and propriety by those owing duties." *Federal Insurance*, 9 CIT at ——, 605 F. Supp. at 303. Third, plaintiff has alleged that it had no actual notice of the extension of the liquidation period and defendant has not disputed this.

Plaintiff, however, has failed to demonstrate that it relied on the regulatory guaranty of notice. Assuming, *arguendo*, that plaintiff relied on the regulation's guaranty of notice, plaintiff has failed to establish that the failure of the government to provide the notice caused it harm. *See, infra*, Part V. In order to establish estoppel, plaintiff must be able to demonstrate that it was prejudiced in some tangible way. *Lincoln National Life Insurance Co.* v. *United States*, 582 F.2d 579, 582 (Ct. Cl. 1978); *cf. Federal Insurance*, 9 CIT at ——, 605 F. Supp. at 303 ("As a result of reliance on the propriety of the government's conduct, Cometals lost $230,344.12."). Inasmuch as plaintiff has not established one of the traditional elements of estoppel, the court need not address whether affirmative misconduct is present.

II. Reversal of Ruling Recognizing Surety's Discharge

Following the issuance of C.S.D. 83–20, 17 Cust. Bull. 754 (1982), but before publication thereof, Customs issued a ruling reversing C.S.D. 83–20 in part. 17 Cust. Bull. No. 19 at 8 (1983). Normally there would be no question of the procedural validity of such a modification. The problem in this case arises because of the subsequent publication of C.S.D. 83–20.[8] Plaintiff contends that this notice of reversal is ineffective to modify C.S.D. 83–20, because Customs failed to comply with regulations governing modification of published rulings. Defendant argues that Customs complied with all applicable regulations and effectively modified C.S.D. 83–20 as claimed in the notice.

The resolution of the controversy rests with the appropriate characterization of the ruling. Customs regulations establish two procedures for modifying or revoking rulings. The choice of procedure depends upon whether the ruling has established a "uniform practice." A "uniform practice" is established by any ruling that affects a rate of duty or charge and is published in the Customs Bulletin.

[8] Customs initially had the option of publishing the decision or otherwise making it available for public inspection. Plaintiff's contention that Customs was obligated by law to publish C.S.D. 83–20 merely because it is a precedential decision is in error. As defendant notes, both the statute and the regulation require that Customs "publish the decision in the Customs Bulletin *or otherwise make it available for public inspection*" within 120 days of the issuance of the decision. 19 U.S.C. § 1625 (1982); 19 C.F.R. § 177.10(a) (1983) (emphasis added).

19 C.F.R. § 177.10(b) (1983).[9] Such a ruling cannot be changed to result in the assessment of a higher duty or charge unless two conditions are met. First, the original ruling must be determined to be "clearly wrong." *Id.* Second, the fact that it is under review must be published in the *Federal Register.* 19 C.F.R. § 177.10(c) (1985). Plaintiff contends that C.S.D. 83–20 is such a ruling.

On the other hand, a ruling that does not affect the rate of duty or charge or is not published in the *Federal Register* can be modified or revoked without compliance with the aforementioned procedures if Customs later finds that the determination is in error or is not in accordance with the current views of Customs. 19 C.F.R. § 177.9(d)(1) (1983).[10] Such modification or revocation is effected by Customs giving notice to the person to whom the ruling letter was addressed and, when appropriate, by publication of a notice in the Customs Bulletin. *Id.*

Defendant contends that these less stringent procedures apply because C.S.D. 83–20 is not a ruling "regarding a rate of duty or charge" within the contemplation of 19 C.F.R. § 177.10(b). In support of this position, defendant cites this court's decision in *American Air Parcel Forwarding Co.* v. *United States*, 7 CIT 231, 587 F. Supp. 550 (1984). At issue in *American Air Parcel* was ruling TAA No. 10, a published ruling which pertained to the appropriate factors to consider in establishing export and transaction value for appraisement purposes. As in the case at bar, Customs subsequently issued another ruling, TAA No. 40, which retroactively revoked part of TAA No. 10 without following the notice and comment provisions of 19 C.F.R. § 177.10(c). *Id.* at 232, 537 F. Supp. at 552. In determining whether TAA No. 10 was a ruling "regarding a rate of duty," the court first defined the term "rate of duty" as "a fixed ratio or proportion arrived at through a particular classification which, when applied to the value of the imported item, will determine the amount of tariff to be paid." *Id.* at 234, 587 F. Supp. at 554. The court found that neither TAA No. 10 nor TAA No. 40 "dealt with a 'rate of duty or charge' since the fixed ratio against which the value of the merchandise was applied remained the same." *Id.* As defendant contends, this language from *American Air Parcel* controls the instant case. TAA No. 10 involved valuation of merchandise, to which the rate of duty is applied. C.S.D. 83–20 involves the question of who must receive notice of an extension of the time for liquidation, an issue even more remote from the issue of what rate of duty applies. Therefore, C.S.D. 83–20 did not establish a uniform practice regarding a rate of duty or charge and, consequently, the notice requirements of 19 C.F.R. § 177.10(c) are inapplicable.

[9] There is no longstanding practice at issue here such as that before the court in *Heraeus-Amersil, Inc.* v. *United States*, 8 CIT 329, 331–33, 600 F. Supp. 221, 223–25 (1984) (denying defendant's motion to dismiss in part); 9 CIT ——, 617 F. Supp. 89 (1985) (granting consent motion to clarify prior opinion and judgment and granting plaintiff's and defendant's motions for summary judgment in part), *aff'd*, No. 86–602/605 (Fed. Cir. July 8, 1986). Thus, any exception to the requirement of publication to establish a uniform practice is not applicable here.

[10] *See, supra* note 9.

III. DEEMED LIQUIDATION

The statute at issue provides for three situations in which Customs may not be able to liquidate merchandise in a timely manner. 19 U.S.C. § 1504(b)(1)–(3) (1982). When one of these situations arises, the Secretary may extend the liquidation period by giving notice to "the importer, his consignee, or agent." *Id.*[11] The customs regulation, on the other hand, states: "If the district director extends the time for liquidation * * * he promptly shall notify the importer or the consignee *and* his agent *and surety*." 19 C.F.R. § 159.12(b) (1980) (emphasis added). This regulation may be read in a variety of ways, but unlike the statute, it clearly requires notice to the surety, at least, for some purposes.[12]

The parties are correct that the key to resolving this issue is in divining the legislative intent underlying 19 U.S.C. § 1504. Defendant contends that the language of the statute makes clear that Congress explicitly excluded sureties from those parties who must receive notice of an extension for it to be valid.[13] In support of this argument, defendant draws a comparison between the provision governing extension of time for liquidation and the provision governing suspension of liquidation. As noted above, extension is effected by giving notice to "the importer, his consignee, or agent." 19 U.S.C. § 1504(b), *supra* note 4. In contrast, the statute requires that if liquidation is *suspended,* the Secretary must give notice to "the importer or consignee concerned and to any authorized agent and surety of such importer or consignee." *Id.* § 1504(c).[14] Defendant contends that the difference in the statutory provisions signifies Congressional intent that sureties not be notified of extensions of liquidation.[15] In support of this contention, defendant invokes the principle of statutory construction, *expressio unius est exclusio alter-*

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[11] *See supra* note 4 for text of 19 U.S.C. § 1504(b). Failure to properly extend the time results in deemed liquidation at the previously asserted rate. *See supra* note 2.

[12] The court has recently considered the relationship between 19 U.S.C. § 1504(b) and 19 C.F.R. § 159.12(b) in a related context. *Detroit Zoological Society* v. *United States*, 10 CIT ——, 630 F. Supp. 1350 (1986). In that case, however, there was a direct conflict between the statutory requirement of notice to the consignee *or* agent and the regulatory requirement of notice to the consignee *and* agent. *Id.* at ——, 630 F. Supp. at 1357–59. The additional reference to sureties in the regulation was not at issue nor was the special position of sureties in the duty collection scheme discussed.

[13] Plaintiff sees a scheme of dual liquidation. That is, the liquidation may be valid as to the importer because it has notice of the extension but it is invalid as to the surety without notice. According to plaintiff Congress foresaw such dual liquidations when it allowed sureties additional time to protest under 19 U.S.C. § 1514(c)(2) (1982) which reads as follows:

> A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.
>
> A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond. If another party has not filed a timely protest, the surety's protest shall certify that it is not being filed collusively to extend another authorized person's time to protest as specified in this subsection.

Thus, according to plaintiff, under § 1514(c)(2), the original liquidation could stand as to the importer, but be superceded as to the surety. Plaintiff believes Congress intended a similar result here. The court finds no support for this theory of dual liquidation in either § 1514 or its legislative history. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 254, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 640; *see also Siara* v. *United States*, 784 F.2d 988, 990 (Fed. Cir. 1985) (court states in dictum that it "would seem possible" that all parties interested in an entry would be bound by a successful protest by the surety alone).

[14] Suspension of liquidation is one ground upon which an extension may be granted. 19 U.S.C. § 1504(b)(2) (1982); *see supra* note 4. Pursuant to the statutory scheme, it appears that if liquidation has been suspended and the time for liquidation will be extended as a result, then the Secretary must tell the importer or consignee and their authorized agent and surety of the suspension, but need only notify the importer, the consignee, or agent of the extension. Thus, if the extension does not involve a suspension there would be no requirement of notice to the surety under the statute.

[15] The court views the intent more narrowly, that is, as intent that the extension be effective without notice to the surety.

ius, that is, "where Congress * * * has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." *Marshall* v. *Western Union Telegraph Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980); *see also South African Marine Corp.* v. *United States*, 10 CIT ——, Slip Op. 86–61 at 12–13 (June 6, 1986) (citing *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 457–58, *reh'g denied*, 415 U.S. 952 (1974)).

The relevant legislative history does not clarify the reasons Congress may have chosen to treat sureties differently with regard to receipt of notices of extension and suspension. The statutory provisions relating to liquidation were drastically revised with the passage of the Customs Procedure Reform and Simplification Act of 1978. Pub. L. No. 95–410, 92 Stat. 888. The former law failed to require liquidation to be completed within a specific time period. The new bill provided for deemed liquidation, extension of the time for liquidation, and suspension of the liquidation process. The report of Senate Committee on Finance included as some of the reasons for the changes (1) increasing certainty in the customs process for sureties, among others, (2) helping sureties to better control their liabilities, and (3) protecting sureties against losses resulting from the dissolution of their principals in instances in which there has been undue delay in liquidating entries. S. Rep. No. 778, 95th Cong., 2d Sess. 32, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2211, 2243. While these considerations are consistent with the desire to provide sureties with notice of extension of the time for liquidation, Congress failed to require such notice to them in section 1504(b), as a prerequisite to extension while explicitly requiring notice to sureties in section 1504(c), if a suspension of liquidation has occurred. Since the provisions are part of the same statutory schemes regarding liquidation of entries, the court can only assume that Congress was aware of the fact that it was omitting sureties from the list of parties to whom notice of extension must be given before the extension is effective.

Further support for the conclusion that Congress did not inadvertently omit sureties from section 1504(b) is found in the subsequent amendment to the statute. As noted above, in 1984, Congress amended the very provision at issue to change the language "the importer, his consignee, or agent" to "the importer of record." *See supra* note 2. Congress did not see fit to add sureties. In addition, this same amendment was made to the suspension provision, section 1504(c), leaving untouched the requirement of notice to the surety in addition to the importer of record.

> Although the court should not place too high a value on the views of one Congress as to the construction of a statute enacted by another Congress, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968), the views of a subsequent Congress may be given some consideration in interpreting relevant

Congressional intent. *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356–57 (1962); *see Heckler* v. *Turner*, 105 S. Ct. 1138, 1152–53 (1985); *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973).

Maine Potato Council v. *United States*, 9 CIT ——, 613 F. Supp. 1237, 1243 (1985); *see Four "H" Corp.* v. *United States*, 9 CIT ——, 611 F. Supp. 981, 984 (1985). Thus, while not determinative, the fact that Congress recently amended, by means of the same bill, the two provisions under discussion, without attempting to harmonize them, lends some weight to the court's conclusion that sureties were intentionally omitted from previous versions of § 1504(b).

Given Congress' apparently intentional omission of sureties from the list of parties who must receive notice as a precondition to a valid extension, the court concludes that the notice that was undisputedly given to the importer in this case was sufficient to effectuate the extension of time for liquidation.[16] In order to be consistent with the statute, the customs regulation cannot be read to effect a deemed liquidation in this case.

IV. Jurisdiction over the Contract Claim

The court's finding that extension of time for liquidation was not invalidated by Customs' failure to notify the surety of the extension of time for liquidation does not resolve plaintiff's contract claim. Plaintiff claims that the customs regulation providing notice to the surety, 19 C.F.R. § 159.12(b), became a term of the bond.[17] Plaintiff contends that the failure to provide this notice constituted a material breach of contract, which discharged plaintiff's liability under the bond. Thus, plaintiff seeks restitution of the duties it paid to Customs as a precondition to bringing the 28 U.S.C. § 1581(a) claim. Defendant challenges plaintiff's theory on two grounds. First, it contends that this court lacks jurisdiction over such a claim. Second, it challenges the claim on the merits.

Plaintiff asserts three bases of CIT jurisdiction over this contract claim, 28 U.S.C. §§ 1581(a), 1581(i)(4) and ancillary jurisdiction. Plaintiff's first argument is that this claim is a challenge to liquidation of the entry, that it protested liquidation pursuant to 19 U.S.C. § 1514(a)(5) (1982),[18] and the denial of the protest thereto is grounds for CIT jurisdiction. 28 U.S.C. § 1581(a) (1982). Inasmuch as the court has rejected plaintiff's contention that the liquidation was invalid, either *in toto* or as to the surety alone, there is no reason to discuss further this basis of jurisdiction for a contract claim.

[16] Plaintiff cites *Tyler* v. *Donovan*, 3 CIT 62, 535 F. Supp. 691 (1982), for the proposition that a time period will not be triggered unless notice is given pursuant to the prescribed procedure, in that case by *Federal Register* publication. *Tyler* is clearly distinguishable from the case at hand. In *Tyler* the statute and regulation stating how notice was to be given were consistent. In this case, if the regulation is read to establish notice requirements as prerequisites to an extension, it is in conflict with the language of the statute.

[17] 19 C.F.R. § 159.12(b) has not been found invalid. It may be valid for purposes other than establishing prerequisites to a valid extension. *See Detroit Zoological*, 10 CIT at ——, 630 F. Supp. at 1358–59 (Secretary may provide for notice to additional parties as a matter of convenience to the parties). Note that Customs did not repeal this regulation following reversal of C.S.D. 83-20. The intended effect of the regulation is the subject of Part V of this opinion.

[18] This section was amended by the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 612(b)(1), 98 Stat. 2948, 3034. This amendment, however, became effective after the relevant events in this case had occurred, *see id.* § 626(b)(1), 98 Stat. 3042, and, in any event, would not affect the outcome here.

At oral argument, plaintiff argued for the first time that this court has jurisdiction over the contract claim under 28 U.S.C. § 1581(i)(4) (1982 & Supp. II 1984).[19] Plaintiff concedes that if the contract claim can be divorced from the body of customs laws, then defendant is correct that this court lacks jurisdiction under section 1581(i)(4). Plaintiff argues, however, that this claim cannot accurately be considered a general contract claim because it involves violation of a specific customs regulation that explicitly confers a benefit on the surety. Defendant argues that the United States Claims Court, and not the CIT, has jurisdiction over the contract claim, pursuant to 28 U.S.C. § 1491(a)(1) (1982).[20] As defendant has acknowledged, if the claim is generally encompassed by the language of the statutes conferring jurisdiction on each court, then jurisdiction would be in this court. 28 U.S.C. § 1491(b) (1982) ("Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade * * * .").

In determining whether this court is the appropriate forum for hearing this claim, the court must bear in mind the Congressional purpose underlying section 1581(i). The legislative history states the purpose of section 1581(i) as follows:

> [Section 1581(i) grants] the court jurisdiction over those civil actions which arise directly out of an import transaction and involve one of the many international trade laws. The purpose of this section was to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the federal district courts and the Court of International Trade. This language made it clear that all suits of this type are properly commenced only in the Court of International Trade and not in a district court. Thus, the Committee did not intend to create any new causes of action, but merely to designate definitively the appropriate forum.

H.R. Rep. No. 1235, 96th Cong., 2d. Sess. 33, *Reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3745.

"Where jurisdiction is asserted under 1581(i), the court must not accept the allegations at face value but must determine the thrust of the complaint." *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 69 CCPA 96, 106, 673 F.2d 1254, 1261, *cert. denied*, 459 U.S. 943

[19] 28 U.S.C. § 1581(i) provides in pertinent part:

> [T]he Court International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> * * *
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[20] 28 U.S.C. § 1491(a)(1) (1982) reads in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or *upon any express or implied contract with the United States*, or for liquidated or unliquidated damages in cases not sounding in tort.

(Emphasis added.) *Compare* 28 U.S.C. § 1346(a)(2) (1982) (provides for concurrent jurisdiction in the district and claims courts over the same actions if the claim does not exceed $10,000).

(1982). The thrust of plaintiff's complaint is a challenge to the collection of duties from a surety on an entry in a situation which calls for the proper application of a customs regulation. Such a claim involves the administration and enforcement of the laws providing for the collection of duties, for revenue purposes or otherwise. Thus, it falls within the purview of section 1581(i)(4), with respect to section 1581(i)(1) & (2), and was properly commenced in this court.[21]

Defendant argues, however, that even if this court would normally have jurisdiction over this case, plaintiff has not raised its claim in a timely manner. An action of which the CIT has jurisdiction under section 1581(i) "is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." 28 U.S.C. § 2636(h) (1982 & Supp. II 1984). Defendant maintains that the breach of contract claim "accrued" on the date of the demand upon the surety for payment of the liquidated amount. This occurred on April 3, 1981. The summons in this case was filed October 3, 1983. Under defendant's interpretation of accrual of the cause of action, plaintiff's breach of contract claim is time barred.

Defendant's position as to when the cause of action accrued is incorrect. It is true that the underlying basis of plaintiff's claim is that defendant breached the surety contract. In most cases, such a claim would be raised by the government brought pursuant to 28 U.S.C. § 1582(2). Plaintiff, however, was put in an unusual position in this case. At the time defendant made its demand for payment of the liquidated amount, April 3, 1981, plaintiff might have decided to wait to bring its contract claim as a defense in a collection action. When its protest was denied on April 22, 1983, plaintiff had to pay the demanded amount in order to bring an action under section 1581(a). 28 U.S.C. § 2637(a) (1982); *see American Air Parcel Forwarding Co.* v. *United States*, 6 CIT 146, 150, 573 F. Supp. 117, 120 (1983). Once it paid this amount, the possibility of bringing the breach of contact claim as a defense to an action in this court was lost, inasmuch as Customs lost all incentive to bring a collection claim. Thus, plaintiff was forced into the offensive position of seeking a refund. The claim at issue, therefore, is more precisely characterized as one for reimbursement, inasmuch as plaintiff is seeking refund of sums it claims were erroneously paid. Thus, plaintiff's cause of action did not accrue until it paid the duties, that is, until it could claim Customs had money that should be reimbursed or refunded to it. *Cf. United States* v. *Beck*, 758 F.2d 1553, 1558 (1985) (government action to recover overpayment on medicare claim ac-

[21] *United States* v. *Federal Insurance Co.*, 6 CIT 243 (1983), seems to reach a different conclusion. There is no indication, however, that 28 U.S.C. § 1581(i)(4) was considered as a basis of jurisdiction in that case. Where jurisdiction might be present in this court under § 1581(i)(4) or in other federal courts, under mandamus, taking, or similar theories, the results have varied. *Compare Azurin* v. *von Raab*, Civ. No. 86-0139, Slip Op. (D. Ha. 1986) (district court jurisdiction because no customs law found giving Customs right to retain certain imported items) *with Azurin* v. *United States*, 10 CIT ——, 632 F. Supp. 30, 31 (1986) (CIT had § 1581(i) jurisdiction over action to compel release of property held by Customs). In *St. Paul Fire and Marine Insurance Co.* v. *United States*, 1 CIT 283 (1981), cited by defendant, the court found it did not have jurisdiction over a claim by a surety that it was not legally responsible for paying the duties. *St. Paul*, however, was commenced in November, 1976, and 28 U.S.C. § 1581(i) took effect on November 1, 1980. Pub. L. No. 96-417, § 701(a), 94 Stat. 1727, 1747.

crues when unjustified payment is made). The court has been informed that such duties were tendered shortly before the action was commenced, and well within the two year period.

V. Breach of Contract Claim

Plaintiff contends that the failure of Customs to give it notice of the extension pursuant to 19 C.F.R. § 159.12(b) discharged Old Republic from its surety obligations. Defendant argues that Customs did not breach any express, statutory or regulatory conditions of the bond.

To resolve this dispute, the court must first determine whether two regulations, 19 C.F.R. §§ 113.44(a) and 159.12(b), are terms of the surety bond. 19 C.F.R. § 113.44(a) (1980) provides that "[t]he assent of the sureties to any extension of the period prescribed in a bond is not necessary when the extension is authorized by law or regulations." As quoted *supra*, 19 C.F.R. § 159.12(b) (1980) requires notice to the surety "[i]f the district director extends the time for liquidation," implying that notice need only be given to the surety after extension has been granted.

The court has examined the immediate delivery and consumption entry bond signed by the parties in this case. The only provisions explicitly referred to in the bond do not concern this dispute.[22] The bond is silent as to which, if any, statutory and regulatory provisions should be incorporated as terms of the bond.

United States v. *De Visser*, 10 F. 642, 647 (S.D.N.Y. 1882) provides a framework for determining whether the regulation in question is properly considered a term of the bond. *See also United States* v. *Fulton Distillery, Inc.*, 571 F.2d 923, 928 (5th Cir. 1978); *American Casualty Co.* v. *Irvin*, 426 F.2d 647, 650 (5th Cir. 1970). In *De Visser*, a surety sought to raise as a defense in a collection action a statute providing that goods "shall be deemed abandoned to the government and sold" after three years. *De Visser*, 10 F. at 646. To determine whether this statute was a term of the bond, the court inquired as to whether the statute created any obligation of the government to the surety, or whether it is merely directory. *Id.* at 647. The court found that a customs bond must be understood or applied with reference to customs laws, and that insofar as the applicable statutes and regulations are "designed to affect the rights of parties to the contract [, such provisions] must be regarded as parts of the contract." *Id.* at 648. In contrast, statutes and regulations that "are designed only to direct the officers of the government in the performance of their duties for its own protection and security merely, are construed as directory to them only, and as not creating any obligation to the surety in the bond, nor as forming any part of the contract of the government with him." *Id.*

[22] These provisions are sections 485(d), 448(b), 499, 484, and 505(a) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1485(d), 1448(b), 1499, 1484, and 1505(a), and address the technicalities of entry, special delivery permits, examination of merchandise, and payment of duties on entry.

The key questions, then, are whether 19 C.F.R. §§ 113.44(a) and 159.12(b) create rights of the parties and what result flows from violation of those rights. Section 113.44(a) limits the rights of a surety under a bond and, as such, is intended to be a term of the bond. Absent this provision, a surety might have the right to reconsider its status as surety in the event the time for the importer's performance, that is, payment of duties, is extended by extending the time for liquidation. *See Bank of Uniontown* v. *Mackey*, 140 U.S. 220, 224 (1891); *SEC* v. *H.L. Rodger & Bro.*, 444 F.2d 1077, 1081 (7th Cir. 1971); 10 S. Williston & W.H.E. Jaeger, *Williston on Contracts*, § 1222 at 726–27 (3d ed. 1967).[23] The bond and rider involved in this case obligate the surety to pay import duties that are not paid by the importer, up to a specific amount. Under normal circumstances, this obligation continues until the import duties are paid. If the time for liquidation is extended the maximum number of times, the increased duty obligation may not be paid for another four years and the bond period may be said to be "extended." 19 U.S.C. § 1504(d) (1982).[24] *See supra* note 4. Pursuant to section 113.44(a), the surety assents to such lawful extension of the liquidation period.[25] The court has determined *supra* that the extension in this case was valid, therefore, this case does not involve an invalid or unassented to extension of the payment obligation or the bond term.

On its face, section 159.12(b) creates an unconditional obligation of the government to notify sureties of any extension of the liquidation period. If this regulation is intended to protect sureties, it should be read into the contract. Evidence of such intent would exist if the surety would be able to avoid prejudice to its reimbursement and subrogation rights if given notice of the extension. First, as to subrogation rights, the court notes that Congress has taken steps to ensure that in an ordinary case, a surety will not miss the opportunity to protest due to ignorance of an extension of the liquidation period. This risk is eliminated in most cases by the 1979 modification of the statutory scheme to give sureties additional time to protest a liquidation. Specifically, a surety may file a protest within ninety days from the date of mailing of notice of demand for payment against its bond, whereas other parties must file within ninety days of the date of liquidation. 19 U.S.C. § 1514(c) (2) (1982); *see supra* note 13. The legislative history explains this change as a response to the difficulties sureties had in fulfilling the prerequisites to suit in the Customs Court, now the Court of International Trade, " due to the frequent failures of the sureties to re-

[23] The two primary theories offered to support this result are (1) the extension is a material alteration that increases the surety's risk by prolonging the term of the obligation, which may increase the probability of the principal's default and decrease the principal's ability to reimburse the surety, and (2) the extension may impair the surety's right to subrogation because the surety can no longer be subrogated to the creditor's rights by performing on the original date and subsequent events may reduce the value of the creditor's position. *See* 10 *Williston on Contracts* § 1225 at 731–33 (cited with approval in *Federal Deposit Ins. Corp.* v. *Manion*, 712 F.2d 295, 298 (7th Cir. 1983)).

[24] Once it is determined, upon liquidation or reliquidation, that duties are owed, payment is due within 15 days after that liquidation or reliquidation. 19 U.S.C. § 1504(c) (Supp. II 1984). Further, "unless payment of the duties is received by the appropriate customs officer within 30 days after that date, [such payment] shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury." *Id.*

[25] One could debate whether this regulation is necessary or whether the statute by implication prevents discharge of the surety solely by reason of a valid extension.

ceive notice of the failure of the importer to pay the duties until after the time for filing a protest has expired." S. Rep. No. 249, 96th Cong., 1st Sess. 254, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 640. In at least one situation, however, lack of notice of extension of the liquidation period may prejudice the surety's right to protest, regardless of the section 1514(c) (2) rights. If the importer fails to deposit the amount of estimated duties required upon entry under 19 U.S.C. § 1505(a) (1982 & Supp. II 1984) and 19 C.F.R. § 141.101 (1985), then a demand for this amount may be made on the surety prior to liquidation. If the surety seeks to protest the original entry classification or appraisement, and liquidation occurs more than 90 days after the original demand on the surety, the time of liquidation would govern the surety's time to protest. In such a case, the surety actually might be harmed by a failure to receive notice of liquidation.

Second, as to reimbursement, plaintiff has alleged, in the affidavit of John R. Ciago, potential methods by which a surety may protect itself financially if given notice of extension of the liquidation period and, presumably, which might be lost if notice is not given. Some of the examples only apply to prejudice as to future contract obligations, but defendant did not challenge the validity of the examples of potential present prejudice. Therefore, inasmuch as the language of the regulation implies it is intended for the sureties benefit, and inasmuch as a surety may be prejudiced in particular cases by failure to receive notice, the right to receive notice of the extension of liquidation period must be considered a term of the bond.

Having determined that section 159.12(b) is a term of the bond, the court must now consider the impact of the undisputed fact that the government failed to provide the surety in this case with the required notice. The Restatement of Security provides:

> Where, without the surety's consent, the principal and the creditor modify their contract otherwise than by extension of time for payment.
>
> * * *
>
> (b) the compensated surety is
>
> (i) discharged of the modification materially increases his risk, and
>
> (ii) not discharged if the risk is not materially increased, but his obligation is reduced to the extent of loss due to the modification.

St. Petersburg Bank & Trust Co. v. *Boutin*, 445 F.2d 1028, 1031 (5th Cir. 1971) (quoting Restatement of Security § 128 (modification of principal's duty)). "Modification need not be accomplished by changes in the language of the instrument but may be by material departures from its terms in its execution and enforcement." *Boutin*, 445 F.2d at 1031. While these principles are announced in the context of modification of the principal's duty, they are also applica-

ble to a situation involving a creditor's obligation to fulfill its duty under the contract. A. Stearns & J. Elder, *The Law of Suretyship*, 106 (5th ed. reprinted 1972) ("[W]here some positive act is required of the creditor and * * * the creditor fails in his duty and the surety's risk is increased thereby or he is deprived of the opportunity to protect himself, the surety will generally be discharged to the extent that he has been injured."). Thus, the question is whether failure to provide notice materially increased the surety's risk in this case. If so, the surety is discharged. If not, the surety's obligation will be reduced to the extent of its actual loss.

In the case at bar, the increase in the surety's risk due to failure to receive the notice has not been demonstrated to be material. Clearly, the surety in this case did not miss the time to protest due to failure to receive notice of the extension, as the companion claim in this case is predicated on 28 U.S.C. § 1581(a) jurisdiction over the denial of a protest. In addition, the potential prejudicial effects of not receiving notice, articulated in Mr. Ciago's affidavit, were presented as hypotheticals. Plaintiff did not allege that any specifically available opportunities to avoid loss were missed because of the defendant's omission in this case. Thus, no material increase in the surety's risk has been demonstrated here and the surety cannot be discharged. *See Continental Bank & Trust Co.* v. *American Bonding Co.*, 605 F.2d 1049, 1056–57 (8th Cir. 1979) (surety liable on bond where it failed to establish in the record that modification materially increased the surety's risk). For the same reasons the surety cannot obtain a partial reduction in its obligation. Plaintiff's motion for summary judgment is therefore denied.

The sparcity of plaintiff's claims on the issue of loss or increase in risk thereof opens the question of whether it is appropriate to grant defendant's motion for summary judgment. Summary judgment is only available when no genuine issue as to any material fact exists. CIT Rule 56(d). The Supreme Court has made clear that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson* v. *Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986) (citing *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) and *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 *reh'g denied*, 393 U.S. 901 (1968)). The Court added that "[i]f the evidence is merely colorable, * * * or is not significantly probative, * * * summary judgment may be granted." *Id.* (citing *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967) (per curiam) and *Cities Service*, 391 U.S. at 290). Evidence on the issue of loss and risk is peculiarly within plaintiff's control and does not require discovery of defendant, but the evidence offered in this case consists of broad and vague allegations of prejudice unrelated to the facts of this case. Such evidence is merely colorable and is not significantly probative to justify proceeding to trial.

The court is aware, however, that because the disposition of some issues in plaintiff's favor and some in defendant's favor, the particular result reached here may have been difficult to foresee. In addition, the substantive challenge to plaintiff's affidavit was not made until defendant's final brief; thus, plaintiff did not have a full opportunity to respond. Accordingly, plaintiff is given thirty days to demonstrate that material factual issues remain to be tried. Defendant may renew its motion for summary judgment within 20 days thereof.

Appeal to the U.S. Court of Appeals for the Federal Circuit

Kelley v. United States, 10 CIT —, Slip Op. 86–66 (June 27, 1986), *appeal docketed*. No. 86–1650 (Fed. Cir. Sept. 3, 1986).

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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Vol. 20 OCTOBER 8, 1986 No. 40

This issue contains:

U.S. Customs Service
T.D. 86-175 and 86-176

U.S. Court of Appeals for the Federal Circuit
Appeal No. 85-2805

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T 17.6/3-4:

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U.S. Customs Service

Treasury Decisions

(T.D. 86–175)

REIMBURSABLE SERVICE
EXCESS COST OF PRECLEARANCE OPERATION

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., September 23, 1986.

This is to provide notice that excess preclearance costs previously published in Federal Register/Vol. 51, No. 160/Tuesday, August 19, 1986/Pg. 29627/are revised. Pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess cost for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning August 31, 1986.

Installation	Biweekly excess cost
Montreal, Canada	$15,904
Toronto, Canada	27,811
Kindley Field, Bermuda	10,140
Nassau, Bahama Islands	23,532
Vancouver, Canada	10,879
Winnipeg, Canada	2,391
Freeport, Bahama Islands	16,455
Calgary, Canada	6,631
Edmonton, Canada	4,125

D. LYNN GORDON,
Acting Comptroller.

[Published in the Federal Register, September 29, 1986 (51 FR 34528)]

19 CFR Part 4

(T.D. 86–176)

AMENDMENT TO THE CUSTOMS REGULATIONS CONCERNING THE COASTWISE TRANSPORTATION OF CERTAIN ARTICLES BY VESSELS OF CYPRUS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to add Cyprus to the list of nations which permit vessels of the U.S. to transport certain articles specified in § 27, Merchant Marine Act of 1920, as amended, between their ports.

Customs has been furnished satisfactory evidence that the Republic of Cyprus places no restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country. This amendment provides reciprocal privileges for vessels registered in Cyprus.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in Cyprus became effective on July 10, 1986.

FOR FURTHER INFORMATION CONTACT: Donald Reusch, Carriers, Drawback & Bonds Division, (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. 883) (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the U.S. except in vessels built in and documented under the laws of the U.S. and owned by U.S. citizens. However, the 6th proviso of the Act, as amended, by Pub. L. 89–194 (79 Stat. 823, T.D. 66–176) and Pub. L. 90–474 (82 Stat. 700, T.D. 68–227), provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the U.S., reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the U.S. will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. On July 10, 1986, the Embassy of Cyprus advised the Director, Carriers, Drawback and Bonds Division, of the Customs Service Headquarters that Cyprus places no restrictions on the transportation of empty cargo vans, empty lift vans, and empty shipping tanks by vessels of the U.S. between ports in Cyprus. The

Carriers, Drawback and Bonds Division is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.93(b). Therefore, the Director of the Division has determined that, effective retroactively to July 10, 1986, Cyprus should be added to the list of nations set forth in § 4.93(b)(1).

By Treasury Department Order 165–25 the Secretary of the Treasury has delegated authority to the Commissioner of Customs to prescribe regulations relating to §§ 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f), Customs Regulations (19 CFR 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f)). These sections contain lists of nations entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated this authority to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then redelegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Embassy of Cyprus as described above, it is determined that Cyprus places no restrictions on the transportation of certain articles specified in the 6th proviso of § 27 of the Merchant Marine Act of 1920, as amended, by vessels of the U.S. between ports in Cyprus. Therefore, reciprocal privileges are accorded as of July 10, 1986, to vessels registered in Cyprus.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, cargo vessels, maritime carriers, vessels.

REGULATIONS AMENDMENT

To reflect the reciprocal privileges granted to vessels registered in Cyprus, Part 4, Customs Regulations (19 CFR Part 4), is amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4, continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103; § 4.93 also issued under 19 U.S.C. 1322(a); 46 U.S.C. 883.

2. Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), is amended by adding "Cyprus", in appropriate alphabetical order to the list of nations entitled to reciprocal privileges.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this is a minor amendment in which the public is not particularly interested and there is a statutory basis for the described extension of reciprocal privileges, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d)(1), a delayed effective date is not required because this amendment grants an exemption.

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of 5 U.S.C. 603, 604, as added by § 3 of Pub. L. 96–354, the "Regulatory Flexibility Act." That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

Dated: September 24, 1986.

B. JAMES FRITZ,
Director, Regulations Control
and Disclosure Law Division.

[Published in the Federal Register, September 30, 1986 (51 FR 34588)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-2805)

GEORGETOWN STEEL CORP., ET AL., APPELLEES *v.* UNITED STATES, APPELLANT

David M. Cohen, Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellant. With him on the brief were *Richard K. Willard*, Assistant Attorney General and *Velta A. Melnbrencis*. *Daniel Hunter*, Department of Commerce, International Trade Administration, of Washington, D.C., of counsel.

Richard O. Cunningham, Steptoe & Johnson, of Washington, D.C., argued for OCAP. With him on the brief were *Susan G. Esserman*, *Jeanne E. Davidson* and *Jo Anne Swindler*.

Charles Owen Verrill, Jr., Wiley & Rein, of Washington, D.C., argued for appellee Georgetown Steel Corporation. With him on the brief were *James M. Johnstone*, *Robert E. Nielsen* and *William B.* Baker. *David E. Birenbaum* and *Alan Kashdan*, Fried, Frank, Shriver, Harris & Jacobson, of Washington, D.C., were on the brief for appellee Atlantic Steel Company.

W. H. Harrell Smith, Drinker, Biddle & Reath, of Washington, D.C., argued for Amicus Curiae, U.S. Steelworkers. With him on the brief was *James S. Gkonos*, of counsel.

N. David Palmeter and *Jeffrey S. Neeley*, Mudge Rose Guthrie Alexander & Ferdon, of Washington, D.C., were on the brief for appellees Kali-Bergbau and Philipp Brothers, Inc. *Kevin B. Dwyer*, Mudge Rose Guthrie Alexander & Ferdon, of Washington, D.C., entered an appearance for appellee Kali-Bergbau and Philipp Brothers, Inc.

C. Loring Jetton, Jr., *John D. Greenwald* and *Thomas F. Connell*, Wilmer, Cutler & Pickering, of Washington, D.C., were on the brief for Amicus Curiae, American Textile Manufacturers Institute.

Eugene L. Stewart, *Terence P. Stewart*, *James R. Cannon, Jr.*, *Mary Elizabeth Tuck* and *D. Scott Nance*, Stewart & Stewart, of Washington, D.C., were on the brief for Amicus Curiae, PPG Industries, Inc. and The Timken Co.

Appealed from: U.S. Court of International Trade
Judge WATSON.

(Appeal No. 85-2805)

GEORGETOWN STEEL CORP., ET AL., APPELLEES *v.* UNITED STATES, APPELLANT

(Decided September 18, 1986)

Before MARKEY, *Chief Judge*, and FRIEDMAN and NIES, *Circuit Judges*.

FRIEDMAN, *Circuit Judge*.

The substantive issue in this case, here on appeal from the Court of International Trade, is whether the countervailing duty provisions in section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1982), apply to alleged subsidies granted by countries with so-called nonmarket economies for goods exported to the United States. The International Trade Administration of the Department of Commerce (Administration) held that section 303 does not apply to nonmarket economies. The Court of International Trade reversed, holding that the Administration's determination was contrary to law.

We reverse the ruling of the Court of International Trade and uphold the Administration's determination. We also hold that the Court of International Trade had no jurisdiction over one of the two cases it decided, because the appeal in that case was not timely filed. We therefore reverse part of the order of the Court of International Trade, and vacate the other part of the order and remand with instructions to dismiss part of the case.

I

A. In November 1983, the appellees, Georgetown Steel Corporation, Raritan River Steel Company, and Atlantic Steel Company (collectively, Georgetown Steel), and Continental Steel Corporation (Continental Steel), filed two countervailing duty petitions with the Administration on behalf of domestic producers of carbon steel wire rod. They alleged that carbon steel wire rod (wire rod) imported into the United States from Czechoslovakia and Poland, respectively, was "subsidized" and therefore subject to countervailing duties under section 303. According to them, the subsidies provided for the exported wire rod involved (1) the receipt of exchange rates higher than the official rates, (2) direct payments on goods sold abroad at prices below domestic prices, (3) retention by the exporting entity of part of the "hard currency" obtained from the export sales, (4) application of "trade conversion coefficients" to change the exchange rate and thereby create a more favorable return on the exports, and (5) granting of income tax rebates for such sales.

The Administration instituted countervailing duty investigations based upon those complaints. After hearing, the Administration issued final negative determinations. It held that the Czechoslovakian and Polish exports of wire rod had not received any "bounty" or "grant" within the meaning of section 303, so that countervailing duties on those items were not applicable.

The Administration concluded that, as a matter of law, section 303 was inapplicable to nonmarket economies. 49 Fed. Reg. 19370, 19374 (1984). The Administration defined a "subsidy" as "any ac-

tion that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth." *Id.* at 19371, 19375. The agency reasoned that the concept of subsidies, and the misallocation of resources that resulted from subsidization, had no meaning in an economy that had no markets and in which activity was controlled according to central plans. *Id.*

B. While the wire rod cases were pending, Amax-Chemical, Incorporated, and Kerr-McGee Chemical Corporation filed with the Administration petitions alleging that the Soviet Union and the German Democratic Republic had provided subsidies for potash imported into the United States from those countries. The Administration commenced investigations into those complaints. After deciding the wire rod cases, the Administration rescinded its investigations in the potash cases and dismissed those complaints on the ground that both of those countries had nonmarket economies, and that under its decision in the Polish wire rod case, section 303 was inapplicable to nonmarket economies. *Id.* at 23428, 23429.

C. Georgetown Steel and Continental Steel sought review in the Court of International Trade of the Administration's negative countervailing duty determinations in the wire rod cases, and Amax Chemical and Kerr-McGee sought review there of the dismissal of their petitions in the potash cases. The court consolidated the cases.

The Court of International Trade reversed the Administration and held that the countervailing duty law covers nonmarket economies. The court stated that the premise of the Administration "that a subsidy can only exist in a market economy" was "fundamental error." *Continental Steel Corp.* v. *United States*, 614 F. Supp. 548, 550 (1985). It said that "[t]he only purpose of the countervailing duty law [was] to extract the subsidies contained in merchandise entering the commerce of the United States in order to protect domestic industry from their effect * * * [and that] its effectiveness [was] clearly intended to be complete and without exception." *Id.* at 553. The court remanded the cases to the Administration for further proceedings consistent with its opinion.

II

The United States contends here, as it did in the Court of International Trade, that that court did not have jurisdiction over the wire rod cases because Georgetown Steel did not file a timely appeal to that court. (Continental Steel does not appear as a party in this court.)

A. The timeliness question arises out of the following facts. Georgetown Steel followed the bifurcated procedure for appealing to the Court of International Trade permitted in section 516A of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1516a(a)(2)(A), of first filing a summons and then filing a complaint. Georgetown Steel timely filed the summons by

mailing it to the clerk of the court on May 24, 1984, which was within 30 days of the publication in the Federal Register of the negative countervailing duty determination.

Georgetown Steel mailed the complaint to the clerk of the court by certified mail on June 22, 1984, which was within 30 days of the filing of the summons. The Postal Service, however, returned the complaint on July 6, 1984, because of insufficient postage. That same day, Georgetown Steel remailed the complaint, accompanied by a motion for leave to file the complaint out of time. The government opposed that motion, but the Court of International Trade granted it.

B. Section 516A, 19 U.S.C. § 1516a(a)(2)(A) provides that "an interested party * * * may commence an action" in the Court of International Trade contesting a negative countervailing duty determination

> [w]ithin thirty days after the date of publication in the Federal Register * * * by filing a summons, and within thirty days thereafter a complaint.

This provision is plain and unambiguous. It imposes two requirements for "commenc[ing] an action" in the Court of International Trade challenging a negative countervailing duty determination: (1) within 30 days of the publication of the determination in the Federal Register, a summons must be filed, and (2) "within thirty days thereafter a complaint" must be filed. The statute requires both steps and imposes precise time limits within which each step must be taken.

Rule 5(g) of the Rules of the Court of International Trade provides that filing of a pleading by mail "is completed when received, except that a pleading * * * mailed by registered or certified mail * * * to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed * * * filed as of the date of mailing." The Court of International Trade has held that a summons in a case challenging an antidumping determination was not timely filed when mailed to the clerk within 30 days of the determination but returned to the sender for insufficient postage and ultimately filed with the clerk more than 30 days after the determination. The court stated that "the date-of-mailing exception in Rule 5(g) expressly requires certified mail 'with the proper postage affixed.' By failing to affix sufficient postage to the summons, plaintiff failed to fulfill an explicit condition under Rule 5(g) for date-of-mailing filing." *NEC Corp.* v. *United States*, 622 F. Supp. 1086 (CIT 1985), *reh'g denied*, 628 F. Supp. 976 (1986).

In *Jernberg Forgings Co.* v. *United States*, 7 CIT 62 (1984), *vacated on other grounds*, 8 CIT 245 (1984), the Court of International Trade held that where the summons had been timely filed but the complaint had been mailed with insufficient postage and therefore not filed within 30 days of the summons, the complaint was untimely

filed. The court, however, authorized the untimely filing on the ground that only the 30-day filing requirement for the summons was jurisdictional. As explained below, we disagree with the latter ruling. We conclude that the principle the Court of International Trade applied in *NEC* is equally applicable in the present case.

That principle requires the conclusion that Georgetown Steel's complaint was not filed until July 6, 1984, which was the first time Georgetown Steel mailed the complaint, "with the proper postage affixed." This was 43 days after the summons was filed. The filing of the complaint therefore did not satisfy the requirement in section 1516a(a)(2)(A) that to "commence an action" in the Court of International Trade challenging a negative countervailing duty determination, the complaint must be filed "within thirty days [after]" "filing a summons."

Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions. *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981). If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit." *United States* v. *Mitchell*, 445 U.S. 535, 538, (quoting *United States* v. *Sherwood*, 312, U.S. 584, 586 (1941)).

C. Georgetown Steel contends, however, that the only jurisdictional prerequisite for invoking the jurisdiction of the Court of International Trade is the filing of a summons within 30 days after the negative countervailing duty determination (which Georgetown Steel did), and that the Court of International Trade therefore was authorized under its Rule 6(b) to waive the 30-day limit for filing a complaint. Georgetown Steel relies upon 28 U.S.C. § 2636(c) (1982), which stated (when Georgetown Steel filed its summons) that a civil action under section 516A "is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of the publication of such final determination in the Federal Register."

Section 2636(c), however, did not modify the requirement in section 1516a(a)(2)(A) that commencement of an action in the Court of International Trade requires both the filing of a summons within 30 days of the publication of the determination in the Federal Register and the filing of a complaint within 30 days thereafter. Section 2636(c) merely stated that unless the action is commenced within 30 days of the publication of the determination, in accordance with the rules of the Court of International Trade, it is barred. It did not purport to change the unequivocal requirement in section 1516a(a)(2)(A) for the filing by specified dates of both a summons and a complaint. The legislative history of the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727, which enacted section 2636(c), stated that that section "substantially restates the law set

forth in section 516A of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 56 (1980), *reprinted in* 1980 Code Cong. & Ad. News 3729, 3767. *See* S. Rep. No. 466, 96th Cong., 1st Sess. 17 (1979); *Bethlehem Steel Corp.* v. *United States*, 742 F.2d 1405, 1411–12 (Fed. Cir. 1984).

Georgetown Steel's argument is refuted not only by the language of section 1516a(a)(2)(A), but also by the legislative history of that provision, which was part of the Trade Agreements Act of 1979, Pub. L. No. 96–39, title X, § 1001(a), 93 Stat. 144, 300 (amended 1980, 1982). The Senate Report on the legislation stated that the complaint must be "filed within 60 days of the filing of the determination complained of." S. Rep. No. 249, 96th Cong., 1st Sess. 251 (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 636. Congress thus recognized that the timely filing of the complaint was an essential element to invoke the jurisdiction of the court.

Georgetown Steel apparently also relies upon 28 U.S.C. § 2632(c), which provides that "[a] civil action in the Court of International Trade under section 516A of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons or a summons and a complaint, as prescribed in such section, with the content and in the form, manner, and style prescribed by the rules of the court." This provision similarly does not modify the explicit requirements of section 1516a(a)(2)(A) regarding the filing of a complaint. It merely gives the plaintiff the alternative of separately filing a summons and then a complaint, or of filing the two together. (The plaintiffs in the potash case followed the second procedure; they filed the summons and the complaint on the same day.) Although section 2632(c) permits the initiation of an action by filing a summons, it does not eliminate the additional requirement in section 1516a(a)(2)(A) that within 30 days after filing the summons the complaint must be filed.

Georgetown Steel cites *Jernberg, supra*, for the proposition that the only mandatory jurisdictional time requirement for commencing an action in the Court of International Trade is the timely filing of the summons, and that the Court of International Trade may extend the time for filing a complaint pursuant to its Rule 6(b), which provides: "[w]hen by these rules or by a notice given thereunder or by order of the court, an act is required or allowed to be done at or within a specified time, the court may upon motion, for good cause shown, order the period extended." For the reasons already given, we disagree with the Court of International Trade's ruling in *Jernberg* and decline to follow it. The Court of International Trade cannot by rule modify a requirement Congress has imposed. That is precisely what that court's rule 3(a) attempted to do, by providing that an action under 19 U.S.C. 1516a(a)(2) is "commenced by filing a summons only."

D. Finally, Georgetown Steel argues that even if both a summons and a complaint must be filed to give the Court of International

Trade jurisdiction, its complaint was timely because it was filed within 60 days after the publication in the Federal Register of the Administration's determination. Although the statute sets a 60-day outside limit for filing a complaint, it does not validate every complaint that is filed within that period. Instead, as we have shown, it requires that the complaint be filed within 30 days after the summons is filed. Since Georgetown Steel did not file its complaint within 30 days after filing the summons, it is immaterial whether it filed its complaint within 60 days of the publication of the Administration's determination.

E. The result is that we vacate the order of the Court of International Trade insofar as it set aside the Administration's negative countervailing duty determination in the wire rod cases, and remand those cases to that court to dismiss Georgetown Steel's complaint for lack of jurisdiction.

There is no question, however, that the summons and complaint in the potash cases were timely filed. We therefore review the merits of the Court of International Trade's reversal of the Administration's determination in those cases.

III

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1982), which authorizes the levy of countervailing duties, provides as follows:

> [W]henever any country * * * or other political subdivision of government * * * shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country * * * or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether * * * imported directly * * * or otherwise, * * * there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

The question before us is whether the economic incentives and benefits that the nonmarket economies of the Soviet Union and the German Democratic Republic have granted in connection with the export of potash from those countries to the United States constitute a "bounty" or a "grant" as those terms are used in section 303. In its decision in the potash cases, the Administration defined a nonmarket economy as one that "operates on principles of nonmarket cost or pricing structures so that sales or offers for sale of merchandise in that country or to other countries do not reflect the market value of the merchandise." 49 Fed. Reg. 23428, 23429 (1984). As the Administration explained in the wire rod cases, in a nonmarket economy "resources are not allocated by a market. With

varying degrees of control, allocation is achieved by central planning." *Id.* at 19371, 19375.

The Administration found in the potash cases that both the Soviet Union and the German Democratic Republic are nonmarket economies. *Id.* at 23428, 23429. Those findings are not here challenged, and we base our decision upon them.

Congress has not defined the terms "bounty" and "grant" as used in section 303. We cannot answer the question whether that section applies to nonmarket economies by reference to the language of the statute. Nor can we answer it, as the Court of International Trade did, by characterizing the statutory language as "abundantly clear" and "the broadest possible," the "plain meaning" of which reflects "an intent to cover as many beneficial acts [for the exporter] as possible," and then concluding that Congress has not attempted to exclude nonmarket economies from what the court believed to be the sweeping reach of the section. 614 F. Supp. at 550–52, 555–57.

In its relevant terms, section 303 is substantially unchanged from the first general countervailing duty statute Congress enacted as section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205. *See Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 448 (1978). At the time of the original enactment there were no nonmarket economies; Congress therefore had no occasion to address the issue before us.

Since that time Congress has reenacted section 303 six times, without making any changes of significance to the issue before us. *Zenith*, *id.* n.8; *see* Trade Agreements Act of 1979, Pub. L. No. 96–39, §§ 103, 105(a), 93 Stat. 190, 193, which, after *Zenith*, reenacted the section a sixth time. That fact itself strongly suggests that Congress did not intend to change the scope or meaning of the provision it had first enacted in the last century. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 43 (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 429. This conclusion is supported by the fact, discussed in part IIIB below, that Congress on several occasions in other statutes specifically dealt with exports from nonmarket economies.

Since, as the Administration stated in the Polish wire rod case, "Congress never has confronted directly the question of whether the countervailing duty law applies to [nonmarket-economy] countries * * *, the function of an administrative agency, as well as a court, is 'to discern dispositive legislative intent by "projecting as well as it could how the legislature would have dealt with the concrete situation if it had spoken."' *Asahi Chemical Industry Co. Ltd.* v. *United States*, 4 CIT 120, 124 (1982) (quoting from *District of Columbia* v. *Orleans*, 406 F.2d 957, 958 (D.C. Cir. 1968))." 49 Fed. Reg. 19377 (1984). In other words, we must determine, as best we can, whether when Congress enacted the countervailing duty law in 1897 it would have applied the statute to nonmarket economies, if they then had existed.

Based upon the purpose of the countervailing duty law, the nature of nonmarket economies and the actions Congress has taken in other statutes that specifically address the question of exports from those economies, we conclude that the economic incentives and benefits that the Soviet Union and the German Democratic Republic have provided for the export of potash from those countries to the United States do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended.

A. In *Zenith*, the Supreme Court stated the purpose of the 1897 Act as follows:

> The countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments.

437 U.S. at 455–56.

Congress thus sought to protect American firms from what it viewed as the unfair competitive advantage a foreign producer would have in selling in the American market if that producer's government in effect assumed part of the producer's expenses of selling here. As the Administration stated in the Polish wire rod case, "[i]n a market economy, scarce resources are channeled to their most profitable and efficient uses by the market forces of supply and demand * * *. In the absence of government intervention, market economies are characterized by flexible prices determined through the interaction of supply and demand. In response to these prices, resources flow to the most profitable and efficient uses." 49 Fed. Reg. 19375 (1984).

American firms were expected and generally were able to compete effectively in the American market against foreign sellers who were subject to the same market pressures and constraints as they were. A foreign seller normally would do business in the American market only because it was profitable for it to do so, and because such sales presumably were at least as profitable, if not more so, than sales elsewhere.

A government subsidy on sales to the United States, however, enabled a foreign producer to sell in the American market in a situation in which otherwise it would not be in the seller's best economic interest to do so. This apparently was what the Administration had in mind when it stated in the Polish wire rod case that "a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth." *Id.* It was this kind of "unfair" competition, resulting from subsidies to foreign producers that gave them a competitive advantage they otherwise would not have, against which Congress sought to protect in the countervailing duty law.

In exports from a nonmarket economy, however, this kind of "unfair" competition cannot exist. Although a nonmarket state may engage in foreign trade through various entities, the state controls

those entities and determines where, when and what they will sell, and at what prices and upon what terms. As the Administration explained in the Polish wire rod case,

> the nonmarket environment is riddled with distortions. Prices are set by central planners. "Losses" suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The wage bill is set by the government. Access to foreign currency is restricted. Private ownership is limited to consumer goods.

Id. at 19376. *See also* G.M. Pickersgill & J. E. Pickersgill, *Contemporary Economic Systems: A Comparative View* 208, 232–33 (1974); P. Marer, *Prices and Exchange Rates in Centrally Planned Economies, Focusing on the USSR and GDR* (Indiana University, Feb. 9, 1984).

In the potash cases the alleged subsidies provided by the Soviet Union and the German Democratic Republic were the receipt on export sales of foreign exchange rates higher than the official rates, direct price equalization payments on exports and, in the case of the Soviet Union, retention by the exporting entities of a portion of the hard currency they earned on foreign sales. Although these benefits may encourage those entities to accomplish the economic goals and objectives the central planners set for them, *see* R. G. Lipsey & P. O. Steiner, *Economics* 803–04 (2d ed. 1969), they do not create the kind of unfair competitive advantage over American firms against which the countervailing duty act was directed.

There is no reason to believe that if the Soviet Union or the German Democratic Republic had sold the potash directly rather than through a government instrumentality, the product would have been sold in the United States at higher prices or on different terms. Unlike the situation in a competitive market economy, the economic incentives the state provided to the exporting entities did not enable those entities to make sales in the United States that they otherwise might not have made. Even if one were to label these incentives as a "subsidy," in the loosest sense of the term, the governments of those non-market economies would in effect be subsidizing themselves. Those governments are not providing the exporters of potash to the United States with the kind of "bounty" or "grant" for which Congress in section 303 prescribed the imposition of countervailing duties.

B. Further support for our conclusion is furnished by the more recent actions of Congress in dealing with the problem of exports by nonmarket economies through other statutory provisions. Those statutes indicate that Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of those statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply.

1. In the Trade Act of 1974 (1974 Act), Pub. L. No. 93–618, 88 Stat. 1978 (1975), Congress amended the antidumping law, 19 U.S.C. §§ 160–171 (1976) (repealed 1979) (current version at 19 U.S.C. §§ 1673–1673i (1982)) (which was first enacted in 1921, Antidumping Act, 1921, ch. 14, §§ 201–212, 42 Stat. 11–15), to deal specifically with exports from nonmarket economies. Under the antidumping law, when "foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value" threaten to cause or causes actual material injury to a domestic industry or to the establishment of a domestic industry, duties are imposed on that merchandise. 19 U.S.C. §§ 1673 (1982). The existence and extent of "dumping" are determined on the basis of the excess of the foreign market value of the goods in the country of production over the selling price for the merchandise in the United States. *Id.*

In the 1974 Act, Congress enacted a special "surrogate country" method for determining whether imports from nonmarket economies were being "dumped" in the United States. 19 U.S.C. § 164(c) (1976) (repealed 1979). Reasoning that in "State-controlled-economy countries * * * the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison," S. Rep. No. 1298, 93d Cong. 2d Sess. 174 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7311, Congress provided that the foreign market value of goods from nonmarket economies should be determined on the basis of either a constructed value or the actual selling price of some other market economy country that sells the same or similar merchandise either for home consumption or to other countries. 19 U.S.C. § 164(c) (1976).

In section 331 of the 1974 Act, Congress also amended the countervailing duty law. Trade Act of 1974, § 331(a), 88 Stat. 2049. There is no indication, however, that in doing so Congress intended to change the scope of that law or believed that it covered nonmarket economies. If Congress had so intended or believed, it is curious that the legislature gave no such indication, particularly in view of the specific changes it made in the antidumping law to deal with the problem.

2. In the Trade Agreements Act of 1979 (1979 Act), Congress reenacted the special surrogate country antidumping provisions applicable to State-controlled economies that it had previously authorized in the 1974 Act. Pub. L. No. 96–39, title I, § 101, 93 Stat. 182. The present provision states that if the economy of the exporting country is "State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section," the foreign market value of the merchandise shall be determined

> on the basis of the normal costs, expenses, and profits as reflected by either—

(1) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-State-controlled economy country or countries is sold either—

(A) for consumption in the home market of that country or countries, or

(B) to other countries, including the United States; or

(2) the constructed value of such or similar merchandise in a non-State-controlled-economy country or countries as determined under subsection (e) of this section.

19 U.S.C. § 1677b(c) (1982).

In the same statute Congress approved the Subsidies Code, which a number of countries had adopted to implement the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619. 19 U.S.C. § 2503 (1982). Article 15 of the Subsidies Code permitted signatory countries to regulate imports from State-controlled economies based on a surrogate cost methodology under either antidumping or countervailing duty legislation enacted in the particular signatory country. Whichever legislation the signatory country chose to use, it was required to calculate the margin of dumping or the amount of the estimated subsidy by comparison of the export price with:

(a) the price at which a like product of a country other than the importing signatory [or exporting country] * * * is sold, or

(b) the constructed value of a like product in a country other than the importing signatory [or exporting nonmarket economy country].

If neither prices nor constructed value as established under (a) or (b) above provide an adequate basis for determination of dumping or subsidies then the price in the importing signatory, if necessary, duly adjusted to reflect reasonable profits, may be used.

As was the case with the 1974 Act, in the 1979 Act Congress also made various changes in the countervailing duty law. Pub. L. No. 96–39, §§ 103, 105(a), 93 Stat. 190, 193. Once again, however, it gave no indication that it understood or intended the latter law to apply to nonmarket economies. Indeed, Congress' realization, reflected in bother the 1974 and 1979 Acts, that changes in the antidumping law were necessary to make that law more effective in dealing with exports from nonmarket economies, coupled with its silence about application of the countervailing duty law to such exports, strongly indicates that Congress did not believe that the latter law covered nonmarket economies.

The Court of International Trade noted that Article 15 of the Subsidies Code gave "a country the choice of using subsidy law [countervailing duty law] *or* antidumping law for imports from a country with a state-controlled economy," and that "Congress was informed that countries with nonmarket economies had participat-

ed in the preparation of the Code and that it had been signed, subject to subsequent ratification, by such countries." 614 F. Supp. at 556–57 (footnotes omitted). The court viewed this as "overwhelming evidence that the 1979 Act show[ed] a definite understanding by Congress that the countervailing duty law covers countries with nonmarket economies." *Id.* at 557.

The latter conclusion, however, is a non-sequitur. It also is inconsistent with our analysis of the Congressional understanding and purpose in enacting the provisions in the 1974 and 1979 Acts dealing with the application of the antidumping law to nonmarket economies.

Since the Subsidies Code was the product of joint agreement among a number of countries, which had varying laws dealing with selling at unreasonably low prices by foreign producers, it was only natural that the Code would merely prescribe the method for determining the existence of a subsidy, and leave it to each country to determine the particular method it would use to deal with the problem. In the United States, as we have held, Congress elected to deal with the problem under the antidumping law and not under the countervailing duty law. The fact that Congress adopted the Code, under which the United States also could have proceeded under the countervailing duty law, does not establish that in fact it did so.

C. The *amici curiae* argue that the Administration's construction of section 303 in effect stands the statute on its head, because it excepts countries that are the worst distorters of world markets from the countervailing duties that are designed to offset and balance those market distortions.

Congress, however, has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law. This law is designed to protect domestic industry from injury resulting from the sale in the United States of foreign merchandise that is priced below its fair value, and provides a remedy therefor in 19 U.S.C. § 1677b(c). If that remedy is inadequate to protect American industry from such foreign competition—a question we could not possibly answer—it is up to Congress to provide any additional remedies it deems appropriate.

D. In *United States* v. *Zenith Radio Corp.*, 562 F.2d 1209, 1219 (CCPA 1977), *aff'd*, 437 U.S. 443 (1978), the Court of Customs and Patent Appeals, whose decisions we follow, recognized that the agency administering the countervailing duty law has broad discretion in determining the existence of a "bounty" or "grant" under that law. We cannot say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45

(1984). *See also Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 928 (Fed. Cir. 1984).

CONCLUSION

The order of the Court of International Trade is vacated insofar as it reversed the Administration's final countervailing duty determinations in the Czechoslovakian and Polish wire rod cases, and the case is remanded to that court with instructions to dismiss the complaint in those cases for lack of jurisdiction because the complaint was not timely filed. The order of the Court of International Trade is reversed insofar as it set aside the Administration's final actions in the Soviet Union and German Democratic Republic potash cases.

VACATED IN PART, REVERSED IN PART, AND REMANDED

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Third Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, October 24, 1986, at The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The Conference will be composed of the Judges of the United States Court of International Trade; officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests. The theme of the Conference is "Judicial Oversight—Relations Between the Court and the Agencies."

Sir Roy Denman, Head of the Delegation, Delegation of the Commission of the European Communities, is the Conference Luncheon Speaker.

Senator Dennis DeConcini, United States Senator from Arizona, and co-sponsor of the Customs Courts Act of 1980, will receive the Court's Annual Award for his outstanding contributions to the administration of justice in international law.

Last year, the Second Annual Judicial Conference was attended by over 400 conferees from 16 states, the District of Columbia, Puerto Rico, and Japan.

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Wednesday, October 1, 1986.

For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

JOSEPH E. LOMBARDI,
Clerk of Court.

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T 17.6/3-4:

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 86-177)

CONSOLIDATION OF NEW ORLEANS, GRAMERCY, AND BATON ROUGE, LOUISIANA; CUSTOMS PORTS FOR MARINE PURPOSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document consolidates the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, for marine purposes only. This change will enable Customs to obtain more efficient use of its personnel, facilities, and resources. It will eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. Moreover, it will simplify vessel entry and clearance procedures and reduce expenses and paperwork for all parties involved thereby enabling Customs to provide better and more economical service to carriers, importers, and the public.

EFFECTIVE DATE: November 3, 1986.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Richard C. Coleman, Office of Inspection (202-566-8157). Legal Aspects: Donald H. Reusch, Carriers, Drawback and Bonds Division (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

The Customs Service field organization currently consists of seven geographical regions further divided into districts, with ports of entry within each district. Customs ports of entry are locations (seaports, airports, or land border ports) where Customs officers or employees are assigned to accept entries of merchandise, collect duties, clear passengers, vehicles, vessels, and aircraft, examine baggage, and enforce the Customs and related laws.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, by notice published in the Federal Register on April 10, 1986 (51 FR 12339), Customs proposed to consolidate, for marine purposes only, the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, located in the New Orleans, Louisiana, Customs district in the South Central Region.

Inasmuch as these three ports are located within approximately 60 miles of one another on the Mississippi River and perform similar services, it was estimated that the proposed consolidation would significantly reduce expenses without impairing Customs ability to provide services to area businesses or to the general public. The notice solicited public comment on the matter.

Discussion of Comments

Few comments were received in response to the notice. One from the New Orleans Steamship Association expressed general support for the consolidation. They welcome the elimination of duplicate port functions, the simplification of vessel entry and clearance procedures, and the reduction of paperwork and expenses. However, they voiced concerns that it might cause problems if different shipping agents are involved in the entry and clearance of vessels visiting more than one of the consolidated ports.

Customs does not believe that the consolidation will cause any particular burden for the public or the various elements of the industry. Any accommodations necessary to adapt to the consolidation should not block the benefits to the public and industry resulting from fewer entries and clearances. Splitting the responsibilities for entry and clearance between different shipping agents should not be a major problem for the industry.

The New Orleans Steamship Association was also concerned that the proposed consolidation was similar to the New Orleans Vessel One-Stop System (NOVOSS), a trial program in the three port area that tested the practice of consolidating the ports. The Association was concerned that the NOVOSS program would not be fully evaluated if the consolidation took place too quickly.

The New Orleans district director has indicated that the NOVOSS program has been accepted by the local shipping industry and there was no reason to delay adopting the consolidation. Also, the district director noted that quick consolidation would be of benefit to the industry in regard to the payment of user fees for arriving vessels. (See T.D. 86–109, published in the Federal Register on June 11, 1986 (51 FR 21152), for an explanation of recently imposed user fees for obtaining Customs services.) Without legally binding regulatory amendments to consolidate the ports, a user fee would be required upon transacting Customs business at each port. After consolidation, one user fee can cover an entry even if it involves a vessel visiting more than one port in the consolidated port area.

After review of the comments and further analysis of the matter, Customs is adopting the proposal to consolidate the ports of entry of New Orleans, Gramercy, and Baton Rouge, Louisiana, for marine purposes only.

Under this change, the laws and regulations administered and enforced by Customs relating to the entry of merchandise will continue to apply at the ports of New Orleans, Gramercy, and Baton Rouge, with each of these ports retaining its port code as well as its current geographical limits. However, the three ports will be considered to be one port for the purposes of the navigation laws. All of the requirements prescribed by the navigation laws administered and enforced by Customs, such as reporting the arrival and making formal entry of vessels arriving at the consolidated marine port from a foreign or another U.S. port (depending upon the vessel's nationality); and obtaining a permit to proceed between the consolidated port and other U.S. ports, will have to be complied with, as is now the case in existing consolidated ports.

It is anticipated that the consolidation also will result in reducing penalties incurred under the navigation laws if carriers fail to enter and properly clear merchandise being shipped in a residue cargo movement within the consolidated marine port (i.e., the ports of New Orleans, Gramercy, and Baton Rouge), and will reduce paperwork for carriers, importers, and Customs, because of the reduction of penalty cases.

There will be no change in the current geographical limits of each port. However, the list of Customs regions, districts, and ports of entry set forth in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended to reflect the consolidation of these ports for the purposes of the navigation laws.

Executive Order 12291

Because this amendment relates to the organization of Customs, it is not a regulation or rule subject to E.O. 12291.

Regulatory Flexibility Act

It is certified that the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this amendment because it will not have a significant economic impact on a substantial number of small entities.

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although the amendments may have a limited effect upon some small entities in the affected areas, it is not expected to be significant because changes in the Customs field organization in other areas have not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it ex-

pected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624, Reorganization Plan 1 of 1965; 3 CFR 1965 Supp.

§ 101.3 [Amended]

2. To reflect this change, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended as follows:

In the South Central Region—New Orleans La., under the column headed "Name and headquarters", the following phrase is added under the listing "New Orleans, La."

"(The ports of New Orleans, Baton Rouge, and Gramercy, consolidated for purposes of the navigation laws. See T.D. 86-177.)"

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: September 9, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1986 (51 FR 35352)]

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19 CFR Parts 24, 113

(T.D. 86-178)

CUSTOMS REGULATIONS AMENDMENT TO ESTABLISH INTEREST CHARGES ON CERTAIN DELINQUENT ACCOUNTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to establish interest charges for the late payment of supplemental duty bills (bills for additional duties ascertained upon liquidation or reliquidation), reimbursable services, and miscellaneous bills issued by Customs to organizations outside the U.S. Government, including sureties.

Presently, there is no provision in the Customs Regulations to charge interest for late payments of supplemental duties, reimbursable services, and miscellaneous bills. However, interest charges for late payments of supplemental duties is now mandated by law. Customs and the Treasury Department believe that charging interest on all delinquent accounts will provide an incentive for prompt payment and, if accounts are not paid timely, provide for reimbursement of interest costs resulting from Government borrowing.

EFFECTIVE DATES:

For amendments: October 31, 1986.

For interest charges:

(1) November 29, 1984: By statute, for liquidations or reliquidations on or after this date upon which increased or additional duties are due.

(2) November 1, 1986: For overdue bills for reimbursable services and miscellaneous amounts, for all actions initially billed on or after October 1, 1986.

(3) October 30, 1984: By statute, for all refunds of amounts paid as increased or additional duties which had been determined to be due upon liquidation or reliquidation.

(4) November 1, 1986: For refunds of amounts of interest that have been paid by parties-in-interest on overpayments of reimbursable services and miscellaneous amounts.

FOR FURTHER INFORMATION CONTACT: Accounting Aspects: Robert B. Hamilton Jr., National Finance Center, (317–298–1308); Bond Aspects: William Rosoff, Carriers, Drawback and Bonds Division, (202–566–5856); Legal Aspects: Arthur I. Rettinger, Office of the Chief Counsel, (202–566–2482); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a report from the Comptroller General to Congress dated August 21, 1978, the General Accounting Office recommended that Customs charge interest on all supplemental duty accounts 30 days past due as part of an effort for the U.S. Government to maximize its use of Customs collections to decrease Government borrowings. That report states that in four Customs Regions (Boston, Chicago, Los Angeles, and New York), accounts receivable for supplemental duties averaged $8.5 million each month from April 1976 to March

1977 and that approximately 38 percent of that amount was over 90 days past due.

Present Customs collection policy is to (1) issue a bill which indicates that it is due and payable, (2) pursue collection in accordance with Federal claims collection standards, and (3) inasmuch as a surety is jointly liable, to make a demand on the surety and the principal for payment if the bill remains unpaid. Importers are required to post a bond to cover each Customs entry to guarantee the payment of increased or additional duties and satisfy other Customs requirements. Enactment of Pub. L. 98–573 required Customs to charge interest on delinquent supplemental duty bills, and interest is currently assessed in accordance with the Act.

Currently, there is no provision in the Customs Regulations for collection of an interest charge exceeding the principal amount, regardless of the time period of delinquency or additional administrative costs to the U.S. Government incurred as the result of special collection efforts. Further, it is necessary to amend the Customs Regulations to address enactment of Pub. L. 98–573, and provide for interest assessment on delinquent reimbursable services and miscellaneous bills. In Fiscal Year 1979, for instance, the percentage of the number of Customs supplemental duty and reimbursable service bills issued during that fiscal year and paid within 30 days was 57 percent. Another 30 percent of these bills were paid within 60 days, and only the remaining 13 percent of the bills were paid more than 60 days after the date of the bill. Customs and the Treasury Department believe that charging interest on delinquent accounts will provide an incentive for prompt payment and, if accounts are not paid timely, provide for reimbursement of interest costs resulting from unnecessary Government borrowing. Customs believes that a majority of those bills which are now paid within 31 and 60 days after the date of billing will be paid within 30 days with the added incentive of interest charges. This means that approximately 13 percent of the bills issued would result in action by Customs to charge interest.

Notice of Proposed Rulemaking

In this regard, on March 10, 1983, Customs published a notice in the Federal Register (48 FR 10077), proposing to amend Parts 24 and 113, Customs Regulations (19 CFR Parts 24, 113), to provide that interest charges would apply to late payments of supplemental duty bills (bills for additional duties ascertained upon liquidation or reliquidation), reimbursable services, (such as provided for in §§ 24.16 and 24.17, Customs Regulations (19 CFR 24.16, 24.17)), and miscellaneous bills (bills other than duties, taxes, reimbursable services, liquidated damages, fines, and penalties) issued by Customs to organizations outside the U.S. Government, including sureties.

The notice stated that if payment for an above-mentioned bill was not received by Customs within 25 days after the due date of the bill, interest charges would be assessed upon the delinquent principal amount of the bill, and calculated from the due date of the bill. The applicable interest rate was to appear on the bill. Interest on an overdue bill would have been assessed on the delinquent principal amount by 30-day periods. The full 30-day interest charge would have been assessed for each additional 30-day period or portion thereof that payment is delayed. The rate of interest was to be determined pursuant to the Debt Collection Act of 1982, Pub. L. 97–365. The applicable interest rate would have been available from any Customs regional financial management office after it is published.

The principal (i.e., the importer of record or party-in-interest) and the surety, would have been individually issued bills for interest and every 30 days thereafter, of the following elements: (i) the amount due, (ii) the accrual of interest charges if payment is not received within 25 days after the due date of the bill (iii) the applicable interest rate, and (iv) the joint and several liability of the principal and the surety.

Commenters had until May 9, 1983, to submit comments. Based upon the 20 comments received in response to the notice and Customs own initiative, changes have been made to the proposal. These changes also reflect T.D. 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), which implemented two provisions of the Trade and Tariff Act of 1984 (Pub. L. 98–573) relating to calculation of interest on overdue accounts and refunds. An analysis of the comments and discussion of the changes follow.

Discussion of Major Comments

Comment:

The proposal to collect interest charges on delinquent accounts is not authorized under current law and should be commenced only after specific authorization by Congress. A former Assistant Secretary of the Treasury (Enforcement and Operations) is quoted in the August 21, 1978, Report by the Comptroller General that Customs has not been granted legislative authority to charge interest and that it would not be in the best interests of the Government to assess interest because interest would also have to be paid on refunds from protests, reliquidations, and other actions. Therefore, it is concluded that legislation is required.

It is further stated that the fact that the Government has been awarded interest in court proceedings to collect duties cannot clothe administrative collection of interest with the force of law.

The proposal is one-sided and inequitable in that it provides no mechanism for the payment of interest to an importer on duty refunds. It is proposed that Customs pay interest on all accelerated drawback payments due when refund is not made timely.

Analysis:

After this comment was submitted, the President signed the Trade and Tariff Act of 1984 on October 30, 1984. By T.D. 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), Customs implemented two provisions of the Act to provide that interest on applicable overpayments or underpayments of increased or additional Customs duties shall be in accordance with the Internal Revenue Code rate established in 26 U.S.C. 6621 and 6622. This determination covers antidumping and countervailing duty payments as well as increased or additional duties determined to be due on a liquidation or reliquidation. In addition, it was determined that a uniform interest payment system should be established and that refunds pursuant to a court determination and payable under 28 U.S.C. 2644, and interest on overpayments and underpayments of estimated excise taxes determined at liquidation, shall be at the rate(s) prescribed under 26 U.S.C. 6621 and 6622.

Furthermore, § 623(b)(1), Tariff Act of 1930, as amended (19 U.S.C. 1623(b)(1)), clearly gives the Secretary of the Treasury statutory authority to prescribe the conditions of bonds. Section 623(d), Tariff Act of 1930, as amended (19 U.S.C. 1623(d)), provides that no condition in a Customs bond shall be held invalid on the ground that it is not specified in law.

Therefore, not only is this amendment equitable, it is also enacted pursuant to specific legislative authority.

Comment:

Relating to bills for supplemental duties, adoption of the final rule will encourage a flood of protests, in large measure not intended to challenge the basis for the liquidated duty increase, but merely to stay the collection of interest. Any attempt by Customs to collect interest after the "25th day following liquidation" would subsequently be cancelled and negated by the filing of a protest.

Analysis:

It appears the commenters misread the proposal. Customs did not propose to collect interest after the "25th day following liquidation," but 25 days after the "due date" of the bill. However, pursuant to Pub. L. 98–573 and T.D. 85–93, the due date of the bill for supplemental duties, as provided in § 24.3(e), Customs Regulations (19 CFR 24.2(e)), shall be 15 days from the date of liquidation or reliquidation and if not paid within 30 days after this date (the 45th day) shall be considered delinquent and bear interest from the due date (15th day after liquidation or reliquidation).

Comment:

The Debt Collection Act of 1982 provides that Customs is not covered by major portions of that law because, except as noted therein, the law does not apply to claims or indebtedness arising under the "tariff laws of the United States." Furthermore, it is suggested the

rate of interest on a bill be changed every 3 months while the bill is delinquent rather than remain the same.

Analysis:

The proposal advised that notwithstanding the above exclusion, because the Government also would be recovering similar costs in matters relating to Customs, consideration was being given to the use of the applicable percentage rate of interest based upon the current value of funds to the Treasury, in accordance with the Debt Collection Act.

However, Customs has reconsidered its position and determined not to use the rate of interest under the Debt Collection Act. Rather, it is appropriate that prejudgement interest be calculated at the same rate as provided for in 28 U.S.C. 2644 since it is that amount which Congress determined would compensate an importer for the loss of use of its money during a portion of the period in which the Government has the use of the money. In 28 U.S.C. 2644 it provides that interest shall be at an annual rate established under § 6621 of the Internal Revenue Code of 1954 (as modified by § 6622 (26 U.S.C. 6621 and 6622)). This is the rate which Customs will use. (See *United States* v. *Harold Goodman*, Slip Op. 83-92, Court No. 81-9-01150).

The notice proposed that the same percentage rate of interest applied to an overdue bill would remain in effect for that bill until complete payment is received. Customs has revised the proposal and determined that the percentage rate of interest will be adjusted based upon the semiannual determinations under § 6621 and be compounded daily in accordance with 26 U.S.C. 6622 for any period of time that such sums of the bill are outstanding.

Comment:

Section 580 of the Tariff Act of 1930 (19 U.S.C. 580), imposes "interest", not an "exaction". It is inequitable to impose a greater burden upon the surety than upon the principal. The rule should state whether the 6 percent amount assessed against a surety is in addition to, or is included within, the interest charged, if any, against the principal. Customs is without authority to adopt regulations which are inconsistent with the Congressional scheme limiting interest at a 6 percent rate on unpaid debts which are the subject of collection actions.

Analysis:

The Act of March 2, 1799, C. 22, § 65, 1 Stat. 676 (19 U.S.C. 580), is applicable to suits brought by the Government upon all bonds for the recovery of duties. The importer of record is liable for the principal amount of the debt (duty) and interest which is assessed upon the late payment of that principal amount. A surety bears the same liability. If Customs must sue the debtor under a bond, it is entitled to recover the principal amount of the debt, plus interest assessed

for the late payment, plus an additional amount of 6 percent assessed under 19 U.S.C. 580.

We believe 19 U.S.C. 580 is applicable only against delinquents where the Government must pursue collection through judicial action. Such action will be necessary under very limited circumstances. Most cases will not require use of the judicial process.

Comment:

Charging interest should be made by regulation with no change in the bond form (no bond rider), or bond forms should be amended upon renewal to incorporate the interest provision.

Analysis:

This comment has merit. The substance of the proposed bond rider on interest charges has been incorporated into the final rule relating to the bond structure which was published in the Federal Register as T.D. 84–213 on October 19, 1984 (49 FR 41152). Sections 113.62, 113.64 and 113.73, Customs Regulations (19 CFR 113.62, 113.64, 113.73), specify the agreement to pay charges demanded by Customs as a condition for basic importation and entry bonds, respectively. This document makes those same conforming changes to §§ 113.63 and 113.65, Customs Regulations (19 CFR 113.65). Customs has determined the word "charges" appearing in these sections to include interest charges for the late payment of supplemental duty bills (bills for additional duties ascertained upon liquidation or reliquidation), reimbursable services, and miscellaneous bills issued by Customs to organizations outside the U.S. Government, including sureties.

Comment:

Customs should obtain from bonding companies their proposed premiums for the new bond provision and publish this information in the Federal Register requesting comments.

Analysis:

This suggestion cannot be adopted because Customs lacks authority to do so.

Comment:

This proposal to charge interest on delinquent bills should be compatible with the Customs proposal relating to the new bond structure project published in the Federal Register on March 15, 1983 (see 48 CFR 11032).

Analysis:

This comment has merit. As noted, the substance of the proposed bond rider on interest charges has been incorporated into the final rule relating to the bond structure which was published in the Federal Register as T.D. 84–213 on October 19, 1984 (49 FR 41152).

Comment:

The principal on the bond is the primary obligor for the payment of monies due Customs and the surety is secondarily liable.

Analysis:

This is incorrect. Customs bonds make principals and sureties joint obligors. In this regard, see *U.S.* v. *Gissel*, 353, F. Supp. 768 (S.D. Tex. 1973) (T.D. 73–86); aff'd 493 F. 2d. 27 (5th Cir. 1974); cert. den. 955 Sup. Ct. 332, 419 U.S. 1012.

Comment:

The language of the rider to be attached to applicable bonds uses the term "late charge." The appropriate terminology should be "interest."

Analysis:

As noted, there is no bond rider. The new bonds provide for interest under the term "late charges."

Comment:

By T.D. 82–204 published in the Federal Register on November 1, 1982 (47 FR 49355), an annual fee was instituted for reimbursement of costs of Customs supervision of warehouses. If the annual fee is not paid timely, liquidated damages will be assessed. Will interest be charged on the last payment of the annual fee?

Analysis:

Provisions governing this fee are contained in §§ 19.2(a) and 19.5, Customs Regulations, rather than §§ 24.16 and 24.17, Customs Regulations, relating to reimbursable and overtime services. Although there is a billing system for the reimbursable services provided in §§ 24.16 and 24.17, there is no billing system for the annual warehouse fee. As no bills are issued to collect annual warehouse fees, no interest will be assessed at this time.

Comment:

Interest charges should be assessed upon the late payment of liquidated damages, fines, and penalties. There should be a provision for extending the due date on liquidated damages, fines, or penalties that may be under appeal or further review.

Analysis:

Customs does not agree. As stated in the proposal, miscellaneous bills do not include liquidated damages, fines, and penalties.

Comment:

Bills for reimbursable services and miscellaneous amounts are due and payable upon receipt in accordance with § 24.3(e), Customs Regulations. Under the proposed rule, interest would accrue on those bills which are not paid within 25 days after that due date. However, Customs would not know when a bill is due because, under existing procedures, only the debtor will know when the bill is received. It is suggested that Customs either provide a longer ini-

tial period before imposing interest (e.g., 45 days) or provide a clear opportunity for the importer to prove that receipt of the bill in question was delayed and that interest is not owed. It also is suggested that the due date be made more specific by marking that date on the bill and by clearly identifying it.

Analysis:

Customs agrees that, as proposed, it would not know when bills for reimbursable services and miscellaneous amounts are received by the debtor. Therefore, Customs has made extensive changes to the proposal. For those bills, if payment is not received by Customs on or before the "late payment date" specified on the bill, interest charges will be assessed upon the delinquent principal amount of the bill. The late payment date is the date 30 calendar days after the "interest computation date." The interest computation date is the date from which interest is calculated and is initially the "bill date" appearing on the bill.

Pursuant to § 210 of the Trade and Tariff Act of 1984, for bills for supplemental duties, (additional duties assessed upon liquidation or reliquidation) the principal amount of the bill shall be due 15 days from the date of liquidation or reliquidation and if not paid within 30 days after this date (the 45th day) shall be considered delinquent and bear interest from the due date (15th day after liquidation or reliquidation).

No interest will be assessed on bills for reimbursable services and miscellaneous amounts if Customs receives payment on or before the late payment date. To ensure processing within 30 days after the interest computation date (so that no interest will be assessed) it is essential that payment is received by Customs on or before the late payment date. No interest will be charged on bills for supplemental duties if Customs receives payment on or before the 45th day after liquidation or reliquidation.

This document amends § 24.3(e) to provide that except for a bill for supplemental duties, a bill for duties, taxes, or other charges is due and payable on the "bill date" appearing on the bill, rather than upon receipt thereof by the debtor.

This change is necessary because, as the commenters observe, Customs does not know exactly when a bill is received by a debtor. Moreover, it is Customs practice to mail a reimbursable service or miscellaneous bill before the "bill date." Therefore, in the usual situation, a party will receive a bill on or before the bill date. Customs notes that a debt for a reimbursable or miscellaneous service is incurred at the time of the action giving rise to such bill (e.g., when a reimbursable service was performed by a Customs officer).

Comment:

Currently, there is no mechanism for Customs to remove bills for supplemental duties off the collection process when a protest is filed. An importer and the surety continue to get "dunned" by Cus-

toms. Under the current proposal, the importer would be faced with interest on the increased duty billing. It is suggested that disputed items be placed under a different system. The rule should provide that the automated billing cycle and resulting interest charges are automatically suspended whenever such bills are questioned or disputed.

Analysis:

The billing system under development by Customs is designed to take into consideration entries under protest, as well as adjustments that are necessary due to improper billing addresses or other administrative errors. Under the terms of § 210 of Pub. L. 98–573 the bill is due and payable 15 days from the date of liquidation or reliquidation, whether or not a protest has been filed. Accordingly, a party will continue to receive a bill for supplemental duties from Customs even though a protest has been filed. Interest will be assessed if payment is not received by Customs within 30 calendar days after the due date for supplemental duty bills issued on or after November 29, 1984.

Comment:

Because of the billing method used by Customs, it is impossible to pay numerous bills within the time frame specified in the new proposal. A bill may be mailed to a different address of the same business entity without the envelope indicating that it contains a bill, or it may be directed to someone other than the person authorizing the service. Bills are not always properly identified as to the services being charged, the person's name authorizing the service, or when or where the service was performed. Bills may be in error. If bills (or substantiating documentation) are not timely received, will the interest charge still be due or be cancelled with proof of untimely receipt? The regulations should provide administrative relief from payment of interest charges if delays resulted, at least partially, due to errors by Customs personnel.

Analysis:

The Customs bill is used to collect amounts owed the Government. In the case of bills issued for amounts owed other than for supplemental duties, the party-in-interest is usually aware of the Customs billing schedule and the purpose for issuance of the bill. Bills for amounts owed as a result of the performance of a reimbursable service by a Customs official are issued approximately 2–3 weeks following actual performance. Requests for the service are made specifically by the party-in-interest receiving the service. The billing package of miscellaneous amounts received by the debtor contains the background information explaining the nature of the charge or provides a "Refer Inquiry To" name and address where the basis of the charge may be obtained. We believe that the time periods provided are sufficient for payment of Customs bills.

It is noted that the importer record number data provided by the importer/broker/party-in-interest is the basis for the Customs name and address file. If the legal provisions concerning the due date for entries under protest change, or verified administrative billing errors have occurred, the Customs billing system will be adjusted using an on-line data processing adjustment capability to update the accounts receivable and invoice files accordingly. Customs will make every effort to minimize any unnecessary administrative expense in a businesslike fashion similar to the usual private and banking interest assessment practices. The Customs bill designates a "Send Payment to" address and requests for administrative adjustments due to billing errors may also be sent to this address. Customs officials have the authority to make adjustments to interest amounts when there is a Customs billing error.

Comment:
Interest rates should be published in the CUSTOMS BULLETIN each quarter. Having to call a Customs regional office should not be necessary.

Analysis:
The Customs bill will show the current interest rate in effect. In addition, as stated in T.D. 85–93, the current semiannual interest rate may be obtained from the IRS or the Customs National Finance Center, Indianapolis, Indiana, at any time, and Customs will also publish the current interest rate in the CUSTOMS BULLETIN and Federal Register on a semiannual basis for the convenience of the importing public and Customs personnel.

Comment:
Simultaneous billing of principal and surety will decrease collection efficiency. Sureties will begin immediate collection action against all importers instead of the truly delinquent debtor. Importers will receive two bills practically simultaneously: one bill from Customs and one bill from the surety. By forcing the surety to expand its collection activities over a substantially larger base, there will be a corresponding loss of collection efficiency.

Analysis:
Customs has determined not to bill the principal and surety simultaneously at the time of the initial billing as proposed. However, upon the written request of a surety, Customs will provide a surety a notice containing billing information at the time of the initial billing to its principal. In addition to such notice, if any sureties will receive notice of the principal amount owed, any interest accruing, and other pertinent information on the monthly "Formal Demand on Surety for Payment of Delinquent Accounts Due" issued to sureties. This monthly notification to sureties will be issued for delinquent bills more than 30 days past due (60 days from bill due date).

Surety demand notices will be issued to sureties monthly until the account is paid or otherwise closed.

Comment:

It is suggested that no interest be assessed against a surety until Customs has provided a copy of the bond and entry in support of its claim. It is also suggested that the bill include the name and address of the principal, and name and address or code of the customs broker. The regulations should provide for placing the delinquent importer on the sanction list and withdrawing immediate delivery privileges.

Analysis:

As previously stated, Customs bonds make principals and sureties joint obligors. In addition, the Customs bond revision, T.D. 84–213, provides for the joint and several liability of the principal and surety for interest charges for specified bills if such bills are not paid timely. Customs will continue to provide copies of entries and bonds as it is determined to be necessary. However, whether or not Customs provides such documents does not affect the liability of a surety on the surety's bond for the amount owed by the principal.

The surety will be notified of the available name and address of the principal on the "Formal Demand on Surety for Payment of Delinquent Amounts Due" and when the bill is issued if the surety desires such notification. Efforts to improve the availability of data elements, including broker's name and address, or code, will be considered during future improvements to existing data processing systems.

Customs will continue to use the importer sanction list as judiciously as possible. However, charging interest is necessary to permit the Government to recover its costs to borrow funds.

Comment:

The effective rates of interest under the proposed regulations are unreasonable and to a great extent arbitrary because the interest would be charged for full 30-day periods. It is suggested either that interest be charged only for the time period of late payment, or that interest be calculated and charged in smaller time increments. (e.g., 10 days).

Analysis:

Customs disagrees. It has been determined that the charge will only be for those payments already in arrears. In fact, no interest will be charged for the period in which payment is actually made.

RELATED COURT DECISION

The U.S. Court of International Trade in *Heraeus-Amersil, Inc.*, v. *United States*, 515 F. Supp. 770 (1981), held that any increased or additional duties determined to be due upon a liquidation or reliquidation are not due and payable at that time, but rather at the time of filing of a court action, or at the expiration of the statute of

limitations, if no action is filed. In *United States* v. *Heraeus-Amersil, Inc.*, Appeal No. 81-19 (February 18, 1982), the U.S. Court of Customs and Patent Appeals affirmed this decision. In light of this holding, Customs published a final rule document in the Federal Register (T.D. 83-14, 48 FR 1186, January 11, 1983) amending § 24.3(e), Customs Regulations (19 CFR 24.3(e)), to clarify the due date of Customs bills for supplemental duties. However, § 210 of the Trade and Tariff Act of 1984 (Pub. L. 98-573) overturned the decision in *Heraeus-Amersil*. Accordingly, § 24.3(e) is being amended to reflect these changes.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), it is certified that the rule will not have a significant economic impact on a substantial number of small entities. The large majority of delinquent bills outstanding tend to be from large importers, not small importers and other small entities. Indeed, neither small nor large entities are likely to be affected unless they are delinquent in their payments.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal authors of this document were Charles D. Ressin and Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR

Part 24
Customs duties and inspection, imports, accounting.
Part 113
Customs duties and inspection, imports, surety bonds.

Amendments to the Regulations

Parts 24 and 113 Customs Regulations (19 CFR Parts 24, 113), are amended as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624, 31 U.S.C. 9701:

§ 24.1 also issued under 19 U.S.C. 197, 198, 1648;

§ 24.3 also issued under 19 U.S.C. 1505, 1520;
§ 24.4 also issued under 19 U.S.C. 1623, 26 U.S.C. 5007, 5054, 5061, 7805;
§ 24.11 also issued under 19 U.S.C. 1485(d);
§ 24.12 also issued under 19 U.S.C. 1524, 46 U.S.C. 927;
§ 24.14 also issued under 19 U.S.C. 1;
§ 24.16 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1623, 46 U.S.C. 2111, 2112;
§ 24.17 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562, 46 U.S.C. 2110, 2111, 2112;
§ 24.32 also issued under 19 U.S.C. 5582, 5583;
§ 24.36 also issued under 26 U.S.C. 6423.

2. Part 24 is amended by adding a new § 24.3a after § 24.3 to read as follows:

§ 24.3a Interest Charges on Certain Bills; Notice to Principal and Surety.

(a) *Due date of Customs bills.* Customs bills for supplemental duties (additional duties assessed upon liquidation or reliquidation), reimbursable services (such as provided for in §§ 24.16 and 24.17), and miscellaneous amounts (bills other than duties, taxes, reimbursable services, liquidated damages, fines, and penalties) shall be due as provided for in § 24.3(e).

(b) *Assessment of interest charges.*

(1) *Bills for reimbursable services and miscellaneous amounts.* If payment is not received by Customs on or before the late payment date appearing on the bill, interest charges will be assessed upon the delinquent principal amount of the bill. The last payment date is the date 30 calendar days after the interest computation date. The interest computation date is the date from which interest is calculated and is initially the bill date.

(2) *Bills for supplemental duties.* The due date for increased or additional duties, determined to be due upon a liquidation or reliquidation, is 15 days from the date of such liquidation or reliquidation. If such duties are not paid within 30 days after their due date (the 45th day), they shall be considered delinquent and bear interest from the due date.

(c) *Interest rate and applicability.*

(1) The percentage rate of interest to be charged on such bills will be based upon the semiannual rate(s) established under §§ 6621 and 6622 of the Internal Revenue Code of 1954 (26 U.S.C. 6621, 6622). The current rate of interest will appear on the Customs bill and may be obtained from the IRS or the Customs National Finance Center, Indianapolis, Indiana. Customs will also publish the current interest rate in the CUSTOMS BULLETIN and Federal Register on a semiannual basis.

(2) The percentage rate of interest applied to an overdue bill will be adjusted as necessary to reflect any change in the annual rate of interest.

(3) Interest on overdue bills will be assessed on the delinquent principal amount by 30-day periods. No interest charge will be assessed for the 30-day period in which the payment is actually received at the "Send Payment To" location designated on the bill.

(4) In the case of any late payment, the payment received will first be applied to the interest charge on the delinquent principal amount and then to payment of the delinquent principal amount.

(5) The date to be used in crediting the payment is the date on which the payment is received by Customs.

(d) *Notice.*

(1) *Principal.* The principal shall be notified at the time of the initial billing, and every 30 days after the due date until the bill is paid or otherwise closed. The following elements will normally appear on the bill:

(i) Principal amount due;

(ii) Interest computation date;

(iii) Late payment date;

(iv) Accrual of interest charges if payment is not received by the late payment date:

(v) Applicable current interest rate;

(vi) Amount of interest owed;

(vii) Customs office where requests for administrative adjustments due to billing errors may be addressed; and

(viii) Transaction identification (e.g. entry number, reimbursable assignment number.).

(2) *Surety.* (i) Customs will report outstanding bills on a Formal Demand on Surety for Payment of Delinquent Amounts Due, for bills more than 30 days past due (approximately 60 days after bill due date), and every month thereafter until the bill is paid or otherwise closed.

The following elements will normally appear on the report:

(A) Principal amount due;

(B) Interest computation date;

(C) Late payment date;

(D) Accrual of interest charges if payment is not received by the late payment date;

(E) Applicable current interest rate;

(F) Amount of interest owed;

(G) Principal's name and address;

(H) Customs office where requests for administrative adjustments due to billing errors may be addressed; and

(I) Transaction identification (e.g. entry number, reimbursable assignment number).

(ii) Upon the written request of a surety, Customs will provide the surety a notice containing the billing information at the time of the initial billing to its principal.

3. Section 24.3(e), Customs Regulations (19 CFR 24.3(e)), is revised to read as follows:

§ 24.3 Bills and accounts; receipts.

* * * * * * *

(e) All other bills for duties, taxes, or other charges are due and payable upon the bill date appearing on the bill. A bill for increased or additional duties determined to be due upon a liquidation or reliquidation is due 15 days from the date of such liquidation or reliquidation.

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624:

Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

2. Section 113.63(f) is amended by removing the word "and" after paragraph (3), removing the period at the end of paragraph (4), adding "and" after paragraph (4), and by adding a new paragraph (5) to read as follows:

§ 113.63 Basic custodial bond conditions.

(f) *Reimbursement and Exoneration of the U.S.*

* * * * * * *

(5) Pay any charges found to be due Customs arising out of the principal's custodial operation.

3. Section 113.65(a) is amended by removing the word "and" after paragraph (2), removing the comma after the word "claim" and replacing it with a period in paragraph (2), removing the period at the end of paragraph (3), adding the word "and" after paragraph (3), and by adding a new paragraph (4) to read as follows:

§ 113.65 Repayment of erroneous drawback payment bond conditions.

(a) *Agreement Under Exporter's Summary Procedure.*

* * * * * * *

4. The principal agrees to pay any changes due Customs as provided by law or regulation..

WILLIAM VON RAAB,
Commissioner Customs

Approved: September 3, 1986.

MICHAEL H. LANE,
Assistant Secretary of the Treasury

[Published in the Federal Register, October 1, 1986 (51 FR 34954)]

U.S. Customs Service

General Notices

19 CFR Part 175

CLASSIFICATION OF ORANGE JUICE CONCENTRATE-BASED PRODUCT; SOLICITATION OF COMMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of comment period.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the classification of orange juice concentrate-based product. Customs received a petition submitted on behalf of a domestic interested party with respect to a Customs ruling that an orange juice concentrate-based product consisting of orange juice concentrated to 65° Brix to which certain ingredients were added was classified under item 183.05, Tariff Schedules of the United States (TSUS), as other edible preparations, not specially provided for. The petitioner contends that the subject product should be classified under item 165.29, TSUS, as concentrated orange juice or orange juice made from concentrated orange juice. The petitioner argues that orange juice is now provided for *eo nomine* in the TSUS because of an amendment by the Trade and Tariff Act of 1984 (Pub. L. 98–573).

A previous solicitation for comments was published in the Federal Register on July 30, 1986 (51 FR 27196). Comments were to have been received on or before September 29, 1986. Customs has received several requests to extend the comment period because additional time is required to prepare reasonably responsive comments. Customs believes the requests have merit. Accordingly, the period of time for the submission of comments is being extended 60 days.

DATE: Comments are requested on or before November 28, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and

§ 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the address above.

FOR FURTHER INFORMATION CONTACT: Thomas L. Lobred, Classification and Value Division (202–566–8181).

Dated: September 26, 1986.

JOHN P. SIMPSON,
Director, Office of
Regulations and Rulings.

[Published in the Federal Register, October 2, 1986 (51 FR 35240)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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Senior Judges

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Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–91)

THE CANADIAN MEAT COUNCIL AND ITS MEMBERS, INCLUDING CANADA PACKERS, INC., PLAINTIFFS, ALBERTA PORK PRODUCERS MARKETING BOARD, ET AL., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, NATIONAL PORK PRODUCERS COUNCIL, ET AL., DEFENDANT-INTERVENORS.

Court No. 85–09–01168

Before DICARLO, *Judge.*

Following the issuance of a negative injury determination by the International Trade Commission (Commission), plaintiffs filed an action challenging a final affirmative subsidy determination by the Department of Commerce (Commerce) pursuant to 19 U.S.C. § 1516a(a)(3) (Supp. II 1984). Defendant and defendant-intervenors move to dismiss the action for lack of jurisdiction on the grounds that (1) actions may be brought under section 1516a(a)(3) only when the negative determination by the Commission is based on the size of the net subsidy or dumping margin found by Commerce, and (2) the action calls for an advisory opinion in violation of Article III of the Constitution since there is currently no countervailing duty order covering the relevant merchandise.

Held: Section 1516a(a)(3) permits a party to challenge a final affirmative subsidy determination when a final negative injury determination is the subject of a pending appeal. The action does not call for an advisory opinion since Commerce's final affirmative subsidy determination has legal consequences affecting the rights of the parties.

[The motion to dismiss is denied.]

(Decided September 12, 1986)

Arnold & Porter (Robert Herzstein, Lawrence A. Schneider and *Alen O. Sykes)* for plaintiffs.

Cameron, Hornbostel & Butterman (William K. Ince and *Caren Z. Turner)* for plaintiff-intervenors.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Commercial Litigation Branch *(Elizabeth C. Seastrum); Douglas Riggs,* General Counsel, United States Department of Commerce *(Lisa Koteen),* for defendant.

Thompson, Hine and Flory (Mark Roy Sandstrom) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs bring an action contesting a final affirmative subsidy determination by the Department of Commerce,

International Trade Administration (Commerce) pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(3) (Supp. II 1984). Defendant and defendant-intervenors move to dismiss the action for lack of jurisdiction. The motion to dismiss is denied.

I. Background

The members of the Canadian Meat Council are pork packers that do not produce live swine. The Canadian Meat Council and its members (plaintiffs) challenge Commerce's final affirmative subsidy determination in *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada*, 50 Fed. Reg. 25,097 (June 17, 1985). The action was commenced within thirty days after the International Trade Commission (Commission) published its final determination that an industry in the United States is materially injured by imports of live swine, but is not materially injured or threatened with material injury by imports of fresh, chilled or frozen pork from Canada. *Live Swine and Pork from Canada*, 50 Fed. Reg. 31,931 (Aug. 7, 1985). Accordingly, Commerce issued a countervailing duty order on imports of live swine, but not on imports of fresh, chilled or frozen pork. *Countervailing Duty Order; Live Swine from Canada*, 50 Fed. Reg. 32,880 (Aug. 15, 1985). The National Pork Producers Council and Wilson Foods Corp., defendant-intervenors in this case, have brought a separate action contesting the Commission's negative injury determination regarding fresh, chilled and frozen pork. *National Pork Producers Council* v. *United States*, Court No. 85-9-01209.

Defendant and defendant-intervenors (movants) seek dismissal of this action for lack of jurisdiction on the grounds that (1) the action may not be brought pursuant to section 1516a(a)(3) since Congress intended that such actions be brought only when the Commission's negative determination is predicated on the size of the net subsidy or dumping margin found by Commerce; and (2) the action calls for an advisory opinion in violation of Article III of the Constitution since there is currently no countervailing duty order regarding fresh, chilled and frozen pork from Canada.

The question presented is whether 19 U.S.C. § 1516a(a)(3) allows a party to challenge Commerce's final affirmative subsidy determination where the Commission's final negative injury determination has been contested, and if so, whether the action constitutes an actual case or controversy within the meaning of Article III of the Constitution.

II. Discussion

1. The Scope of Section 1516a(a)(3).

A final affirmative determination by Commerce that a subsidy is being provided under 19 U.S.C. § 1671d (1982 & Supp. II 1984), may be challenged within thirty days after the publication of a final

countervailing duty order, under section 19 U.S.C. § 1516a(a)(2)(B)(i) (Supp. II 1984). An opportunity for challenging a final affirmative subsidy determination is also provided by section 1516a(a)(3), which states:

> Exception—Notwithstanding the limitation imposed by paragraph (2)(A)(ii) of this subsection, a final affirmative determination by the administering authority under section 1671d or 1673d of this title may be contested by commencing an action, in accordance with the provisions of paragraph (2)(A), within thirty days after the date of publication in the Federal Register of a final negative determination by the Commission under section 1671d or 1673d of this title.

This action comes within the class of actions described in section 1516a(a)(3). Movants argue, however, that section 1516a(a)(3) must be read in the context of House Report on the Trade and Tariff Act of 1984 (Act), which says that section 1516a(a)(3) may be invoked only when the Commission's negative determination "is predicated on the size of the dumping margin or net subsidy." H. Rep. No. 98–725, 98th Cong., 2d Sess. 47, *reprinted in* 1984 U.S. Code Cong. & Ad. News 5127, 5174.

Movants' argument is misplaced. The passage quoted from the legislative history was written for proposed legislation which would have limited appeals under section 1516a(a)(3) to instances where negative Commission determinations were predicated on margin or net subsidy size. Defendant concedes that "[t]he 'exception' as finally enrolled in section 516a(a)(3), however, was shorn of the clause limiting its application to cases where the ITC used margins analysis." Reply Brief for Defendant, at 7. Since the language regarding margin or net subsidy size was deleted, the House Report does not reflect Congress' intent concerning the availability of section 1516a(a)(3) review.

Only in the Summary of Provisions of H.R. 3398, Trade and Tariff Act of 1984, House Ways and Means Committee Print No. 98–39, at 33, is the final version of section 1516a(a)(3) described. The report, which does not constitute part of the legislative history of the Act, states in part:

> The conference agreement eliminates all interlocutory judicial reviews by the U.S. Court of International Trade during the course of CVD and AD investigations. All challenges to agency determinations would be combined and reviewable by the court after final agency action has been taken. The agreement also clarifies when negative portions of affirmative determinations may be reviewed, *and that a final affirmative determination by the administering authority may be contested when an appeal is based on a negative determination by the ITC* [emphasis added].

The Court finds nothing in the legislative history of the Act showing that section 516a(a)(3) as enacted was intended to apply only

where negative Commission determinations are based on the size of the net subsidy or dumping margin.

The Court disagrees with movants' further argument that Congress intended to eliminate section 1516a(a)(3), and that its survival in amended form was inadvertent. To declare that section a nullity would violate the express language of the statute.

The Court holds that section 1516a(a)(3) permits a party to challenge Commerce's final affirmative subsidy determination where the Commission's final negative injury determination has been contested.

2. Constitutionality of Section 1516a(a)(3).

Movants argue that if section 1516a(a)(3) permits this action to be brought, the statute unconstitutionally requires this Court to render an advisory opinion. They say that if the Commission's negative injury determination is upheld in *National Pork Producers Council* v. *United States*, Court No. 85–9–01209, an opinion regarding the validity of Commerce's affirmative subsidy finding would prove advisory. Movants' argument rests upon the assumption that unless the negative determination of the Commission is the result of margins analysis, an affirmative subsidy determination presents a live controversy only when it is certain that countervailing duties will be imposed.

"Congress may not, of course, require this Court to render opinions in matters which are not 'cases or controversies.' " *Buckley* v. *Valeo*, 424 U.S. 1, 11 (1976). Article III of the Constitution limits the jurisdiction of this Court to disputes which call "for an adjudication of present right upon established facts." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 242 (1937). "This requires a real and substantial dispute affecting the legal rights and obligations of parties with adverse interests." *C.R. Bard, Inc.* v. *Schwartz*, 716 F.2d 874, 879 (Fed. Cir. 1983). A final administrative action that "determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable." *Pennsylvania Railroad* v. *United States*, 363 U.S. 202, 205 (1960).

The subsidy investigation regarding live swine and fresh, chilled and frozen pork from Canada is final and complete. Commerce's role in the administration of the subsidy investigation terminated when it issued its final determination which established that the investigated industry is receiving countervailable subsidies, and that countervailing duties would be assessed on all relevant products upon the issuance by the Commission of an affirmative injury determination.

Although Commerce's final determinations constitute final agency action, Congress has prohibited parties from seeking review of those determinations prior to the issuance of the Commission's determination. By postponing challenges to final affirmative Commerce determinations, section 1516a effectively eliminates those ap-

peals which are rendered unnecessary by the Commission's determination. Thus, where the Commission determines that there is no injury, and no appeal from that determination is brought, the proceedings are at an end and Commerce's determination can have no further impact on the parties' rights.

Section 1516a(a)(3) gives a right to review a final affirmative subsidy determination where the legality of a negative injury determination has been placed in question. The appeal in *National Pork Producers Council* v. *United States,* Court No. 85–9–01209, may result in a determination that an industry in the United States is materially injured or threatened with material injury by imports of fresh, chilled and frozen Canadian pork products.

If an affirmative determination by the Commission is issued, Commerce's final affirmative subsidy determination retains its full vitality and effect, and provides a basis for the issuance of a countervailing duty order. The Court holds that Commerce's final affirmative subsidy determination is an action from which legal consequences flow, having a substantial impact on the rights of the parties. *See Pennsylvania Railroad* v. *United States, supra.* It is within the Court's power under Article III of the Constitution to entertain a challenge to the validity of the determination as required by section 1516a(a)(3).

The Court disagrees with movants' contention that this case is governed by *American Spring Wire Corp.* v. *United States,* 6 CIT 122, 569 F. Supp. 73 (1983), where an action challenging a suspension agreement based on an affirmative subsidy determination was held to be moot once a negative injury determination was issued. In that case the suspension agreement, the subject of the challenge, became void and could not be resurrected once the Commission issued its final negative injury determination:

> It is true that in another action pending in this court, * * * plaintiffs have challenged the ITC's no-injury determination—the event which terminated the suspension agreement. However, *no disposition of that determination by this court could possibly breathe new life into the suspension agreement.* The ITC's no-injury finding sounded the death knell of that agreement; this court lacks power to resurrect it, under the circumstances presented here.

6 CIT at 124, 569 F. Supp. at 75 (emphasis added). In contrast, the case before the Court presents a live controversy since the reversal of the Commission's negative injury determination would result in the issuance of a countervailing duty order.

III. Conclusion

Section 1516a(a)(3) permits a party to challenge a final affirmative subsidy determination where a final negative injury determination is the subject of a pending appeal. The action does not call for an advisory opinion since Commerce's final affirmative subsidy de-

termination has legal consequences affecting the rights of the parties.

The motion to dismiss is denied.

(Slip Op. 86–92)

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSCALI, AND ENZO PIZZI, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–10–01435

Before DiCARLO, *Judge.*

[The action is dismissed.]

(Decided September 15, 1986)

Klayman & Gurley, P.C. (Larry Klayman and *John Gurley)* for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Elizabeth Seastrum; Edward Madaj,* International Trade Commission, of counsel) for defendant.

Mudge, Rose, Guthrie, Alexander & Ferdon (N. David Palmeter and *Jeffrey Neeley)* for *amicus curiae* Hyundai Steel Ind. Co. Ltd.

Dewey, Ballentine, Bushby, Palmer & Wood, (Alan Wm. Wolff, Jane Albrecht) and *Akin, Gump, Strauss, Hauer & Feld, (Richard R. Rivers)* for *amicus curiae* Lone Star Steel Co.

MEMORANDUM OPINION AND ORDER

DiCARLO, *Judge:* On June 12, 1986 the Court held that a final determination by the Department of Commerce, International Trade Administration (Commerce) that pads for woodwind instrument keys from Italy are being sold in the United States at less than fair value, was not supported by substantial evidence or in accordance with law. *Luciano Pisoni Fabbrica Accessori Instrumenti Muscali, et al.* v. *United States,* 10 CIT ——, Slip Op. 86–62 (June 12, 1986). Commerce's final determination had resulted in an order assessing an antidumping duty of 1.16% *ad valorem.*

The Court held that Commerce had improperly compared different merchandise in determining the difference between United States price and home market price. The action was remanded to Commerce with instructions to make an adjustment for differences in the physical characteristics of the merchandise under 19 C.F.R. § 353.16 (1985).

The Court also held that in an investigation involving only ten home market sales, Commerce may not reasonably find a dumping margin by using quarterly exchange rates when no dumping margin would result if conversions were based on rates prevailing at the time of the transactions.

In accordance with the Court's instructions, Commerce made a merchandise adjustment under 19 C.F.R. § 353.16 and used daily exchange rates for all lira/dollar conversions. Commerce found a

weighted-average dumping margin of .286%, which it said was *de minimis*, and concluded that the merchandise was being sold in the United States at not less than fair value.

Although Commerce did not give its reasons for finding the dumping margin *de minimis*, see *Carlisle Tire & Rubber Co.* v. *United States*, 10 CIT ——, 634 F. Supp. 419 (1986), the parties have submitted their comments on the remand proceedings, and there are no objections to Commerce's redetermination.

Accordingly, Commerce's redetermination is affirmed and the action is dismissed. So ordered.

(Slip Op. 86–93)

THE DESERET CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–5–00718

(Decided September 17, 1986)

Barnes, Richardson & Colburn (David O. Elliott) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office and *Barbara M. Epstein*, Civil Division, United States Department of Justice.

OPINION

RESTANI, *Judge:* This action involves the proper classification for tariff purposes of electro-cardiograph (EKG) electrodes, pads, and strippers. Each EKG electrode consists of a circular piece of foam with an adhesive on one side. In the center of the foam is a metal electrode on a small pre-gelled disc. The electrode is in the form of a snap which enables it to be connected to lead wires. These wires are attached to a cable which is plugged into an EKG machine. Each EKG pad consists of a piece of rectangular foam on which there are affixed four metal or silver chloride electrodes, surrounded by four adhesive discs. A separate wire is attached to each of the four electrodes. These wires are bound together at one end by a connector that allows the wires to be plugged into the cable which, in turn, is plugged into the EKG machine. Each EKG stripper consists of either three or four electrodes, each of which is connected to a separate wire. The wires are bound together at one end by a four pole plug. The plug is attached to the cable which is plugged into the EKG machine.

Upon entry through the port of Nogales, Arizona, in 1981, the United States Customs Service (Customs) classified the EKG pads and EKG strippers under item 688.15 of the 1981 Tariff Schedules of the United States (TSUS) which provides for: "[i]nsulated * * * electrical conductors * * * [w]ith fittings * * * Other," at the rate of 6.3% *ad valorem*. The EKG electrodes were classified under item 685.90, TSUS (1981), as "other electrical apparatus * * * for making

connections to or in electrical circuits" at the rate of 7.7% *ad valorem*. Plaintiff, Deseret Company (Deseret), challenges Customs' classification and alleges, instead, that the proper classification for all the merchandise is item 709.17, TSUS, which provides for "electro-medical apparatus and parts thereof * * * Other,"[1] at the rate of 5.6% *ad valorem*.

In support of its classification, Customs asserts that the articles in question are not separate "apparatus," but are "parts" of an EKG machine and that TSUS General Interpretative Rule 10(ij) is controlling. General Interpretative Rule 10 (ij) provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." Customs further states that items 685.90, TSUS and 688.15, TSUS, specifically provide for the articles.

In contrast, plaintiff argues that the articles are "apparatus," rather than "parts" and that General Interpretative Rule 10(ij) is therefore inapplicable. In addition, plaintiff states that because the articles are "apparatus," headnote 1(vi) of part 5 to schedule 6, which applies to Customs' classification here, precludes classification of the articles in question under items 685.90 and 688.15, TSUS. This headnote states that part 5 to schedule 6 "does not cover * * * electrical instruments and apparatus provided for in schedule 7." Plaintiff, therefore, claims that item 709.17, TSUS, is the proper classification for the merchandise. The court notes that plaintiff concedes that if the articles in question are "parts," then Customs' classifications here are correct.[2] Defendant, on the other hand, concedes that if the articles are "apparatus," then plaintiff's asserted classification must prevail.

This case cannot be decided on such a basis. The terms "parts"[3] and "apparatus" are not mutually exclusive and an article may be apparatus and at the same time may be a part of another article. *See J.E. Bernard & Co., Inc.* v. *United States*, 62 Cust. Ct. 536, 259 F. Supp. 1129 (1969) *aff'd* 58 CCPA 91, 436 F.2d 506 (1971) (meter iris-

[1] The statistical annotations to item 709.17 are subdivided into (1) "Therapeutic apparatus," which is not applicable, (2) "Other apparatus," which includes "electrocardiographs;" and (3) "Parts, not specifically provided for."

[2] Plaintiff apparently acknowledges, therefore, that if the articles are "parts," they are specifically provided for in schedule 6, part 5. What constitutes a specific provision for purposes of Rule 10(ij) is a topic of some debate, but applicable generic provisions will suffice. *See Tariff Classification Study, Seventh Supplemental Report* (Aug. 14, 1963) (p. 99):

> General Headnote 10(ij)—*Parts.* A provision for "parts" does not prevail over a specific provision for such part. Thus, a provision for "parts" is more specific than a provision for "articles, not specially provided for", but is not more specific than provisions such as the following for: "springs" (item 652.85), "illuminating articles" (items 653.30–.40), "pumps" (items 660.90–661.15), etc.

The court does not rely on plaintiff's concession and does not reach the issue of whether Customs' classifications are sufficiently "specific" within the meaning of Rule 10(ij).

[3] There seems to be confusion as to whether Rule 10(ij) provides a definition of "parts." It does not. The main clause of Rule 10(ij) specifies in what circumstances merchandise may be classified under a provision for parts of another article rather than as a separate item. Merchandise may be so classified when it is "chiefly used as a part of such article." This rule of classification is meant to override prior case law which required the merchandise to be *dedicated to use* as a part of such article. *See E.R. Hawthorne & Co., Inc.* v. *United States*, 730 F.2d 1490, 1492 (Fed. Cir. 1984) (citing 2 R. Sturm, *Customs Law and Administration*, § 354.9, at 42 (3rd Ed. 1983). *See also United States* v. *DeLaval Separator Co.*, 65 CCPA 48, 50, 569 F.2d 1134, 1135–36 (1978) (farm tanks classified as "parts" because they were "solely or chiefly" used as parts of another article). This rule of classification does not, however, answer the question of what is a part of an article. That question remains to be analyzed pursuant to the standards developed in a long line of cases. "The nature, function and purpose of an item in relation to the article to which it is attached or designed to serve determines whether the item constitutes a part of the article." *Ideal Toy Corp.* v. *United States*, 58 CCPA 9, 13, 433 F.2d 801, 803 (1970).

There is no question that the merchandise at issue here is "chiefly used" with an EKG machine. In fact, the parties have stipulated that this is the only use of the merchandise. There is a question as to whether the merchandise is a part of the EKG machine. That is, many things, which are used only with an article, and without which the article would not function, are not parts. Film for a camera is one common example.

es in motion picture cameras were both parts and apparatus); *Westinghouse Electric International Co.* v. *United States*, 28 Cust. Ct. 209, 218, C.D. 1411 (1952) (cameras used with X-ray apparatus held to be parts and apparatus).[4]

The merchandise at issue fits the broad definition of apparatus—an aggregate of materials intended for a specific use. *ITT Thompson Industries, Inc.* v. *United States*, 3 CIT 36, 44, 537 F. Supp. 1272, 1277–78, *aff'd* 703 F.2d 585 (Fed. Cir. 1982). Furthermore, the merchandise fits the definition of electro-medical apparatus. Defendant, however, cites *ITT* in support of its position. In *ITT* the court found that the lamp sockets and harnesses at issue were not classifiable as "electric lighting equipment" or "visual signaling apparatus" because they were only "parts" of these items. 3 CIT at 39–46, 49, 537 F. Supp. at 1274–79, 1281. The court was convinced by the relevant legislative history and trial testimony that "electric lighting equipment" must be able, "standing alone, [to] produce light or otherwise illuminate." *Id.* at 40, 537 F. Supp. at 1274. Similarly, the court found that "visual signaling apparatus" is "meant to encompass imported items that actually (physically) convey a visual or a sound signal * * *." *Id.* at 43, 537 F. Supp. at 1277. Although sockets fall within the definition of "apparatus," *id.* at 44–46, 537 F. Supp. at 1277–78, they do not, by themselves, carry out the specified functions and therefore can not be classified as either "electric lighting equipment" or "visual signaling apparatus." *Id.* Neither may harnesses be so classified because they too are incapable, by themselves, of producing light or sound. *Id.* at 49, 537 F. Supp. at 1281.

It does not follow from *ITT*, however, as defendant argues, that to constitute "electro-medical apparatus," the articles in question here must be capable "of providing an electro-medical end result, such as monitoring the heart." Post Trial Brief For The United States at 14. Defendant cites nothing in the relevant legislative history, in any definition of "electro-medical apparatus" or in any evidence before the court to suggest such a requirement. In fact, the *Tariff Classification Study* for schedule 7, part 2 subpart B, in which item 709.17 appears, does not indicate that the articles covered must function alone as medical apparatus but rather states that they must be "used generally" in a medical context. 9 *Tariff Classification Study* 144 (1960)[5]; *but cf. ITT*, 3 CIT at 41, 537 F. Supp. at 1275 (legislative history to TSUS item for "electrical lighting equipment" states that the item covers " '*illuminating* articles' " and thus requires that article must have an "end functional result of *actual* illumination * * *") (supplying emphasis). In this case, the merchandise in question is designed to attach to the human body for one electro-medical

[4] Although *Westinghouse* was decided prior to the introduction of General Interpretative Rule 10(ij) and headnote 1(vi), it remains valid for the proposition that "parts" and "apparatus" are not mutually exclusive terms.

[5] Provisions dealing with medical instruments and appliances within schedules 2, 3, 4, 9, 12, 13 and 15 of the Tariff Act of 1930 were incorporated into schedule 7, part 2, subpart B. *See* 9 *Tariff Classification Study* at 102–03. Subpart B, medical and surgical instruments and apparatus, of schedule 7, part 2, "covers a wide variety of instruments and appliances *used* generally in professional practice for diagnosis, prevention, and treatment of diseases, the correction of deformities and defects, the repair of injuries, etc." 9 *Tariff Classification Study* 144 (1960) (emphasis added).

function, and it is used only with electrocardiograph machines. Thus, this merchandise is undoubtedly "used" for medical purposes and the court will not impose defendant's narrow construction on TSUS item 709.17.

Inasmuch as the merchandise at issue is "electro-medical apparatus," it is irrelevant whether or not it is also parts of another electro-medical apparatus. If it were parts of a larger apparatus, Rule 10(ij) would not allow the merchandise to be classified under the "parts" provision of item 709.17, because a non-parts section of that same item specifically covers the merchandise.[6] Thus, the question here is not whether the merchandise is parts or apparatus but whether it is better classified under item 688.15 and 685.90 or under item 709.17; that is, not as "parts" but as "electro-medical apparatus" itself. Headnote 1(vi) provides the answer to this question. It is indicated that merchandise should not be classified under part 5 of schedule 6 if it is provided for in schedule 7. As indicated, the merchandise is provided for in schedule 7 at item 709.17, TSUS. A more detailed analysis of the legislative history supporting this result is found in *Terumo Corp.* v. *United States*, 10 CIT——, Slip Op. 86–19 (Feb. 21, 1986). Inasmuch as such history has been so recently and thoroughly discussed, it will not be repeated here.

Accordingly, the court holds that plaintiff has overcome the presumption of correctness applying to Customs' classification and has established that item 709.17, TSUS, is the proper classification for the EKG electrodes, pads, and strippers.

[6] Item 709.17, TSUS is sufficiently "specific" for purposes of Rule 10(ij). *See supra* note 2.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No and rate	Item No and rate		
C86/165	Re, C.J. September 11, 1986	Sanwa Foods Inc	82-12-01639, etc	Item 774.55 7.3% or 7.7%	Item 772.20 5.8% or 6.4%	Agreed statement of facts	Los Angeles Unassembled or unfinished plastice containers chiefly used for marketing merchandise
C86/166	Restani, J. September 11, 1986	North American Foreign Trading Corp	83-8-01239, etc	Item 715.05, 715.15, 716.18, 720.28, 720.35, or 774.55 various rates	Item 688.36 5.1% or 4.9%	Agreed statement of facts	New York Electronic watches

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/243	DiCarlo, J. September 9, 1986	Carlyle Footwear	80–1–00056, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	New York Footwear
V86/244	Re, C.J. September 11, 1986	Marubeni Iida America, Inc.	75–5–01130	Export value or Constructed value for items marked "A" United States value for items marked "C"	Unit values found by the appraising customs official, less ocean freight and marine insurance, and without additions for currency fluctuation, for items marked "A" Equal to appraised values less any additions made for currency fluctuation, and less 10%, or the invoiced unit values, less all non-dutiable charges, whichever value is higher for items marked "C"	C.B.S. Imports Corp. v. U.S., C.D. 4739	Los Angeles Various articles
V86/245	Re, C.J. September 11, 1986	Marubeni America, Inc.	75–1–00174	Export value or constucted value for items marked "A"	Unit values found by appraising customs official, less ocean freight and marine insurance, and without additions to said values for currency fluctuation, for items marked "A"	C.B.S. Imports Corp. v. U.S. C.D. 4739	Los Angeles Various articles

V86/246	Re, C.J. September 12, 1986	Puma USA, Inc	83-10-01547	Transaction value	Equal to appraised values, less any additions made for currency fluctuation, and less 10%, or the invoiced unit values, less all non-dutiable charges, whichever value is higher for items marked "C"	Agreed statement of facts	San Juan Footwear
V86/247	Restani, J. September 12, 1986	Samuel Brilliant Co.	84-1-00085	Export value	Invoiced price paid to Ormaco Ltd. of Hong Kong Invoice value of $2.80 per pair, net, packed	Samuel Brilliant v U.S. S.O. 86-42	Boston Footwear

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Third Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, October 24, 1986, at The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The Conference will be composed of the Judges of the United States Court of International Trade; officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests. The theme of the Conference is "Judicial Oversight—Relations Between the Court and the Agencies."

Sir Roy Denman, Head of the Delegation, Delegation of the Commission of the European Communities, is the Conference Luncheon Speaker.

Senator Dennis DeConcini, United States Senator from Arizona, and co-sponsor of the Customs Courts Act of 1980, will receive the Court's Annual Award for his outstanding contributions to the administration of justice in international law.

Last year, the Second Annual Judicial Conference was attended by over 400 conferees from 16 states, the District of Columbia, Puerto Rico, and Japan.

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Wednesday, October 1, 1986.

For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

JOSEPH E. LOMBARDI,
Clerk of Court.

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*U.S. GOVERNMENT PRINTING OFFICE: 1986-181-118:40005

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

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(T.D. 86–161)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO CUSTOMS BROKERS; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In FR Doc. 86–19256, published as T.D. 86–161 on August 26, 1986 (51 FR 30336), Parts 111, 171 and 178, Customs Regulations (19 CFR Parts 111, 171, 178), were extensively revised to implement the statutory changes made by the Trade and Tariff Act of 1984, relating to customs brokers. Corrections were made to T.D. 86–161 on September 5, 1986, in 51 FR 31760 and on September 10, 1986, in 51 FR 32208. It has come to our attention that another correction is necessary. On page 30342 of T.D. 86–161, § 111.23(e)(2)(v), Customs Regulations, provides that a written request for authorization to maintain financial records on a centralized systems basis shall include an agreement that all financial records pertaining to customs transactions will be made available to Customs for complete inspection in accordance with § 111.25 and § 162.1(d), Customs Regulations (19 CFR 111.25, 162.1(d)) after reasonable notice in writing has been provided. One of the purposes of amending the brokers' regulations was to ensure uniformity with the record-keeping provisions of § 162.1(d). Section 162.1(d)(2), Customs Regulations (§ 162.1(d)(2)), provides that reasonable notice for examination of records may be provided either orally or in writing. To allow for the same treatment for brokers as is given to other segments of the importing community, § 111.23(e)(2)(v) should also have stated that reasonable notice for examination of records may be provided either orally or in writing.

EFFECTIVE DATE: September 25, 1986.

FOR FURTHER INFORMATION CONTACT: Steven I. Pinter or Fred Burns O'Brien, Entry, Licensing and Restricted Merchandise Branch (202–566–5765).

CORRECTION TO THE REGULATIONS

In FR Doc 86–19256 beginning on page 30336 in the issue of Tuesday, August 26, 1986, make the following correction.

On page 30342, second column, in § 111.23(e)(2)(v), sixth line, the words "orally or" should be inserted between the words "notice" and "in".

Dated: October 2, 1986

ELIZABETH B. ANDERSON,
Acting Commissioner of Customs.

[Published in the Federal Register, October 9, 1986 (51 FR 36221)]

(T.D. 86–179)

APPROVAL OF TRANSCAN MARINE CONSULTANTS & SURVEYORS TO GAUGE IMPORTED PETROLEUM AND PETROLEUM PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of Approval

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Transcan Marine Consultants & Surveyors, 2500 Central Parkway, Suite V2, Houston, Texas 77092, has applied to Customs for approval to gauge imported petroleum and petroleum products. It has been determined that Transcan meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of Transcan Marine Consultants & Surveyors to gauge imported petroleum and petroleum products in all Customs districts is approved.

EFFECTIVE DATE: September 29, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–2446).

Dated: September 29, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

[Published in the Federal Register, October 9, 1986 (51 FR 36335)]

(T.D. 86–180)

QUARTERLY RATES OF EXCHANGE

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 USC 372(c)), for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulation (19 CFR 159, Subpart C).

Quarter beginning: October 1, 1986 through December 31, 1986.

Country	Name of currency	U.S. dollars
Australia	Dollar	0.630800
Austria	Schilling	0.070274
Belgium	Franc	0.023844
Brazil	Cruzando	0.072254
Canada	Dollar	0.720461
China, P.R.	Renimbi yuan	0.268528
Denmark	Krone	0.131062
Finland	Markka	0.203770
France	Franc	0.151000
Germany	Deutsche mark	0.494682
Hong Kong	Dollar	0.128139
India	Rupee	0.078125
Iran	Rial	N/A
Ireland	Pound	1.356800
Italy	Lira	0.000715
Japan	Yen	0.006487
Malaysia	Dollar	0.380518
Mexico	Peso	N/A
Netherlands	Guilder	0.437828
New Zealand	Dollar	0.488200
Norway	Krone	0.135410
Philippines	Peso	N/A
Portugal	Escudo	0.006800
Rep. So. Africa	Rand	0.446000
Singapore	Dollar	0.460405
Spain	Peseta	0.007508
Sri Lanka	Rupee	0.035264
Sweden	Krona	0.144781
Switzerland	Franc	0.609570

Thailand	Baht (tical)	0.038300
United Kingdom	Pound	1.444000
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-181)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of Exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

September 1, 1986: Holiday.

Greece drachma:	
September 2, 1986	$.007471
September 3, 1986	.007479
September 4, 1986	.007479
September 5, 1986	.007407
Israel shekel:	
September 2-5, 1986	N/A
South Korea won:	
September 2-5, 1986	.001132
Taiwan N.T. dollar:	
September 2, 1986	.027034
September 3, 1986	.027042
September 4, 1986	.027049
September 5, 1986	.027056

(LIQ-03-01 S:COM CIE)

Dated: September 5, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–182)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of Exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
September 8, 1986	$.007394
September 9, 1986	.007364
September 10, 1986	.007364
September 11, 1986	.007286
September 12, 1986	.007348
Israel shekel:	
September 8–12, 1986	N/A
South Korea won:	
September 8–10, 1986	.001131
September 11–12, 1986	.001132
Taiwan N.T. dollar:	
September 8, 1986	.027071
September 9, 1986	.027078
September 10, 1986	.027086
September 11, 1986	.027093
September 12, 1986	.027100

(LIQ–03–01 S:COM CIE)

Dated: September 12, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–183)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of Exchange, based on these buying rates, are published for the information and use of Customs officers and others con-

cerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
September 15, 1986	$.007386
September 16, 1986	.007383
September 17, 1986	.007429
September 18, 1986	.007547
September 19, 1986	.007530
Israel shekel:	
September 15–19, 1986	N/A
South Korea won:	
September 15, 1986	.001132
September 16–17, 1986	.001133
September 18–19, 1986	.001132
Taiwan N.T. dollar:	
September 15, 1986	.027115
September 16, 1986	.027122
September 17, 1986	.027130
September 18, 1986	N/A
September 19, 1986	.027137

(LIQ–03–01 S:COM CIE)

Dated: September 19, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–184)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of Exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
September 22, 1986	$.007407
September 23,1986	.007337
September 24,1986	.007348
September 25,1986	.007396
September 26,1986	.007337
Israel shekel:	
September 22–26, 1986	N/A
South Korea won:	
September 22, 1986	.001134
September 23, 1986	.001133
September 24, 1986	.001132
September 25–26, 1986	.001133
Taiwan N.T. dollar:	
September 22, 1986	.027144
September 23, 1986	.027159
September 24, 1986	.027167
September 25, 1986	.027174
September 26, 1986	N/A

(LIQ–03–01 S:COM CIE)

Dated: September 26, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–185)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of Exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
September 29, 1986	$.007402
September 30, 1986	.007391
Israel shekel:	
September 29–30, 1986	N/A

South Korea won:	
September 29, 1986	.001133
September 30, 1986	.001135
Taiwan N.T. dollar:	
September 29, 1986	N/A
September 30, 1986	.027181

(LIQ-03-01 S:COM CIE)

Dated: September 30, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-186)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

September 1, 1986: Holiday.

Australia dollar:	
September 2, 1986	$.60930
September 3, 1986	.61240
September 4, 1986	.61620
September 5, 1986	.61610
Austria schilling:	
September 2, 1986	.069930
September 3, 1986	.070077
September 4, 1986	.069979
September 5, 1986	.069396
Belgium franc:	
September 2, 1986	.023759
September 3, 1986	.023838
September 4, 1986	.023787
China, P.R. renminbi yuan:	
September 2-5, 1986	.269331

Denmark krone:	
September 2, 1986	129971
September 3, 1986	.130159
September 4, 1986	.130064
Germany deutsche mark:	
September 2, 1986	.492126
September 3, 1986	.493462
September 4, 1986	.492659
September 5, 1986	.488281
Italy lira:	
September 2–4, 1986	.000713
September 5, 1986	.000707
Japan yen:	
September 2, 1986	.006483
September 3, 1986	.006464
September 4, 1986	.006456
Netherland guilder:	
September 2, 1986	.436300
September 3, 1986	.437254
September 4, 1986	.436681
September 5, 1986	.433088
New Zealand dollar:	
September 2, 1986	.48730
September 3, 1986	.48800
September 4, 1986	.48150
September 5, 1986	.47850
Republic of South Africa rand:	
September 3, 1986	.42400
September 4, 1986	.41850
September 5, 1986	.42000
Switzerland franc:	
September 2, 1986	.610128
September 3, 1986	.611247
September 4, 1986	.608643
September 5, 1986	.600781

(LIQ–03–01 S:COM CIE)

Dated: September 5, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–187)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
September 8, 1986	$.61550
September 9, 1986	.61310
September 10, 1986	.60750
September 11, 1986	.61750
September 12, 1986	.61960
Austria schilling:	
September 8, 1986	.068587
September 9, 1986	.068966
September 10, 1986	.069037
September 11, 1986	.069061
September 12, 1986	.068989
China, P.R. renminbi yuan:	
September 8–12, 1986	.269331
Germany deutsche mark:	
September 8, 1986	.482625
September 9, 1986	.485437
September 10, 1986	.484543
September 12, 1986	.485201
Ireland pound:	
September 11, 1986	1.3170
Italy lira:	
September 9, 1986	.000704
September 10, 1986	.000702
September 12, 1986	.000703
Japan yen:	
September 10, 1986	.006460
Netherlands guilder:	
September 9, 1986	.430385
September 10, 1986	.429553
September 12, 1986	.429923

New Zealand Dollar:	
September 8, 1986	.47850
September 9, 1986	.47450
September 10, 1986	.46950
September 11, 1986	.47550
September 12, 1986	.48100
Republic of South Africa rand:	
September 8, 1986	.41750
September 9, 1986	.41750
September 10, 1986	.41950
September 11, 1986	.41700
September 12, 1986	.42200
Switzerland franc:	
September 9, 1986	.597015
September 10, 1986	.597193
September 12, 1986	.598444
United Kingdom pound:	
September 11, 1986	1.4695

(LIQ-03-01 S:COM CIE)

Dated: September 12, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-188)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
September 15, 1986	$.069396
September 16, 1986	.069379
September 17, 1986	.070126
September 18, 1986	.071444
September 19, 1986	.071408

Belgium franc:	
September 17, 1986	.023810
September 18, 1986	.024155
September 19, 1986	.024033
China, P.R. renminbi yuan:	
September 15–19, 1986	.269331
Denmark krone:	
September 17, 1986	.130107
September 18, 1986	.132468
September 19, 1986	.132345
France franc:	
September 18, 1986	.153315
September 19, 1986	.153221
Germany deutsche mark:	
September 15, 1986	.487448
September 16, 1986	.488043
September 17, 1986	.492975
September 18, 1986	.502563
September 19, 1986	.502008
Italy lira:	
September 15–16, 1986	.000707
September 17, 1986	.000714
September 18, 1986	.000726
September 19, 1986	.000725
Japan yen:	
September 17, 1986	.006460
September 18, 1986	.006508
September 19, 1986	.006579
Netherlands guilder:	
September 15, 1986	.431872
September 16, 1986	.432339
September 17, 1986	.436681
September 18, 1986	.444050
September 19, 1986	.444148
New Zealand dollar:	
September 15, 1986	.47750
September 16, 1986	.47680
September 17, 1986	.47550
September 18, 1986	.47400
September 19, 1986	.47350
Republic South Africa rand:	
September 15, 1986	.43000
September 16, 1986	.43550
September 17, 1986	.43600
September 18, 1986	.45350
September 19, 1986	.45250

Spain peseta:	
September 18, 1986	.007637
September 19, 1986	.007605
Switzerland franc:	
September 15, 1986	.603136
September 16, 1986	.603318
September 17, 1986	.609756
September 18, 1986	.620925
September 19, 1986	.623441
United Kingdom pound:	
September 18, 1986	1.4720

(LIQ-03-01 S:COM CIE)

Dated: September 19, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–189)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
September 22, 1986	$.070004
September 23, 1986	.069396
September 24, 1986	.069444
September 25, 1986	.069372
September 26, 1986	.069457
Belgium franc:	
September 22, 1986	.023742
China, P.R. renminbi yuan:	
September 22–24, 1986	.269331
September 25–26, 1986	.268528
Denmark krone:	
September 22, 1986	.130344

Germany deutsche mark:	
September 22, 1986	.492247
September 23, 1986	.487448
September 24, 1986	.488281
September 25–26, 1986	.488759
Italy lira:	
September 22, 1986	.000713
September 23, 1986	.000706
September 24–26, 1986	.000707
Japan yen:	
September 22, 1986	.006510
September 23, 1986	.006466
September 24, 1986	.006470
September 25, 1986	.006470
September 26, 1986	.006479
Netherlands guilder:	
September 22, 1986	.435635
September 23, 1986	.431034
September 24, 1986	.432339
September 25, 1986	.432246
September 26, 1986	.432339
New Zealand dollar:	
September 22, 1986	.47450
September 23, 1986	.48100
September 24, 1986	.48050
September 25, 1986	.47820
September 26, 1986	.48400
Republic South Africa rand:	
September 22, 1986	.44850
September 23, 1986	.44500
September 24, 1986	.44650
September 25, 1986	.44400
September 26, 1986	.44700
Switzerland franc:	
September 22, 1986	.610128
September 23, 1986	.602047
September 24, 1986	.603136
September 25, 1986	.602773
September 26, 1986	.602047
United Kingdom pound:	
September 22, 1986	1.4560
September 23, 1986	1.4487
September 24, 1986	1.4465
September 25, 1986	1.4345
September 26, 1986	1.4365

(LIQ-03-01 S:COM CIE)

Dated: September 26, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-190)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
September 29, 1986	$.070175
September 30, 1986	.070077
Belgium franc:	
September 29, 1986	.023804
September 30, 1986	.023776
China, P.R. renminbi yuan:	
September 29-30, 1986	.268528
Denmark krone:	
September 29, 1986	.130617
September 30, 1986	.130531
Germany deutsche mark:	
September 29, 1986	.493705
September 30, 1986	.493291
Italy lira:	
September 29, 1986	.000714
September 30, 1986	.000713
Japan yen:	
September 29, 1986	.006508
September 30, 1986	.006479
Netherlands guilder:	
September 29, 1986	.436967
September 30, 1986	.436681
New Zealand dollar:	
September 29, 1986	.49150
September 30, 1986	.48820

Republic South Africa rand:	
September 29, 1986	.45100
September 30, 1986	.44850
Switzerland Franc:	
September 29, 1986	.609385
September 30, 1986	.607165
United Kingdom Pound	
September 29, 1986	1.4330
September 30, 1986	1.4468

(LIQ-03-01 S:COM CIE)

Dated: September 30, 1986

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notice

REMOVAL OF PROHIBITION ON IMPORTATION OF TUNA AND TUNA PRODUCTS FROM COSTA RICA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of removal of prohibition.

SUMMARY: This notice is to advise that under the Fishery Conservation and Management Act of 1976 (the "Act"), the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs has notified the Secretary of the Treasury that the reasons for the imposition of a prohibition on the importation of tuna and tuna products from Costa Rica no longer prevail. Accordingly, the prohibition against the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Costa Rica is removed.

EFFECTIVE DATE: October 10, 1986.

FOR FURTHER INFORMATION CONTACT: Harrison C. Feese, Commercial Compliance Division, (202–566–5307).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 205(a)(4)(C) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801, *et seq.*), provides that the Secretary of State shall certify to the Secretary of the Treasury any determination that a fishing vessel of the U.S., while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the U.S., has been seized by a foreign nation as a consequence of a claim of jurisdiction not recognized by the U.S. The responsibility for this certification was delegated to the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs by Department of State Delegation of Authority No. 138 of April 29, 1977.

Pursuant to § 205(b) of the Act, upon receiving the certification, the Secretary of the Treasury is required to take such action as may be necessary and appropriate to prohibit the importation of all fish and fish products from the fishery involved.

Section 205(c) of the Act provides that if the Secretary of State finds that the reasons for the import prohibition no longer prevail, the Secretary of State shall notify the Secretary of the Treasury, who shall promptly remove the import prohibition.

On April 24, 1986, a notice was published in the Federal Register (51 FR 15571), advising that under § 205(a)(4)(C) of the Act, on March 10, 1986, the Secretary of State certified to the Secretary of the Treasury that a U.S. fishing vessel, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the U.S., was seized by Costa Rica as a consequence of a claim of jurisdiction which is not recognized by the U.S. Under the authority of § 205(b) and (c) of the Act, the Secretary of the Treasury determined that the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Costa Rica was prohibited until the Department of State notified the Secretary of the Treasury that the reasons for this prohibition no longer prevailed.

On August 29, 1986, the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs informed the Secretary of the Treasury that the reasons for the imposition of the import prohibition on tuna and tuna products from Costa Rica no longer prevail. Accordingly, the prohibition against the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Costa Rica is removed.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings. However, personnel from other offices participated in its development.

Dated: September 26, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 10, 1986 (51 FR 36504)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85–2451)

JOHN DEPAUW, PETITIONER *v.* U.S. INTERNATIONAL TRADE COMMISSION, RESPONDENT

Peter B. Broida, Passman & Broida, of Washington, D.C., argued for petitioner. *Charles H. Nalls*, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for respondent. With him on the brief were *Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

Appealed from: U.S. International Trade Commission

(Appeal No. 85–2451)

JOHN DEPAUW, PETITIONER, *v.* U.S. INTERNATIONAL TRADE COMMISSION, RESPONDENT

(Decided January 30, 1986)

Before DAVIS, BALDWIN and NIES, *Circuit Judges*.

DAVIS, *Circuit Judge*.

Petitioner John DePauw contends that his removal for unacceptable performance by respondent U.S. International Trade Commission (ITC or agency) was grounded in inadequate performance standards, and unsupported by either the evidence before the arbitrator (who upheld the agency's action) or by the arbitrator's own decision. We affirm.

I

Mr. DePauw was employed in 1970 by the then Tariff Commission (later, the ITC) as a commodity-industry analyst, grade GS–11. After three months he was promoted to GS–12, and the agency considered his performance satisfactory through September 1981. Thereafter, the ITC believed that the quality of his work was declining. For the appraisal period October 1, 1981 – June 30, 1982, his performance was rated "minimally acceptable." In November 1982, he received an interim rating of "unacceptable" and he was given 90 days to improve. Petitioner's supervisor continued to be dissatisfied with his work, but an upper-level supervisor gave him another

opportunity to improve by helping him obtain a reassignment to another division in the ITC's Office of Industries. DePauw agreed to accept a downgrading to grade GS–11.[1]

Some ten months after the reassignment, petitioner's new immediate supervisor issued him (in February 1984) an interim appraisal of "unacceptable." He was given 60 days to improve—a period later extended to 91 days. On May 22, 1984 petitioner went on sick leave and never returned to duty. Toward the end of July 1984, the ITC proposed to remove him for unacceptable performance during the improvement period. His removal was made effective November 9, 1984.

DePauw requested arbitration (in lieu of appealing to the Merit Systems Protection Board). After a hearing, the arbitrator denied the grievance. This appeal followed.[2]

II

Petitioner challenges the objectivity and propriety of the performance standards he was found not to have met. We have recently delved into the general subject of proper performance standards in *Wilson* v. *Department of Health and Human Services* and *Jackson* v. *Environmental Protection Agency*, 770 F.2d 1048 (Fed. Cir. 1985). Under that decision, the standards here involved—as they were applied to this petitioner—pass muster (though perhaps not with flying colors). First, those standards[3] were close parallels to those applicable in *Jackson's* case (*see* 770 F.2d at 1055), similarly governing the work of a professional employee who had to expect to be treated as a professional and whose work necessarily called for some subjective evaluation. The standards here, like those in *Jackson*, "are sufficiently objective and precise in the sense that most [professional] people will understand what they mean and what they require * * *." 770 F.2d at 1055. Second, just as in *Jackson's* case, 770 F.2d at 1056, DePauw's superiors filled him in, in detail, as to exactly what was demanded of him. His immediate supervisor after reassignment (Ms. Hagelin) gave him (in her interim appraisal of February 1984) very specific criticisms and a list of what was expected from him. She told him that she would be available, at any time during his improvement period, to discuss problems with him and

[1] In this position, DePauw was responsible for identifying, developing and maintaining data on assigned products and for interpreting trade data from the standpoint of comparability, classification and competitive factors.

[2] The arbitrator is to apply the same substantive rules that the Merit Systems Protection Board (MSPB) would apply. *Cornelius* v. *Nutt*, 53 U.S.L.W. 4837, 4840 (U.S. June 25, 1985). Accordingly, we gauge his decision by the same standards as if the case came here from the MSPB.

[3] One standard provided:

> Usually identifies and anticipates problems and takes corrective action; usually meets requirements for questionnaire construction and data collection to support project; meets all statutory deadlines and usually meets other deadlines; reports are substantially complete with few errors, and require few extensive changes due to omissions or lack of analysis.

Another stated:

> Usually understands most facets of producing a commodity and usually understands economic and market factors operating within a commodity sector; with few major exceptions, non-investigative reports, Summaries of Trade and Tariff Information, trade information monitoring system, correspondence and other output reflect up-to-date data (changing conditions in assigned commodities especially concerning technology, uses, volume of imports and exports, volume of production, and tariff treatment and history) and address economic, trade and tariff issues; output requires few extensive changes in data or content.

urged him to work closely with her. During that improvement period, both his first and second level supervisors worked with him. With the help of his supervisors' criticism and with the further opportunity to consult with them, petitioner should have known his obligations. The performance standards thus met the statutory criteria.[4]

III

Another assault on the decision below is that there was no substantial evidence sustaining petitioner's failure to meet the performance standards.[5] In support of the charges, the ITC submitted to the arbitrator (a) documentary evidence consisting of Ms. Hagelin's detailed and specific interim appraisal of petitioner's work (in February 1984) as well as the detailed removal charges found as true by ITC, and (b) oral testimony of Mr. Trezevant (petitioner's upper-level supervisor who was thoroughly familiar with DePauw's case)[6] summarizing with specific examples the low-level of petitioner's work.[7] This combination was enough to make a prima facie case (*Schapansky* v. *Department of Transportation*, 735 F.2d 477, 482 (Fed. Cir. 1984)), which DePauw did not even seek to rebut by introducing any evidence to the contrary. In the absence of any rebuttal, the arbitrator could and did accept the ITC's case as sufficient proof. *See Hale* v. *Department of Transportation*, 772 F.2d 882, 885–86 (Fed. Cir. 1985).

DePauw seeks to have us reject the detailed agency charges (accepted by ITC as true) as forming any part of management's valid proof, but there is no reason why the arbitrator must refuse to accept such specific documentary materials[8] which, in this instance, were strongly supported by Ms. Hagelin's interim appraisal and by Trezevant's oral testimony. Nor was it necessary that the ITC produce petitioner's own materials for *de novo* evaluation by the arbitrator. The arbitrator could base his determination on the "overwhelming evidence" (as the arbitrator put it) proffered by ITC. As the arbitrator said:

> The evidence offered as to the [petitioner's] work record subsequent to his transfer to the General Manufacturers Division established that he had displayed a consistently unacceptable level of performance in two of the four critical elements of his position. The documentation offered in support of those performance standards shows that his work was replete with errors and numerous deficiencies.

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[4] We repeat in this case the caution set forth in Part II of *Weirauch* v. *Department of the Army*, Fed. Cir. No. 85-2290, also decided this day.

[5] Unacceptable performance is "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." *Loushin* v. *Department of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985), quoting 5 U.S.C. § 4301(3).

[6] The arbitrator pointed out that Trezevant headed a division with only 17 employees, that he was in close touch with the work of his division, that he was fully prepared to testify in depth about petitioner's work record, and that he was subject to able and searching cross-examination.

[7] Ms. Hagelin, the first-level supervisor, was not available at the time of the arbitrator's hearing.

[8] The letter of charges was not merely conclusory but set forth in great factual detail petitioner's errors and deficiencies; the specifications were so specific that they could be disputed by petitioner, if he desired to do so.

IV

The last of petitioner's complaints is that the arbitrator did not adequately discuss DePauw's actual performance in the light of the elements of the performance standards he was held to have failed to meet. Although the arbitrator's decision might have been fuller on this precise point, we are satisfied from his entire decision that he canvassed the full record, was aware of the requirements of the performance standards, and understood and accepted the agency's strong proof of petitioner's specific deficiencies. DePauw's failure to present rebuttal evidence as those matters made it acceptable for the arbitrator to be as general as he was in his treatment of the uncontradicted ITC evidence.

The decision of the arbitrator is *affirmed*.[9]

[9] Petitioner does not raise before us any claim as to his asserted handicapped condition or as to an alleged conspiracy against him by his supervisors.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–94)

COASTAL STATES MARKETING, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–10–01632

Before CARMAN, *Judge*.

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted.]

(Decided, September 18, 1986)

Freeman, Wasserman & Schneider (Bernard J. Babb on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Field Office, (*Judith M. Barzilay* on the motion) for the defendant.

CARMAN, *Judge:* The issue in this case is the country of exportation of three entries of plaintiff's imported product, a mixture of gas oil from the Soviet Union and fuel oil from Italy. Plaintiff has moved for summary judgment, with defendant cross-moving for summary judgment. The Court determines that there are no genuine issues of material fact regarding whether the imported mixture is a new and different product and grants the defendant's cross-motion for summary judgment.

FACTS

The parties' briefs and stipulation of facts reveal the following:

In January 1972 the M/T Tichi oil tanker took on approximately 12,341,419 metric tons of No. 2 gas oil at the port of Tuapse in the Union of the Soviet Socialist Republic. The gas oil was distributed among 25 of the vessel's 27 storage tanks. The vessel then proceeded to the Port of Milazzo in Italy, where approximately 12,117,839 metric tons of fuel oil having physical properties resembling No. 5 fuel oil were loaded into the same 25 tanks which contained the No. 2 gas oil from the Soviet Union and the oils were mechanically mixed. Shortly after the M/T Tichi was loaded in Italy, the vessel sailed for New York and arrived in port on approximately February 23,

1972, where the merchandise was unloaded and entered for consumption into the United States.

On March 2 and 9, 1979, the United States Customs Service (Customs) liquidated the subject entries, classifying the oil mixture under item 475.10, Tariff Schedules of the United States (TSUS), as residual fuel oil. Treating the product as commingled articles under General Headnote 7, TSUS,[1] however, Customs assessed duties on the oil of Soviet origin separately from that of Italian origin as required by General Headnotes 3(e) and 3(f) of the General Headnotes and Rules of Interpretation, TSUS.[2] Approximately 50.5 percent of the oil mixture, representing the amount loaded on the M/T Tichi in the Soviet Union, was assessed the duty rate of 0.5 cents per gallon applicable under Column 2 of the TSUS to products of Communist countries, while the remaining oil was assessed 0.25 cents per gallon, the rate of duty applicable under Column 1 to products of all other countries. Documentation provided by plaintiff enabled Customs to determine the precise amounts of oil originating from the two countries and accordingly assess duties at the different rates.

While the M/T Tichi was at the Port of Milazzo, Sayboltvan Duyn N.V., an independent marine bulk oil surveyor, took and analyzed a sample of the Russian No. 2 gas oil already loaded on the vessel, a sample of the Italian No. 5 fuel oil loaded into the vessel's tanks, and a sample of the resulting mixture after the No. 5 fuel oil was loaded. The results of the analyses were provided to the Court as attachments to the affidavit of Francis V. Elias, submitted as part of plaintiff's motion for summary judgment.

In addition to the above facts, the parties have also stipulated that the American Society for Testing and Materials (ASTM) is a scientific and technical organization whose purpose is the development of standards on characteristics and performance of materials, products, systems an services. The parties agree that ASTM publishes standards containing, among other things, formally approved ASTM standard classifications, guides, practices, specifications, test

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[1] General Headnote 7(a), TSUS, provides:

7. Commingling of articles.

(a) Whenever articles subject to different rates of duty are so packed together or mingled that the quantity or value of each class of articles cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by one or more of the following means—

(i) sampling,
(ii) verification of packing lists or other documents filed at the time of entry, or
(iii) evidence showing performance of commercial settlement tests generally accepted in the trade and filed in such time and manner as may be prescribed by regulations of the Secretary of the Treasury,

The commingled articles shall be subject to the highest rate of duty applicable to any part thereof unless the consignee or his agent segregates the articles pursuant to subdivision (b) hereof.

[2] General Headnote 3(e) of the General Headnotes and Rules of Interpretation, TSUS, provides as follows:

(e) *Products of Communist Countries.* Notwithstanding any of the foregoing provisions of this headnote, the rates of duty shown in column numbered 2 shall apply to products, whether imported directly or indirectly, of the following countries and areas pursuant to section 401 of the Tariff Classification Act of 1962, to section 231 or 257(e)(2) of the Trade Expansion Act of 1962, or to action taken by the President thereunder:

. . . .

Union of Soviet Socialist Republics and the area in East Prussia under the provisional administration of the Union of Soviet Socialist Republics.

General Headnote 3(f) of the General Headnotes and Rules of Interpretation, TSUS, provides as follows:

(f) *Products of All Other Countries.* Products of all countries not previously mentioned in this headnote imported into the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedules.

methods, and terminology, and that ASTM standards have been referred to, relied upon, and applied as authoritative guidelines by the Customs Service and the courts in resolving questions of classification, where appropriate and relevant statutory requirements have permitted. *See*, for example, T.D. 66–23(13), 101 Treas. Dec. 94 (1966); P.R.D. 73–19, 7 Cust. Bull. 954 (1973); *United States* v. *Exxon Corporation, Chevron Oil Co.*, 66 CCPA 129, C.A.D. 1233, 607 F.2d 985 (1979); *J.D. Smith Interocean, Inc.* v. *United States*, 79 Cust. Ct. 99, C.D. 4719 (1977). The Court will therefore rely upon standards published by the ASTM in discussing the issues and will as well take judicial notice of other authoritative references. *See Van Gelder-Fanto Corp.* v. *United States*, *41 CCPA 90, C.A.D. 534 (1953).*

DISCUSSION

The issue of substantial transformation arises in a variety of contexts within the administration of the customs laws. *See, e.g., National Juice Products Assn.* v. *United States*, 10 CIT ——, 628 F. Supp. 978 (1986) (country of origin marking requirements); *Torrington Co.* v. *United States*, 764 F.2d 1563 (Fed. Cir. 1985), *aff'g* 8 CIT 150 (1985) (country of production for GSP treatment); *United States* v. *International Paint Co.*, 35 CCPA 87, C.A.D. 376 (1948) (country of manufacture or production for drawback purposes); and *Belcrest Linens* v. *United States*, 741 F.2d 1368 (Fed. Cir. 1984), *aff'g* 6 CIT 204 (1983) 573 F. Supp. 1149 (country of exportation for purposes of Headnote 3(e), TSUS; duty applicable to products of Communist countries). Tests applied by the court in determining whether a product has been "substantially transformed" in the course of its progression through intermediate countries such that the country of origin for customs purposes is affected are not necessarily identical within the various contexts. *See, Belcrest Linens*, 6 CIT at 208–10, 573 F. Supp. at 1152–54; *National Juice Products*, 10 CIT at ——, 628 F. Supp. at 988–89, n. 14.

Further, the rule applicable when determining the country of exportation in cases involving merchandise from Communist countries is more stringent than that when determining the country or exportation generally. *See*, Sturm, *Customs Law & Administration, § 41.9 (3rd ed. 1986); United States* v. *Hercules Antiques, The Danville Co.*, 44 CCPA 209, C.A.D. 662 (1957). So although the Court may consider the "substantial transformation test" as it has evolved under various statutes, only those decisions dealing with the determination of the country of exportation under Headnotes 3(e) are controlling. The courts, realizing the importance of focusing on the facts of each case, have refrained from setting out specific definitions in this area of the law. *Belcrest Linens* v. *United States*, 741 F.2d at 1372. Nevertheless, inquiries into whether an imported article is the "product of" a Communist country have appropriately centered upon changes in the character, appearance, identity or use of merchandise as a result of processes performed in intermediary

countries. *See, e.g., id.* at 1371 (affirming lower court's application of this test).[3]

Regardless of the specific formulation of the rule applicable in this case, plaintiff contends its imported fuel oil was a new and different product created in Italy by mixing the Russian No. 2 gas oil with the Italian No. 5 fuel oil. Plaintiff concludes the Russian oil was substantially transformed in Italy and Italy is the country of exportation for duty assessment purposes.

The factual basis of the plaintiff's argument is that the mixing of the oils resulted in a fuel oil having qualities different from those of the original Russian gas oil. It was determined the blended oil had a specific gravity of 0.8678, while that of the Russian oil was 0.8310; the sulphur content of the blend was 0.33, while that of the Russian oil was 0.19; the flashpoint of the blend was 73°C., while that of the Russian oil was 68°C.; and the pourpoint of the blend ws 25°C., while that of the Russian oil was –10°C. In addition, the kinematic viscosity of the blended oil at 100°F. was 72. As confirmed by the parties' stipulation, these qualities place the oil blend in the category of Grade No. 5 (heavy) or No. 6 fuel oil, well beyond the requirements for Grade No. 2 oil, which the Russian gas oil satisfied. *See, 1985 Annual Book of ASTM Standards, Petroleum Products, Lubricant and Fossil Fuel, Volume 5.01. Petroleum Products and Lubricants* 207 (Table 1, Detailed Requirements for Fuel Oil) [hereinafter cited as *ASTM Standards*].

Plaintiff also makes something of the No. 2 oil being referred to as "gas oil," *see* G. G. Hawley, *The Condensed Chemical Dictionary*, 481, 491 (10th ed. 1981), while admitting gas oil falls within the broad category of fuel oil. *See* McGraw Hill, *Dictionary of Scientific and Technical Terms* 66 (3rd ed. 1984). According to the ASTM, the Grade No. 2 gas oil is a petroleum distillate, as distinguished from residual petroleum products comprising the heavier fuel oils. *See ASTM Standards* 209 (Significance of ASTM Specification for Fuel Oils).

Finally, plaintiff points out that the uses of Grade No. 2 gas oil differ from those of Grades No. 5 and No. 6. Grade No. 2 "is intended for use in atomizing type burners which spray the oil into a combustion chamber where the tiny droplets burn while in suspension." *Id.* Grade No. 6 fuel oil, on the other hand, is used mostly for commercial and industrial heating. Its disadvantage is that it is more difficult to handle, requiring preheating in the storage tank to permit pumping, additional preheating at the burner to permit atomizing, and additional devices capable of atomizing oils of a higher viscosity than the oil usual residential burners are capable of atomizing. The advantage of the heavier residual oil is lesser cost. *Id.*

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[3] The Court of Appeals for the Federal Circuit noted the difficulty in perceiving how this test differs from the "substantial transformation test" used in other contexts. *Belcrest Linens*, 741 F.2d at 1372. This test, nevertheless, has its own lineage and incorporates case law interpreting Section 5 of the Trade Agreement Extension Act of 1951 and Presidential Proclamation 2808 implementing the Act. *Id.* at 1371; *see, also, United States v. Hercules Antiques, The Dansvill Co.*, 44 C.C.P.A. 209 (1957).

Defendant counters by arguing simply that the imported fuel oil consisted of two products—one of the Soviet Union and one of Italy—which were mingled together prior to importation into the United States. As commingled merchandise, contends defendant, Customs properly subjected the importation to General Headnote 7(a), TSUS, which requires that

> [t]he commingled articles shall be subject to the highest rate of duty applicable to any part thereof unless the consignee or his agent segregates the articles * * *

Because of available documentation establishing the exact quantities of oil loaded in the respective countries, Customs was able to impose the applicable rate of duty to each portion of the commingled merchandise.

In *United States Industrial Chemicals, Inc.* v. *United States*, 29 Cust. Ct. 131, C.D. 1458 (1952), *appeal dismissed*, 41 CCPA 200, C.A.D. 551 (1954), the court concluded that such method of duty assessment was proper. In *Industrial Chemicals*, molasses from the Dominican Republic had been mixed together with molasses from Cuba in the tanks of the importing vessel. Because of available documentation and an acceptable method of testing for determining the quantity and value of the constituent parts, the court held that the molasses from Cuba was dutiable at a lower rate pursuant to a trade agreement between Cuba and the United States.

The distinction in the present case, argues plaintiff, is that the mixing of the two products created a new product distinct from the original Russian gas oil and that two products were not merely commingled.

As the parties have submitted a stipulation of fact, and the Court is able to view any additional material facts in the light most favorable to plaintiff, *see United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), the Court is satisfied that summary disposition of the legal issues in favor of defendant is appropriate. *See Lusson* v. *Carter*, 704 F.2d 646, 649–50 (1st Cir. 1983). The Court concludes that the stipulated facts and the additional factual information submitted by plaintiff in the form of affidavits fail to prove, as a matter of law, that there was such a change in the appearance, character, identity or use of the Russian oil to warrant the conclusion that the imported blend was solely a product of Italy. Despite the differences in the products and the qualification of the Russian oil as a grade different from the blend, the essential character of the Russian component as a fuel oil used primarily for heating remained unchanged.

Plaintiff does not claim there was any processing done to the product in Italy other than simple mixing of the two oils, or that the value of the Russian oil was thereby enhanced. *Compare, National Juice Products*, 10 CIT at ——, 628 F. Supp. at 990–91, (total of domestic manufacturing contributing at most 6.68 to 7.57 percent to value of end product found not significant).

The Russian product and the Italian product were both classified as distillate and residual fuel oils (including blended fuel oils) under item 475.10, TSUS, and there is no indication the blend would have not been properly classified as such.[4] But although a change in tariff classification is certainly not controlling, *Rolland Freres, Inc.* v. *United States*, 23 CCPA 81, 89, T.D. 47763 (1935), the Court finds that the *same* classification treatment of the products involved in this case is some indication that the imported blend was not a new and different product. The imported components are each simply variant grade of the same product identified as fuel oil, with the resulting blend also identified as fuel oil.

It is also not determinative that the Russian No. 2 oil can also be referred to as "gas oil." First, "a change in the name of the product is the weakest evidence of a substantial transformation." *National Juice Products Assn.*, 10 CIT at ——, 628 F. Supp. at 989. Second, as already noted, gas oil is a specific type of fuel oil, but is not used for a substantially different purpose. *Supra*, p. 9. According to ASTM specifications and terminology, all of the oils involved in this case are intended for use in atomizing type burners, although the heavier, high viscosity fuel oil requires extra equipment for the atomization of the oil. *See ASTM Standards* 209. Again, the component products as well as the blend are variant grades of the same product and are intended for essentially the same uses.

CONCLUSION

Because plaintiff has failed to allege or point to facts showing the character, identity or use of its imported blended fuel oil was substantially different from that component of the blend of Soviet origin, the defendant's cross-motion for summary judgment must be granted. Customs properly applied headnote 7(a) for commingled merchandise to the oil mixture in question, segregating the components of the blend pursuant to available documentation, and assessed duty on the oil loaded in the Soviet Union as "a product of" the Soviet Union.

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[4] Schedule 4, Part 10 (TSUSA 1972) provides:

	Rates of Duty	
	1	2
Crude petroleum (including reconstituted crude petroleum); topped crude petroleum; crude shale oil; and distillate and residual fuel oils (including blended fuel oils) derived from petroleum, shale, or both, with or without additives:		
. . .		
475.10 Testing 25 degrees A.P.I. or more	0.25c per gal.	0.5c per gal.

(Slip Op. 86–95)

CARTER FOOTWEAR, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–6–00796

Before TSOUCALAS, *Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff challenges the refusal by Customs to afford duty allowance under item 807.00, TSUS, for vamps returned to the United States with plastic toe reinforcement.

Held: There are material issues of fact as to the application of the plastic material and, therefore, summary judgment is not warranted.

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment denied.]

(Decided September 19, 1986)

Siegel, Mandell and Davidson, P.C. (Stephen M. Zelman), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice *(Susan Handler-Menahem),* for the defendant.

TSOUCALAS, *Judge:* Plaintiff brings this action challenging the refusal of the Customs Service to allow duty free treatment under item 807.00, TSUS, for certain parts of shoe uppers. The imported merchandise includes textile vamps, precut in the United States and exported to the Dominican Republic for assembly, where a layer of plastic was applied to the vamp. Customs classified the merchandise under item 386.50, TSUS, and liquidated the merchandise at 10.5 percent *ad valorem.* Plaintiff contests this classification alleging that the vamps qualify as American goods returned and are entitled to be entered duty free under item 807.00, TSUS. Defendant argues that the vamps are further fabricated by the application of this plastic and thus, this is not an assembly process or one incidental to assembly.

Pursuant to USCIT R. 56 plaintiff has moved for summary judgment. Defendant opposes that motion claiming that there are genuine material issues of fact in dispute but also cross moves for summary judgment.

BACKGROUND

Plaintiff manufactures footwear containing fabric uppers and thermoplastic soles. The vamps comprise the front portion of the footwear. The vamp is precut in the United States and shipped to the Dominican Republic with other textile components as well as the bindings, threads, eyelets, and plastic material to create the complete shoe uppers. At the plaintiff's plant in the Dominican Republic, plastic material is heated by machine until it reaches a molten state. A layer of this plastic formed in a halfmoon shape is deposited on the vamp. The purpose is to form a reinforced plastic toe box area. The vamp is then assembled by the attachment of eyelets,

thread, and bindings, and is then sewn to other textile components. The complete shoe uppers were then imported back to the United States. Defendant denies that this reinforcement process is commonly utilized in the industry in assembling footwear uppers and denies that it is regarded as an assembly process in that industry.

The initial question presented to this court is whether the application of the plastic to the textile vamp is an assembly of solids and not a further fabrication. If this process is not an assembly, then the second inquiry is whether the application of the plastic is incidental to the assembly of the shoe uppers.

Plaintiff claims that the vamp, of United States origin, is a fully fabricated component in its condition as exported. It is plaintiff's position that the application of the plastic is an assembly of solids within the purview of item 807.00 because the thermoplastic is applied in a controlled operation set down in a uniform shape and thickness. It is argued that this is not a further fabrication because the plastic quickly solidifies.

Defendant claims that this process merely coats the vamp with the plastic which actually becomes intermixed with the textile thereby advancing the condition of the vamp. Further, defendant raises several issues apparently not sufficiently addressed by plaintiff as to the cost, time and labor involved in the process: whether the material is applied in uniform thickness; whether there was an intermixing of the liquid and textile fabric; and, questions the necessity of this operation.

DISCUSSION

On a motion for summary judgment the court cannot try issues of fact, *Yamaha International Corp.* v. *United States*, 3 CIT 108, 109 (1982), the court merely determines the existence or nonexistence of any factual dispute material to resolution of the action. *Bushie* v. *Stenocord Corp.*, 460 F.2d 116, 118–119 (9th Cir. 1972); *Standard Commodities Import and Export Corp.* v. *United States*, 9 CIT ——, Slip Op. 85–124 at 4 (Dec. 5, 1985). All ambiguities should be resolved and all reasonable inferences should be drawn in favor of the party opposing summary judgment. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *S.S. Kresge Co.* v. *United States*, 77 Cust. Ct. 154, 157, C.R.D. 76–6 (1976). If the party opposing summary judgment raises any triable issues of fact then he is not forced to rely on the affidavits submitted with his opposing motion; rather, he has the right to present live expert testimony and cross examine the opponent's witnesses. *United States* v. *J.B. Williams Company, Inc.*, 498 F.2d 414, 430, n. 19 (2d Cir. 1974); *S.S. Kresge Co.* v. *United States*, 77 Cust. Ct. at 157. Based on the pleadings and affidavits submitted, this Court must agree with the defendant that material issues of fact are in dispute and therefore summary judgment is not appropriate.

Item 807.00 exempts from duty the cost or value of certain American goods returned, as provided:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting * * *.
>
> A duty upon the full value of the imported article, less the cost or value of such products of the United States (see headnote 3 of this subpart)

It is well established that the term assembly in item 807.00 contemplates the joinder of solids. *United States* v. *Baylis Bros. Co.*, 59 CCPA 9, 11, C.A.D. 1026, 451 F.2d 643, 645 (1971), *E. Dillingham, Inc.* v. *United States*, 60 CCPA 39, 43, C.A.D. 1078, 470 F.2d 629, 633 (1972). A material may initially be a liquid and be transformed into a solid, enabling it to be assembled with another component. *Sigma Instruments, Inc.* v. *United States*, 5 CIT 90, 565 F. Supp. 1036 (1983), aff'd. 724 F.2d 930 (Fed. Cir. 1983). However, there must be no intermixing of the components. *C.J. Tower & Sons of Buffalo, Inc.* v. *United States*, 62 Cust. Ct. 643, 646, C.D. 3840, 304 F. Supp. 1187, 1189 (1969).

Defendant's affiant, George Walter, Assistant Laboratory Director at Customs in New York, states that, unlike *Tower*, the plastic has become intermixed with the textile fibers. Apparent is a question of fact as to whether the machine actually produces a layer of plastic of uniform thickness. In the context of this case it is decisive whether the plastic is not of uniform thickness because it has intermixed with the textile vamp.

Furthermore, there are questions of fact as to whether this operation was a further fabrication of the textile fabric or was incidental to the assembly process, based on the criteria set forth in *Rudolph Miles* v. *United States*, 65 CCPA 32, 36, C.A.D. 1202, 567 F.2d 979, 982 (1978), and *Mast Industries, Inc.* v. *United States*, 1 CIT 188, 515 F. Supp. 43 (1981), *aff'd.* 69 CCPA 47, 668 F.2d 501 (1981). There are issues in dispute as to: the cost of the plastic application relative to the cost of the vamp; the time required to apply the toe reinforcement relative to the time required to assemble the complete upper; the necessity of reinforcing the toe area; and, how closely related this procedure was to the assembly of the entire footwear upper.

CONCLUSION

In light of the above, this Court has concluded that summary judgment cannot be granted since there are genuine issues of mate-

rial facts to be determined. Therefore, both plaintiff's motion and defendant's motion are denied.

(Slip Op. 86–96)

EASTALCO ALUMINUM CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–1–00095

(Decided September 23, 1986)

John M. Peterson and *Donohue and Donohue (Joseph F. Donohue* and *John M. Peterson* at the trial; *John M. Peterson* on reply brief), for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, *Kenneth N. Wolf,* Civil Division, United States Department of Justice, for defendant.

OPINION AND ORDER

RESTANI, *Judge:* The issue in this case is the proper classification for tariff purposes of certain carbon block, exported from France and entered at the port of Baltimore, Maryland, in 1981. The United States Customs Service (Customs) classified the merchandise as "[e]lectrodes in part of carbon or graphite, for electric furnace or electrolytic purposes" under item 517.61 of the Tariff Schedules of the United States (TSUS). Plaintiff, Eastalco Aluminum Company, claims the merchandise should be classified as refractory brick under item 531.27, TSUS. The government counterclaimed for classification under item 517.91, TSUS, "[a]rticles not specifically provided for, of carbon or graphite," and made an alternate claim for classification under item 535.14, TSUS, as "ceramic electrical ware * * * Other."

The merchandise in question is carbon block, used to construct the side and bottom lining of Hall-Heroult aluminum reduction cells at plaintiff's plant.[1] Testimony at trial indicated that the block is designed to withstand extreme stress, heat, and corrosion during the production of aluminum. Witnesses also established that for a period of twelve to twenty-four hours during the start-up phase of the cell, the carbon bottom block acts as a cathode.[2] Cathodic action is necessary for proper start-up and to ensure the longevity of the cell. After the start-up phase and after molten aluminum is added, a molten aluminum pad becomes the cathode. For the duration of

[1] The Hall-Heroult process produces aluminum metal by electrolysis of the fused salt aluminum oxide (Al_2O_3), also called alumina, in cells containing a molten electrolyte bath whose primary component is cryolite. Electric current passes through the cell, causing the aluminum ions to separate from the oxygen ions. The oxygen ions migrate to the anode (positive electrode) at the top of the cell and the aluminum ions migrate to the cathode (negative electrode) at the bottom of the cell. When the aluminum ions reach the cathode, they pick up additional electrons and are deposited as elemental aluminum metal.

[2] There is an earlier preheating stage, but it involves no electrolytic bath. Consequently, the carbon block does not act as an electrode during that phase.

the life of the cell, approximately 1500 days, the carbon bottom block continues to function in its refractory capacity.[3]

I. The Merchandise May Not Be Classified As Electrodes

The parties agree that the carbon block at issue has refractory characteristics. Item 531.27, plaintiff's claimed classification, is an *eo nomine* provision for refractory brick.[4] Defendant contends, however, that the block's temporary cathodic use during the start-up phase makes classification under item 517.61, apparently a use provision, the more specific classification.[5] The general rule of construction provides that, in the absence of legislative intent to the contrary, "a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision." *United States* v. *Siemens America, Inc.*, 68 CCPA 62, 70, 653 F.2d 471, 478 (1981) (emphasis omitted), *cert. denied*, 454 U.S. 1150 (1982);[6] *Novelty Import Co.* v. *United States*, 55 Cust. Ct. 169, 173–74, C.D. 2570 (1965), *appeal dismissed*, 53 CCPA 155 (1966).

A tariff classification controlled by use is to be determined by the chief use. Rule 10(e)(i) of the General Headnotes and Rules of Interpretation states chief use is "the use which exceeds all others (if any) combined." Case law has interpreted chief use to mean the primary or principal use, not a fugitive use or mere capability of use. *United States* v. *Baltimore & Ohio Railroad Co.*, 47 CCPA 1, 5–7, C.A.D. 719 (1959) (after-dinner size china cups and saucers classified as "ornamental or decorated china" rather than "tableware," based on their chief use for display or decoration).

Inasmuch as defendant classified the block under item 517.61, "electrodes," it follows that in order for defendant's classification to prevail the block's chief use must be as an electrode. The trial record does not support this claim. Given the average cell-life of 1500 days, the carbon bottom block acts as an electrode for only twelve to twenty-four hours, or less than one percent of the cell's life.[7] Chief use is that use which exceeds all others; here that use is as a refractory brick. Therefore, the carbon block cannot be classified under item 517.61 because it fails to meet the test of chief use an a electrode.

Assuming, *arguendo*, that item 517.61 is an *eo nomine* provision, the carbon block remains incorrectly classified. When an item has features or functions other than as described by the statutory provi-

[3] Testimony also established that the carbon corner and side block (hereinafter side block) does not function cathodically except in an incidental manner or under abnormal conditions. Unlike the bottom block, it is not in the normal electrical path, and it only interacts with the electrolytic bath until a ledge of frozen cryolite is formed. The ledge remains in place during normal operation.

[4] "An *eo nomine* provision is one which names a specific product or describes a commodity by a specific name." *Travenol Laboratories, Inc.* v. *United States*, 83 Cust. Ct. 1, 4, 476 F. Supp. 1075, 1077 (1979), *aff'd*, 67 CCPA 71, 622 F.2d 1027 (1980).

[5] Apparently, defendant also claims that the carbon block cannot be classified under part 2, schedule 5, as plaintiff claims, because it is not "ceramic."

[6] In accordance with this aid to construction, the *Siemens* court held that the imported surge voltage protectors were "more specifically provided for under the use provision of item 685.90 as 'other electrical apparatus * * * for the protection of electrical circuits' than under the *eo nomine* provision of item 687.60 as 'electronic tubes.'" *Siemens*, 68 CCPA at 70, 653 F.2d at 477. The court also noted, however, that this statutory construction aid need not be automatically applied. Rather, "[t]he aid is merely '*a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance.*' *Simon Saw & Steel Co.*, 51 CCPA 33, 40, C.A.D. 834 (1964) (emphasis in original)." *Id.* at 70 n.6, 653 F.2d at 478 n.6.

[7] Use of side block as an electrode is even more problematic. *See supra* note 3.

sion, either more limited or more diversified, and the difference is significant, it cannot be classified within such a provision. The item is thus said to be "more than" the type described in the statute. *Robert Bosch Corp.* v. *United States*, 63 Cust. Ct. 96, 103–04, C.D. 3881 (1969) (starter solenoid switches for starting automobile engines found to be "more than" electrical switches because they operated mechanically as well as electrically and both functions were significant in starting the motor) (cited in *Sanyo Electric Inc.* v. *United States*, 84 Cust. Ct. 167, 175, 496 F. Supp. 1311, 1317 (1980), *aff'd*, 68 CCPA 14, 15, 642 F.2d 435, 436 (1981) (power failure light described as a multifunction article could not be classified under a statutory provision that described only one of its functions)). The carbon block at issue has features which enable it to function as more than an electrode; it is one of a few substances that can withstand the tremendous temperatures, stress, and abrasion generated by producing aluminum. This is a significant difference from an ordinary electrode, which is only a facilitator of the electrolytic process. Because the carbon block is "more than" an electrode, it cannot be classified under item 517.61.

Although the legislative history of certain statutory provisions suspending duties on electrodes is not entirely clear, it does not contradict this construction of the statutes. In referring to "electrodes" Congress described items which are made of carbon, manufactured at the site where they are to be used and which are consumed in large quantities. S. Rep. No. 530, 89th Cong., 1st Sess. 23, *reprinted in* 1965 *U.S. Code Cong. & Ad. News* 3416, 3437; S. Rep. 1235, 90th Cong., 1st Sess. 1, reproduced at 1968 *U.S. Code Cong. & Ad. News* 3999–4000; S. Rep. 91–1471, 91st Cong., 2nd Sess. 1, *reprinted in* 1970 *U.S. Code Cong. & Ad. News* 5799–5800. The record (including testimony) generally establishes that this description of "electrodes" is actually a description of "anodes." A memorandum written by Customs in 1968 uses a very similar description of anodes.[8] A reference in S. Rep. 91–220 91st Cong., 1st Sess. *reprinted in* 1969 *U.S. Code Cong. & Ad. News* 1029–30, to electrodes as "anodes and cathodes" must be considered an oversight, inasmuch as it renders the report internally inconsistent and also conflicts with three more detailed reports. Accordingly, Customs' classification is found to be incorrect.

II. The Proper Classification of the Merchandise Has Not Been Established

Plaintiff claims the carbon block should have been classified as "other" refractory brick, under item 531.27, TSUS, "is an *eo nomine* provision without limitation, and therefore includes all forms of re-

[8] Defendant's motion to strike references to certain memoranda and letters is denied. They need not be admitted into evidence insofar as they are used only to establish legislative facts. The court notes their authenticity is not denied. In any case, the court finds plaintiff's arguments regarding Congressional ratification of administrative practice less than persuasive in this case given the changing views at Customs and the lack of any reference in the legislative history to Customs' classification practices with regard to the type of merchandise at issue.

fractory brick, absent any showing of contrary legislative intent, judicial decision, or administrative practice." *Pittsburgh Plate Glass Co.* v. *United States*, 73 Cust. Ct. 49, 55, C.D. 4553 (1974) (tank blocks which are larger and heavier than standard straight refractory brick constitute refractory brick for tariff purposes); *cf. Nomura (America) Corp.* v. *United States*, 58 CCPA 82, 85, 435 F.2d 1319, 1321–22 (1971) ("wader boots—chest high" properly classified under *eo nomine* provision for boots, shoes or other footwear).

Schedule 5, Part 2, Subpart A, Headnote 3 sets out the specific properties necessary for qualification as refractory articles for TSUS purposes:

> 3. For purposes of this subpart, "*a refractory article*," whether shaped or not shaped, is one having a bulk density over 75 pounds per cubic foot and designed to be used to resist temperatures above 260°F. A shaped refractory article has special properties of strength and resistance to thermal shock and may also have, depending upon the particular uses for which designed, other special properties such as resistance to abrasion and corrosion.

Plaintiff's witness testified during trial that the imported carbon block met each of these specifications.[9] Further, plaintiff argues that the block's ability to conduct electricity is another "special property" related to its use in the Hall-Heroult cell but that this property does not make it more than refractory brick. Defendant contends the block's cathodic applications make the block more than the refractory articles contemplated by headnote 3.

The primary function of an imported article may be determinative in establishing proper classification. *Trans-Atlantic Co.* v. *United States*, 60 CCPA 100, 103, 471 F.2d 1397, 1399 (1973); *see E. Green & Son (New York)* v. *United States*, 59 CCPA 31, 35, 450 F.2d 1396, 1399 (1971). A combination or multifunction article, however, cannot be classified under a provision that describes only one of the article's multiple functions because it is "more than" the article described by the provision. *Sanyo Electric*, 84 Cust. Ct. at 174, 496 F. Supp. at 1316–17. An incidental, subordinate, or secondary function which relates to an article's predominant use, does not make that article more than the article named in the tariff provision. *Trans-Atlantic*, 60 CCPA at 103, 471 F.2d at 1398–99; *ASEA, Inc.* v. *United States*, 7 CIT 128, 131, 587 F. Supp. 1072, 1073–74, *aff'd*, 748 F.2d 676 (1984); *Tridon, Inc.* v. *United States*, 5 CIT 167, 169 (1983); *Ashflash Corp.* v. *United States*, 76 Cust. Ct. 112, 115–16, 412 F. Supp. 585, 587 (1976). Whether or not a given function is secondary or coequal is a question of fact. *Tridon*, 5 CIT at 169 (1983).

The record at trial establishes that the carbon block provides a refractory lining for the Hall-Heroult cell. Without a complete lining, the cell is disrupted and aluminum production ceases. Both parties agree that the bottom block serves as a cathode only during the

[9] Defendant does not dispute the block's refractory characteristics.

twelve to twenty-four hour start-up phase of the cell. Although the block does operate as a temporary cathode, which helps prepare the cell for its life-cycle of 1500 days, this does not make the block more than refractory brick. In this case the only significant cathodic function of the carbon bottom block is during start-up where the carbon block itself becomes sealed against aluminum penetration. Inasmuch as this enables the block to function more efficiently in its refractory capacity, its cathodic function must be considered auxiliary.[10] *Compare with Tridon,* 5 CIT at 169–70 (clicking sound created by signal flasher as it opened and closed electrical contacts did not make it more than a switch because this function was secondary or auxiliary to the main switching function) *and ASEA,* 7 CIT at 132, 587 F. Supp. at 1074 (shunt reactors are not "more than" inductors simply because they contain bushing current transformers, where this second function (as a transformer) is auxiliary to the reactors' function as inductors).

Nonetheless, the merchandise at issue has not been shown to be classifiable as refractory brick. One issue yet to be decided is whether the electrical conductivity and resistivity of the bottom block which apparently is important throughout the life of the cell makes certain of the merchandise at issue more than refractory brick. The evidence at trial did not establish that these functions are auxiliary, nor did the testimony establish that these are normal properties of refractory brick. Further-more, the record is not entirely clear as to whether the merchandise is ceramic, as is necessary for plaintiff's claimed classification.[11] Inasmuch as this was not the focus of the evidence presented at trial, this matter is remanded to the Customs Service for consideration of this point and for classification consistent with this opinion.

(Slip Op. 86–97)

CHEMICAL PRODUCTS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–9–01321

Before DICARLO, *Judge.*

Plaintiff challenges a final determination by the Department of Commerce, International Trade Administration (Commerce) that barium carbonate from the People's Republic of China is being sold in the United States at not less than fair value. Plaintiff contends that Commerce erred by (1) using constructed value to determine foreign market value rather than prices from a non-state-controlled economy, (2) using information from the barium chloride industry instead of information from plaintiff's petition under the best information rule upon the refusal of one producing plant to supply requested information, (3) using the minimum eight percent profitability figure under 19 U.S.C. § 1677b(e)(1)(B)(ii) (1982 & Supp. II 1984), and (4) allo-

[10] As indicated, testimony established that the side block's cathodic use is purely incidental as is the temporary aluminum making cathodic use of the bottom block during start-up.

[11] The alternative classification sought by defendant, item 535.14, TSUS, other ceramic electrical ware, is not applicable. The blocks at issue are not *ejusdem generis* with the other objects mentioned therein.

cating a portion of the factors of production to the production of hydrogen sulfide gas (HSG) based on the respective quantities of barium carbonate and HSG yielded in the production process.

Held: Commerce's allocation of factors of production to HSG on a quantity basis is not supported by substantial evidence since Commerce did not determine the value of HSG and it would not be reasonable to allocate factors of production on a quantity basis to two products with significantly different values. Commerce's determination is otherwise supported by substantial evidence and in accordance with law.

[The action is remanded.]

(Decided September 26, 1986)

Gibson, Dunn & Crutcher (Joseph H. Price and *Robert M. Kruger)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(A. David Lafer)* for the defendant.

Memorandum Opinion and Order

DiCarlo, *Judge:* Chemical Products Corporation (CPC), a domestic producer of barium carbonate, challenges a final determination by the United States Department of Commerce, International Trade Administration (Commerce) that barium carbonate from the People's Republic of China (PRC) is being sold in the United States at not less than fair value. *Barium Carbonate from the People's Republic of China,* 49 Fed. Reg. 33,913 (1984). The action is remanded since Commerce's allocation of factors production to hydrogen sulphide gas, a product created during the production of barium carbonate, is not supported by substantial evidence in the record or in accordance with law.

I. Background

Commerce determined that barium carbonate from the PRC is being sold in the United States at not less than fair value based on its finding of a dumping margin of .29% which it determined to be *de minimis.* Plaintiff has not contested the finding that a margin of .29% is *de minimis. See Carlisle Tire & Rubber Co.* v. *United States,* 10 CIT ——, 634 F. Supp. 419 (1986). Plaintiff seeks review of Commerce's final determination pursuant to section 516A(a)(2)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A) (1982 & Supp. II 1984). The question presented is whether the following determinations by Commerce are supported by substantial evidence and in accordance with law:

1) The construction of foreign market value based on factors of production valued in Thailand under 19 U.S.C. § 1677b(c)(2) (1982 & Supp. II 1984) and 19 C.F.R. 353.8 (1984);

2) The use of weighted average factors of production using data from two Chinese barium chloride plants under the verification and best information available requirements, 19 U.S.C. § 1677e, and 19 C.F.R. § 353.1;

3) The use of the minimum eight percent profit factor in calculating foreign market value under 19 U.S.C. § 1677b(e)(1)(B)(ii) and 19 C.F.R. § 358.8(c);

4) The allocation of factors of production between barium carbonate and hydrogen sulphide gas on a quantity basis rather than on the value of the respective products.

II. DISCUSSION

In reviewing a determination by Commerce, the standard of review is not *de novo*. Rather, the Court must determine whether the challenged determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Under this standard the Court must accept Commerce's findings if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Federal Trade Commission* v. *Indiana Federation of Dentists*, 106 S. Ct. 2009, 2015 (1986). Substantial deference is granted to the agency in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law. *See American Lamb Co.* v. *United States*, 785 F.2d 994 (Fed. Cir. 1986); *Carlisle Tire & Rubber Co.* v. *United States*, 9 CIT ——, 622 F. Supp. 1071 (1985).

1. Constructed value

Since the PRC has a state-controlled-economy, its sales of barium carbonate cannot be used to determine foreign market value under 19 U.S.C. § 1677b(a). Rather, foreign market value is determined by selecting an appropriate non-state-controlled economy and determining the prices or the constructed value of barium carbonate or similar merchandise in that country. *See* 19 U.S.C. § 1677b(c); 19 C.F.R. § 353.8(a). Commerce constructed the foreign market value of the merchandise based on factors of production valued in Thailand under section 1677b(c)(2). Commerce's final determination states:

> After analysis of countries which produce barium carbonate we determined that India would be the most appropriate surrogate selection. However the Indian government declined to participate in the investigation. When we determined that there was no other country which manufactures barium carbonate and which is at a comparable economic level as the PRC, we inquired whether there is a product which is such or similar (as defined in section 771(16) of the Act) to the PRC barium carbonate.
>
> Based on available information, we did not find any product that could be considered such or similar merchandise within the meaning of the Act. Therefore, pursuant to section 773 of the Act, and § 353.8(c) of the Commerce Regulations, we proceeded to construct a value based on specific components or factors of production in the PRC, valued on the basis of prices and costs in a non-state-controlled-economy "reasonably comparable" in economic development to the PRC. After analyzing

> those non-state-controlled-economies most similar to the PRC, we concluded that Thailand was a comparable economy for valuation of the PRC factors of production.

49 Fed. Reg. at 33,914.

Plaintiff says that Commerce should have used home market sales prices of barium carbonate in Mexico to determine foreign market value. It contends that Commerce was required to use Mexican prices for these reasons: (1) 19 C.F.R. § 353.8 establishes a hierarchy under which foreign market value in a state-controlled economy must be determined by the prices at which such or similar merchandise is sold for consumption or export in a non-state-controlled economy, if such price information is available; (2) even if the regulation does not establish a hierarchy in all cases, it establishes a preference for prices over constructed value when price information is readily available from a cooperating non-state-controlled economy; and (3) Commerce policy and practice dictates that price information be used instead of constructed value when price information is readily available. The Court disagrees.

In determining foreign market value in a state-controlled economy, the antidumping law allows the determination to be made on the basis of either prices or constructed value. 19 U.S.C. § 1677b(c).

While no preference for prices over constructed value is expressed in the statute, 19 C.F.R. § 353.8(a) (1984) states:

> foreign market value shall be determined on the basis of the normal costs, expenses, and profits as reflected *in order of preference by either:*
>
> (1) The prices, determined in accordance with §§ 353.3 or 353.5, at which similar merchandise produced in a non-state-controlled-economy country or countries is sold either: (i) for consumption in the home market of that country or countries, or (ii) to other countries, including the United States; or
>
> (2) The constructed value of such or similar merchandise in a non-state-controlled-economy country, determined in accordance with § 353.6 [emphasis added].

The regulation does not require Commerce to ascertain foreign market value in every instance where prices are available. Section 353.8(a) states that prices are the *preferred* method of establishing foreign market value. "As this Court recently held, failure to use a discretionary alternative method does not constitute error when the agency uses a lawful second method." *Carlisle Tire & Rubber Co.* v. *United States*, 622 F. Supp. at 1076 (citing *Zenith Radio Corp.* v. *United States*, 9 CIT ——, 606 F. Supp. 695, 698 (1985), *aff'd*, 783 F.2d 184 (Fed. Cir. 1986)).

Plaintiff argues, however, that even if the statute and regulations do not establish a hierarchy requiring Commerce to use prices over constructed value in every instance, Commerce must follow the preference for prices in its regulation when price information is readily available from a cooperating non-state-controlled economy.

Plaintiff points out that such information was available since a Commerce case officer visited a Mexican barium carbonate plant and obtained home market pricing data and other information required for calculating foreign market value.

The Court finds that Commerce need not use prices to determine the foreign market value of merchandise from a state-controlled economy once a non-state-controlled economy makes price information available. Commerce's preference in favor of prices is tempered by its policy of ascertaining foreign market value by looking to *comparable* non-state-controlled economies:

> (b) *Comparability of economies.* (1) The prices as determined under paragraph (a)(1), or the constructed value as determined under paragraph (a)(2), shall be determined, to the extent possible, from the prices or costs in a non-state-controlled-economy country or countries at a stage of economic development comparable to the state-controlled-economy country from which the merchandise is exported. Comparability of economic development shall be determined from generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise).

19 C.F.R. § 353.8(b)(1).

In this case Commerce found that Thailand has an economy at a stage of development comparable to that of the PRC, whereas Mexico does not:

> We found Mexico not to be a suitable surrogate for purposes of this determination because it is not at a stage of economic development comparable to the PRC. The only non-state-controlled economy country at a comparable level of economic development which manufactures barium carbonate is India, and India did not agree to cooperate in this investigation.

49 Fed. Reg. at 33,915.

A Commerce economist stated:

> Mexico's per capital GNP is more than seven times that to China's (US $2,090 v. $290). Sixty-four percent of Mexico's labor force is engaged in the industrial and service sectors of the economy, with only thirty-six percent still in agriculture. By contrast, 71 percent of China's labor force is employed in the agricultural sector, with only 29 percent in industry and service. Sixty-seven percent of Mexico's total population resides in urban areas, while only 13 percent of China's total population does.

R. Doc. 51.

The Court does not agree that 19 C.F.R. § 353.8(b) may be applied by Commerce only in distinguishing between countries with available price data. Such an interpretation would render the constructed value provisions of section 353.8 meaningless except when no market economy produces the merchandise in question or is willing

to cooperate in an investigation. Although 19 C.F.R. § 353.8(b)(2) provides a means by which Commerce may make adjustments to prices from a market economy which is at a different level of economic development than a home-market state-controlled economy, the regulation does not require that such adjustments be made, but grants Commerce discretion whether to make adjustments or to use constructed value to determine foreign market value.

The purpose of the statute's state-controlled-economy provisions is to arrive at the best estimate of foreign market value in the country of export. This purpose would be undermined if Commerce were prohibited from constructing a foreign market value based on factors of production in a country at a stage of economic development comparable to that of the exporting country whenever there exists a non-comparable producer country willing to supply price information.

The Court holds that Commerce may consider the comparability of economies before it determines whether to employ prices or constructed value as a means of determining foreign market value.

Plaintiff also contends that the decision by Commerce to construct foreign market value rather than to use Mexican prices is inconsistent with Commerce policy and practice. In *Carbon Steel Plate from Romania*, 47 Fed. Reg. 35,666 (1982) (Preliminary), 48 Fed. Reg. 317 (1983) (Suspension), Commerce used home market prices from Finland in determining the foreign market value of carbon steel plate from Romania after countries with economies comparable to Romania's refused to cooperate with Commerce's investigation. In *Natural Menthol from the People's Republic of China*, 46 Fed. Reg. 3258 (1981) (Preliminary), 46 Fed. Reg. 24,614 (1981) (Final), Commerce determined the foreign market value of a product from the PRC using home market prices from Paraguay rather than constructed value. This investigation is distinguishable, however, since Commerce found Paraguay's economy to be at a stage of economic development comparable to that of the PRC.

In contrast, plaintiff says that constructed value has been used only when no price data was available. For example, in *Unrefined Montan Wax from the German Democratic Republic*, 46 Fed. Reg. 38,555 (1981), Commerce stated:

> Since there is no commercial production of unrefined montan wax in a non-state-controlled-economy country (other than the United States) and no such or similar merchandise, we constructed a value based on specific components or factors of production in the GDR, valued on the basis of prices in a non-state-controlled-economy country "reasonably comparable" in economic development to the GDR.

Defendant argues that past Commerce practice does not show that Commerce has always used available price information instead of constructed value. In *Chloropicrin from the People's Republic of China*, 48 Fed. Reg. 41, 799 (1983) (Preliminary), 49 Fed. Reg. 5982

(1984) (Final), foreign market value was constructed even though price information was available from Japan and France. Plaintiff argues that use of constructed value in the chloropicrin investigation was grounded on Commerce's finding that cost adjustments under section 353.8(b)(2) would prove impractical, whereas in the present case no finding of impracticality was made as to suitable adjustments to Mexican prices.

The Court finds that there is no practice which bars Commerce from exercising its discretion whether to use the preferred price method in determining foreign market value. Commerce may construct foreign market value or use suitably adjusted prices when it determines that the economies of countries willing to provide price information are not comparable to that of the country under investigation. Nothing in the investigations cited by plaintiff shows that Commerce has adopted a policy or practice which denies Commerce the discretion it has under the statute and the regulation to determine which method to use in determining foreign market value.

Even if Commerce were obligated to explain why it did not follow the approach used in a previous investigation, the record shows that Commerce did so. Commerce reviewed the *Romanian Steel Plate* investigation and determined that (1) the goal of ensuring a fair comparison between the state-controlled economy and the surrogate requires the comparison of comparable economies, (2) where a cooperating producer country with a comparable economy exists, price will be preferred over constructed value and (3) Commerce's decision in the *Romanian Steel Plate* investigation to use prices of a non-comparable surrogate in determining foreign market value was inconsistent with Commerce's policy of requiring comparability of economies and should not be followed. R. Doc. 129.

Since Commerce's use of constructed value for determining foreign market value is a reasonable exercise of discretion under the statute and the regulation, the determination of foreign market value on the basis of Chinese factors of production valued in Thailand is supported by substantial evidence and in accordance with law.

2. Best Information Available

In an antidumping investigation, Commerce is required to meet the verification and best information available requirements of 19 U.S.C. § 1677e (1982 & Supp. II 1984), which in pertinent part provides:

> The administering authority shall verify all information relied upon in making——
>
> (1) a final determination in an investigation
>
> * * *.
>
> If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information

> available to it as the basis for its action, which may include, * * * the information submitted in support of the petition. * * *.
>
> [W]henever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [the administering authority shall] use the best information otherwise available.

Commerce's regulation, 19 C.F.R. § 353.51(b)(1984), states in part:

> Whenever information cannot be satisfactorily verified, or is not submitted in a timely fashion or in the form required, the submitter of the information will be notified and the affected determination will be made on the basis of the best information then otherwise available which may include the information submitted in support of the petition* * *. Where a party to the proceeding refuses to provide requested information, that fact may be taken into account in determining what is the best available information.

In this case, Commerce requested data on the factors of production from two Chinese plants which produce barium carbonate in order to construct a foreign market value on the basis of weighted-average plant cost. One of the plants did not submit the requested information, and Commerce was obligated to look to an alternative source for the information. In its final determination Commerce stated:

> Absent the requested information, we considered information developed on the factors of production of the significant producers in the contemporaneous antidumping investigation on barium chloride from the PRC. We determined the ratio of factors of production between the more efficient and less efficient producers of barium chloride and applied this ratio to the factors of production for the producer of barium carbonate that did provide information to calculate the factors of production for the non-responding plant. We then calculated a production-weighted average constructed value for the two plants. In employing this methodology, we assumed that the responding producer was the equivalent in efficiency to the more efficient barium chloride producer.

49 Fed. Reg. at 33,914–15.

Plaintiff contends that the best information rule was not satisfied by Commerce's examination of the relative efficiencies of barium chloride plants as an alternative source for the information not supplied by the barium carbonate plant since barium chloride and barium carbonate are distinct products. Plaintiff argues that the best information available for supplying the missing information was contained in the petition, and that under *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556 (Fed. Cir. 1984) and *Shop Towels of Cotton From the People's Republic of China*, 50 Fed. Reg. 26020

(1985) (Final), such information should be used when a party fails to supply requested information.

The best information rule does not compel Commerce to use data supplied by plaintiff. *See Zenith Radio Corp.* v. *United States*, 606 F. Supp. 695, 699 (1985), *aff'd*, 783 F.2d 184 (Fed. Cir. 1986); *Carlisle Tire & Rubber Co.* v. *United States*, 622 F. Supp. at 1081. Neither the statute nor the applicable regulation requires Commerce to use information supplied by the plaintiff once an exporter or manufacturer has failed to comply with an information request from Commerce. The authorities cited by plaintiff stand for the proposition that information in the petition *may* be relied upon under the best information rule when the respondent does not cooperate in the investigation. *See Krupp Stahl AG* v. *United States*, 4 CIT 244, 553 F. Supp. 394, 395 (1982); 19 U.S.C. § 1677(e); 19 C.F.R. § 353.15(b). Commerce may exercise discretion in determining what is the best information available when an exporter or manufacturer has failed to supply requested information.

Commerce considered the information contained in the petition, but the information relating to Chinese factors of production was based on United States values. A letter to a Commerce case officer from counsel to CPC reads:

> Based on its own production expertise and its knowledge of conditions in China, Chemical Products Corporation ("CPC") has quantified the inputs of raw materials, energy, and labor that should be required for producing barium in China and *has valued these inputs at their cost in the United States.*

R. Doc. 34 (emphasis added). The use of the information contained in the petition would have been inconsistent with C.F.R. § 353.8(c), which requires that factors of production be valued and verified in a non-state-controlled-economy country "reasonably comparable in economic development to the state-controlled-economy country under investigation."

The record shows that Commerce's use of barium chloride data in determining the foreign market value of barium carbonate was based on similarities between the production processes of the chemicals, including similarities in major production stages, the use of identical raw materials, and the existence of mutual production-related problems. R. Doc. 39.

The Court holds that Commerce's use of information from an industry similar to the industry under investigation was a reasonable means of determining relative efficiencies among barium carbonate plants. Commerce's use of barium chloride production data in its investigation is supported by substantial evidence and in accordance with law.

3. Profitability

In calculating a constructed foreign market value for the merchandise, Commerce is directed by statute to include:

> an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that——
>
> * * *.
>
> (ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost.

19 U.S.C. § 1677b(e)(1)(B)(ii); *see* C.F.R. § 353.6(a)(2) (1984). In determining the profitability factor in a state-controlled-economy investigation, the profit formula is applied to producers in the surrogate country. 19 U.S.C. § 1677b(c)(2); 19 C.F.R. § 353.8(a)(2).

Commerce surveyed four Thai chemical companies to determine a representative profitability percentage figure. Commerce found that during 1983 the companies showed profit margins of 20.40% (Company C), 8.82% (Company D), 0% (Company F), and 2.10% (Company G). Since these percentages resulted in an average profit of 7.85%, Commerce applied the minimum 8% profit factor as provided by statute.

Plaintiff argues that Commerce's determination is flawed in that the surveyed company showing no profit (Company F) "was suffering from special and unusual problems that made it [a]typical and unrepresentative of the chemical industry in Thailand." Brief for Plaintiff at 47. This company's financial problems were largely attributed to the shutting down of an old plant and the building of a new one. R. Doc. 134. Plaintiff asserts that if Company F had not been included in the survey, the average profitability of the remaining Thai chemical companies would have been 10.47 percent.

Although Company F's 1983 profitability percentage figure was atypical according to the Commerce case officer, the sampling was designed to gauge profitability within an industry, and it is not unreasonable to consider that some companies in an industry may replace production plants in any given year. Commerce's inclusion of Company F in its sampling offsets the unusually strong profit shown by Company C (20.49%) which was more than double the next most profitable company included in the sampling.

The Court holds that it was reasonable for Commerce to include in its sampling companies showing unusually high and low profitability margins in order to ascertain average profitability in an industry. Commerce's use of the minimum eight percent factor profit in calculating foreign market value under 19 U.S.C. § 1677b(e)(1)(B)(ii) and 19 C.F.R. § 353.8(c) is supported by substantial evidence and in accordance with law.

4. Allocation of Factors of Production

Commerce determined that the process in which barium carbonate is produced also yields an amount of hydrogen sulfide gas (HSG), and that a portion of the factors of production used in pro-

ducing barium carbonate should be allocated to the production of HSG. As a result, foreign market value was lower than if Commerce had attributed to barium carbonate all of the factors of production used in barium carbonate production.

Plaintiff contends that (1) Commerce should not have allocated a portion of the factors of production to HSG since HSG is a noxious waste product, and (2) by basing its allocation on quantity without regard to the relative values of barium carbonate and HSG, Commerce improperly allocated too great a portion of the factors of production to HSG.

The record shows that barium carbonate and HSG are generated simultaneously in the same production process. It also shows that HSG is used by the producing plants as a raw material input in the production of sulfur and sodium thiosulfate. Therefore, Commerce's finding that HSG is not a waste product is supported by substantial evidence and in accordance with law.

However, Commerce did not establish a commercial value for HSG nor did it establish the cost to the producer of obtaining a substitute input for producing sulfur and sodium thiosulfate, if HSG were not available. Although the final determination states that Commerce based its allocation on an analysis of the relative value of HSG to the plant, *see* 49 Fed. Reg. at 33,916, this statement is not borne out by the record. Instead, the record shows that Commerce treated barium carbonate and HSG equally, by allocating factors of production based on the quantity of each chemical yielded by the production process.

Under Commerce's reasoning, if the product produced were gold, and the process also yielded rocks which had no market value but were used for pavement at the plant, factors of production would be allocated between the gold and rock according to how much of each was produced. Such an allocation would obviously be unreasonable and not in accordance with law since it fails to take into account the disparate values of the products.

On this record, Commerce's allocation of factors of production is not supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Federal Trade Commission* v. *Indiana Federation of Dentists, supra,* at 2015. It is not reasonable to allocate factors of production between barium carbonate and HSG on a quantity basis if the value of one product is significantly greater than the other. The Court holds that Commerce must find a reasonable means of ascertaining the market value of HSG or the value of HSG to the plant so that the record may show the respective values of barium carbonate and HSG. If the values of those products are not equal, Commerce must adjust its allocation of factors of production to reflect the difference in the value of the two products.

III. Conclusion

Upon review of the record and Commerce's determination, the Court sustains Commerce's determination except with respect to its allocation of factors of production between barium carbonate and HSG. Commerce shall make any necessary adjustments in accordance with this opinion and file with the Court within 45 days a supplemental record explaining the adjustments made and the resulting margin. Plaintiff will file any comments on the results of the remand within 15 days after the filing of Commerce's redetermination, and defendant will respond within 10 days after the filing of plaintiff's comments.

So ordered.

(Slip Op. 86–98)

NEW TRENDS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT.

Court No. 81–4–00465

Memorandum Opinion and Order

Plaintiff contended that the Customs Service appraisal of giftware, furniture, and decorative accessories imported from the Philippines, Hong Kong, Japan, and Taiwan, improperly included charges representing bona fide buying commissions.

Held: Plaintiff has not introduced sufficient evidence to show that the merchandise was improperly appraised, and, therefore, has failed to rebut the presumption of correctness that attaches to the government's determination.

[Judgment for defendant.]

(Decided September 29, 1986)

Johnson, Johnson & Johnson (Ralph Perry-Miller), at the trial and on the brief), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Judith M. Barzilay,* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper valuation, for customs duty purposes, of certain giftware, furniture, and decorative accessories of bamboo, rattan, and other fibrous materials imported from the Philippines, Hong Kong, Japan, and Taiwan.

The Customs Service appraised the merchandise on the basis of export value, in accordance with section 402(b) of the Tariff Act of 1930, 19 U.S.C. § 1401a(b) (1976) (amended 1979).

The Tariff Act defines export value as:

> the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not in-

> cluded in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

Tariff Act of 1930 § 402(b), 19 U.S.C. § 1401a(b) (1976) (amended 1979).

The parties agree that the export value is the proper basis for valuation. *See* 19 U.S.C. § 1401a(b). Plaintiff, however, contends that the export value of the merchandise improperly included bona fide buying commissions paid to its overseas agents. Defendant contends that "the alleged 'agents' were actually the sellers of the merchandise, and New Trends' agency agreements were sham agreements designed to avoid the payment of duties."

The question presented is whether certain buying commissions, included by the Customs Service in determining the dutiable value of the merchandise, were bona fide commissions paid to plaintiff's agents. If the amounts were bona fide commissions, they were not a proper element of dutiable value, and should not have been included. *See, e.g., United States* v. *Nelson Bead Co.*, 42 CCPA 175, 183, C.A.D. 590 (1955); *Oriental Exporters, Inc.* v. *United States*, 4 CIT 1, 3 (1982); *J.C. Penney Purchasing Corp.* v. *United States*, 80 Cust. Ct. 84, 95, C.D. 4741, 451 F. Supp. 973, 982 (1978).

After careful examination of the evidence adduced at trial, the arguments of the parties, and the relevant case law, it is the determination of the Court that plaintiff has not overcome the presumption of correctness which attaches to the government's determinations of dutiable value. *See* 28 U.S.C. § 2639(a)(1) (1982); *Diamex Hawaii, Ltd.* v. *United States*, 4 CIT 162, 165–66 (1982). Therefore, the valuation of the imported merchandise by the Customs Service is affirmed.

At trial, numerous exhibits were entered by the parties, and the Court heard the testimony of the plaintiff's sole witness, Mr. Robert Edward Parker, owner of New Trends, Incorporated. On direct examination, Mr. Parker testified that New Trends obtained a wide range of merchandise from approximately 300 manufacturers located throughout the Far East.

Mr. Parker asserted that New Trends had the capability to deal directly with the manufacturers. Nevertheless, he testified that New Trends employed the services of 10 overseas buying agents, who were to be paid 10 percent of the ex-factory price of the imported merchandise.

Mr. Parker testified that once a product design was conceived by New Trends, it was forwarded to an agent who located manufacturers capable of producing the desired merchandise. Mr. Parker would then travel to the Far East to examine samples of the merchandise, and would negotiate directly with the foreign manufacturers, who were frequently local villagers who worked at their homes. Mr. Parker stated that the agents lacked authority to bargain on

behalf of New Trends, and that their function was limited to arranging the meetings and, at times, serving as interpreters.

After a price was agreed upon with the manufacturer, New Trends would forward a purchasing order together with a letter of credit, payable to the agent, who proceeded with the transaction with the manufacturer. Although it was "customary" to prepare the documentary transactions in the name of the agent, Mr. Parker testified that it was beyond the authority of the agent to purchase on behalf of New Trends without express instructions.

Mr. Parker further testified that it was the responsibility of the agent to prepare the merchandise for shipment, and that the agent would bear the cost of shipping preparations. He added that New Trends preserved the right to pursue claims against its agents for defective or damaged merchandise. If a claim arose, New Trends would either delay disbursement of the funds set aside for the letter of credit until the claim was settled by the agent, or New Trends would reduce the amount paid to the agent. Mr. Parker assumed that the agent was reimbursed for these claims by the manufacturer, yet, he could neither substantiate nor support this assumption with testimony or documentation. Nor could Mr. Parker substantiate that the agent actually paid the negotiated price to the manufacturer since the letters of credit were made payable to the agent.

The record discloses that an employee of New Trends, in response to a questionnaire submitted by Customs, admitted that: (1) New Trends did not specify the manufacturers or factories from which the agent was to make purchases; (2) New Trends could not purchase the merchandise directly from the manufacturer; (3) New Trends bought only F.O.B. from the buying agent; (4) New Trends did not participate in negotiations, and the agent conducted all negotiations with the factories while New Trends dealt only with the agent; (5) New Trends did not know if the manufacturers were aware that New Trends was the actual purchaser; and (6) New Trends did not know how much the agent paid the manufacturers for the merchandise.

Mr. Parker attempted to refute this document, and testified that the employee who prepared it had no authority to answer Customs' request for information. Defendant, however, introduced a letter which indicated that, at the time, the employee was the Import Manager for New Trends. Mr. Parker denied that the employee had ever held the position of Import Manager for New Trends.

Defendant introduced into evidence documentary exhibits consisting of the purported agents' letterheads, commercial invoices, and customs' invoices in which the agents designated themselves as "sellers" and "manufacturers." Mr. Parker suggested that the designation was a misnomer because these specific agents were financially incapable of functioning as selling companies. He added that it was the custom of Far Eastern business persons to characterize themselves as sellers.

Plaintiff contends that the evidence adduced at trial confirms the principal-agency relationship exhibited in the buying agency agreement. Plaintiff asserts that New Trends exerted the degree of control over its overseas agents necessary to establish an agency relationship. Plaintiff also maintains that the record establishes that the commissions paid to the agents inured solely to the benefit of New Trends and not to the manufacturers.

It is the determination of the Court that plaintiff's evidence is not sufficient to support its contention that a bona fide principal-agency relationship existed between New Trends and its overseas agents.

It is fundamental that a buying commission paid to a bona fide agent of the importer is not a proper element of dutiable value. *See United States* v. *Nelson Bead Co.*, 42 CCPA 175, 183, C.A.D. 590 (1955); *J.C. Penney Purchasing Corp.* v. *United States*, 80 Cust. Ct. 84, 95, C.D. 4741, 451 F. Supp. 973, 982 (1978). The existence of a bona fide agency relationship, however, is not determined by any single factor. Whether a buying commission is bone fide depends upon the relevant facts of each case. *E.g.,Oriental Exporters, Inc.*v. *United States, 4 CIT 1, 1–3 (1982); J.C. Penney* 80 Cust. Ct. at 95–102, 451 F. Supp. at 983–88.

It is not questioned that plaintiff has the burden of proof as to the existence of a bona fide agency relationship. *See, e.g., B & W Wholesale Co.* v. *United States*, 58 CCPA 92, 97, C.A.D. 1010, 436 F.2d 1399, 1403 (1971). On this important issue, it has been stated that "if the existence of an agency relationship is not clearly established, the legal relationship is not that of agency." *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, 545, R.D. 11758, 337 F. Supp. 465, 469 (1971). The essence of an agency relationship is the exercise of control by the principal over the conduct of the agent as to those matters entrusted to the agent's care. *See Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, 546, R.D. 11758, 337 F. Supp. 465, 470 (1971) (citing *Restatement (Second) of Agency* § § 1 comment b, 14 comment b (1958)).

Plaintiff relies upon *J.C. Penney Purchasing Corp.* v. *United States*, 80 Cust. Ct. 84, C.D. 4741, 451 F. Supp. 973 (1978), to support its contention that New Trends exhibited the requisite control over its agents to establish a bona-fide agency relationship. In the *J.C. Penney* case, the importer contended that the Customs Service, in determining dutiable value, improperly included commissions paid to the importer's buying agent. Defendant asserted that since the importer lacked control over the agent's actions, there was no principal-agency relationship. The court held that a principal-agency relationship existed, and stated that the evidence presented revealed the active role taken by the importer throughout the transactions in question. *Id.* at 95, 451 F. Supp. at 983. The court noted certain significant factors that were illustrative of the importer's active role and control. These factors included the importer's frequent visits to the Far Eastern factories where the goods were produced, his

direct negotiations with manufacturers as to price and shipping specifications, the manufacturers' awareness that the importer was the ultimate purchaser, and the lack of any discretion, on the part of the agent, as to the purchasing of the merchandise. *Id.* at 95–96, 451 F. Supp. at 983–84.

Unlike the *J.C. Penney* case, the record in this case does not reveal a similar active role and control on the part of New Trends. In the *J.C. Penney* case the evidence was deemed sufficient to overcome the presumption of correctness that attaches to the government's determinations of dutiable value. In this case, the evidence shows that the agents were granted a great deal of discretion and authority throughout the entire purchasing process. Although Mr. Parker testified that he was intricately involved in the negotiations with the Far Eastern manufacturers, he was unable to recall any of the names of the manufacturers who were involved in the direct negotiations. Indeed, the record makes clear that New Trends had very little to do with the purchasing process once the price was established. As an example, it may be stated that New Trends gave no instructions specifying the manner in which the goods were to be handled or shipped. Not only were the agents fully responsible for these matters, but they were also required to absorb the cost of shipping and handling as part of their commissions.

Control, however, is but one factor which indicates the presence of a principal-agency relationship. *See Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F.2d 73, 81 (6th Cir. 1943). It has been recognized that "[o]ne may submit to a degree of control by another without being an agent * * *" *Id.; see Griffin* v. *United States* 521 F.2d 521, 528 (5th Cir. 1979). If an agent is to acquire property and deliver it to a principal, an agency exists only if the agent acts primarily for the benefit of the principal and not for himself. *Restatement (Second) of Agency* § 14K. The *Restatement (Second) of Agency* sets forth several factors which indicate that there was no agency relationship in the case at bar. It is noted that the following factors are inconsistent with an agency relationship:

> (1) That [the agent] is to receive a fixed price for the property, irrespective of the price paid by him * * *. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property.

Restatement (Second) of Agency § 14K comment a. The agent's liability for lost or damaged goods would also tend to indicate a sale rather than an agency. *See* W. Seavey, *Handbook of the Law of Agency* 23 (1964).

Careful examination of the evidence of record reveals that the alleged buying agents did not act primarily for the benefit of New Trends. On the contrary, the credible evidence negates the existence of a bona fide agency relationship. As an example, reference may be made to the manner of payment, which was left to the dis-

cretion of the alleged buying agents. The letters of credit issued by New Trends were made payable to the agents. From these letters of credit, the agent was to deduct his commission and then forward the negotiated price to the manufacturer. Mr. Parker, however, could not substantiate this method of payment to the manufacturers either by oral testimony or by documentary evidence. The failure to produce documentary evidence of a transaction which is normally reduced to writing, and that would be indicative of agency status weakens the probative value of the attempted explanation offered by Mr. Parker. *See A & A Trading Corp.* v. *United States,* 65 Cust. Ct. 785, 791–92, A.R.D. 276 (1970).

The evidence also reveals that the so-called agents conducted independent businesses. Customs invoices entered into evidence expressly designated several of the alleged agents as "sellers" of the imported goods. The commercial invoices of the alleged agents designated the agents as "manufacturers" and "producers" of goods. In addition, correspondence between the "agents" and New Trends often characterized New Trends as the "purchaser" of goods "sold" by the "agents." This language or terminology has been held to be inconsistent with the existence of an agent-principal relationship. *See Globemaster Midwest, Inc.* v. *United States,* 67 Cust. Ct. 538, 545, R.D. 11258, 337 F. Supp. 465, 470 (1971); *A & A Trading Corp.* v. *United States,* 65 Cust. Ct. 785, 790–91, A.R.D. 276 (1970).

In the *Globemaster* case, plaintiff contended that Customs' appraisement of imported merchandise improperly included the nondutiable commissions paid to an overseas buying agent. Defendant argued that the buying agent was actually the seller of the merchandise and, therefore, the commissions were not bona fide. The court upheld the determination of Customs, and found the relationship between the importer and its alleged agent to be that of buyer and seller. 67 Cust. Ct. at 548, 337 F. Supp. at 472.

The court, in the *Globemaster* case, noted that the fact that the agent was designated on the Customs invoices as the "seller" of the imported goods was a factor which supported the conclusion that the "agent" was not a bona fide agent of the importer. The importer's attempts to refute or dispel the designations were rejected by the court, since an agent experienced in the trade was presumed to be aware of his true capacity in the transaction. Specifically, the court stated:

> "Where the official papers accompanying an entry unequivocally set out a relationship between two parties which is subsequently disclaimed by them, this court has looked askance at such later allegations in the absence of clear and convincing proof that the statements made at time of entry were erroneous."

Id. at 345, 337 F. Supp. at 470 (quoting *United States* v. *Manhattan Novelty Corp.*, 63 Cust. Ct. 699, 704, A.R.D. 263 (1969)). Consequently, the court determined that the designation of the agent as a "sell-

er" outweighed the existence of a written buying agency agreement. 67 Cust. Ct. at 545, 337 F. Supp. at 470.

Plaintiff, citing *Oriental Exporters, Inc.* v. *United States*, 4 CIT 1 (1982), contends that it was a common practice among buying agents to designate themselves as sellers or manufacturers. In the *Oriental Exporters* case, the designation of the agent as a seller did not defeat the agent's bona fide status. In that case, however, the evidence was clear and convincing. The designation was explained as a requirement imposed upon the parties by the importer's bank. *Id.* at 3. In this case, plaintiff's only explanation consisted of Mr. Parker's testimony that everybody in foreign countries "projects themselves as a manufacturer." This explanation is insufficient to rebut or refute the documents in evidence.

An additional indication that an agency relationship did not exist is plaintiff's preservation of a right to pursue claims against its agents. In effect, the buying agents bore the risk of loss for damaged, lost, or defective merchandise. In the *J.C. Penney* case, the court recognized that the risk of loss, which was not borne by the agent in that case, was a factor to be considered in determining the existence of an agency status. 80 Cust. Ct. at 100, 451 F. Supp. at 986. Documentary evidence confirms that New Trends exercised its right to assert damage claims against its agents by withholding the amount of the particular claim in its next letter of credit to an agent. Mr. Parker testified that the agent could then collect the claim from the manufacturer, hence, he could only assume that the manufacturer, and not the agent, was the "ultimate sufferor."

Another factor which supports an agency relationship is the agent's financial detachment from the manufacturers of the merchandise. *See J.C. Penney*, 80 Cust. Ct. at 97, 451 F. Supp. at 984; *Manhattan Novelty Corp.* v. *United States*, 68 Cust. Ct. 884, 885–86, R.D. 11648 (1969). Mr. Parker testified that he had no knowledge whether any of the agents' commissions inured to the benefit of the manufacturer. He was also unable to substantiate the distribution of the letters of credit issued to the agents. Hence, whether the commissions were shared or retained solely by the agents is not known, and one can only guess what were the actual facts. Furthermore, without any elaboration, Mr. Parker admitted his awareness of "kickback" arrangements between the agents and the manufacturers. It is clear that, on this record, complete financial detachment has not been established.

Finally, plaintiff contends that the existence of a contractual buying agency agreement is proof of a bona fide agency relationship. The cases cited in support of this contention mention the existence of a written agency agreement as an indication of an agency relationship. *See Oriental Exporters, Inc.* v. *United States*, 4 CIT 1, 2 (1982); *J.C. Penney Purchasing Corp.* v. *United States*, 80 Cust. Ct. 84, 98, C.D. 4741, 451 F. Supp. 973, 985 (1978); *Dorco Imports* v. *United States*, 67 Cust. Ct. 503, 512, R.D. 11753 (1971). In none of

these cases, however, was the written agreement dispositive of the court's determination.

Although plaintiff contends that the inclusion of the buying commissions in the dutiable value was improper, it has failed to introduce sufficiently persuasive evidence to prove that the merchandise was improperly appraised by the Customs Service. Therefore, it is the determination of the Court that plaintiff has not rebutted the presumption of correctness that attaches to the appraisal by the Customs Service. Accordingly, the appraised values are affirmed, and the action is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/167	Watson, J. September 16, 1986	Lloyd's Electronics Int'l.	85-3-00390	Items 685.24 and A684.62 8.2% or free of duty	Item 688.43 4.7%	Agreed statement of facts	New York Solid-state digital AM/FM timekeeping radio/telephone combinations
C86/168	Watson, J. September 17, 1986	Ando Corp.	85-12-01761	Item 712.05 15.6% or 13.8%	Item 712.49 6.8% or 6.2%	Agreed statement of facts	San Francisco Model AQ-1417B Optical Spectrum Analyzer and Model AQ-1407B and Model AQ-1406B Plug in Units
C86/169	Watson, J. September 17, 1986	Farwest Garments, Inc.	85-5-00693	Item 383.90 21¢ per lb. + 27.5%	Item 376.56 12.1%	Pacific Trail Sportswear v. U.S., 5 CIT 206 and Izod v. U.S., S.O. 85-72	Tacoma Unisex jacket
C86/170	Newman, S.J. September 17, 1986	Novatronics of Canada, Ltd.	81-12-01716	Item 682.25 11.8%	Item 682.30 5.8%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/171	Newman, S.J. September 17, 1986	Novatronics of Canada, Ltd.	81-12-1718	Item 682.25 11.8%	Item 682.30 5.8%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/172	Watson, J. September 18, 1986	A. N. Deringer, Inc.	84-2-00219	Item 705.35 15%	Item A735.06 Free of duty	Agreed statement of facts	Champlain Leather Ski Gloves
C86/173	Watson, J. September 18, 1986	Arrow Trading Co.	84-3-00331	Item 685.24 8.2% for items marked "A" and "B"	Item 684.70 6.2% for items marked "B" Item 911.95 Free of duty for items marked "A"	Agreed statement of facts	New York LCD watch with radio, etc.

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/174	Newman, C.J. September 26, 1986	Bourns Trimpot Division	85-1-00106	Item 686.10 6% with no allowance under item 807.00 for cost or value of subject metal terminal pins	Allowance under item 807.00 for cost or value of said metal and ceramic contacts, whose cost or value is set out in schedules "A" attached to decision and judgment	Sigma Instrument, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Potentiometers

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/248	Restani, J. September 16, 1986	Samuel Brilliant Co.	82-3-00290	Export value	Invoice value of $2.10 per pair, net, packed	Samuel Brilliant Co. v. U.S., S.O. 85-42	Boston Footwear
V86/249	DiCarlo, J. September 16, 1986	Mitsubishi Int'l Corp.	83-5-00705	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	New Orleans Footwear
V86/250	DiCarlo, J. September 16, 1986	Mitsubishi International Corp.	84-7-00918	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Boston Footwear
V86/251	Watson, J. September 18, 1986	Household Manufacturing Co.	R67/13424	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Ceramic products
V86/252	Watson, J. September 18, 1986	National Silver Co.	R67/22732, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Diego Porcelainware
V86/253	Watson, J. September 18, 1986	Surface Freight Co.	R61/12270, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts, an entirety
V86/254	Watson, J. September 18, 1986	Toyo Rug Co.	R61/2992, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Houston Rugs
V86/255	DiCarlo, J. September 23, 1986	Mitsubishi International Corp.	82-11-01591, etc.	American selling price	Appraised values less 22% per pair	Agreed statement of facts	New York Footwear
V86/256	DiCarlo, J. September 23, 1986	Mitsubishi International Corp.	82-5-00612-S, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	San Francisco Footwear

ABSTRACTED VALUATION DECISIONS — Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/257	Watson, J. September 24, 1986	Providence Imports	R62/6130	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Galveston Rugs
V86/258	Re, CJ. September 25, 1986	Empire Ultrasonics Ltd	73-1-00213	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S., C.D. 4739	New York Various articles

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*U.S. GOVERNMENT PRINTING OFFICE: 1986-181-118:40008

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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Vol. 20 OCTOBER 29, 1986 No. 43

This issue contains:

U.S. Customs Service
T.D. 86–191 and 86–192
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U.S. Court of International Trade
Slip Op. 86–99

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

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U.S. Customs Service

Treasury Decisions

(T.D. 86–191)

APPROVAL OF WILLIAM A. FINN TO GAUGE IMPORTED PETROLEUM AND PETROLEUM PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Mr. William A. Finn, 1908 Naomi Street, Glassport, Pennsylvania 15045, has applied to Customs for approval to gauge imported petroleum and petroleum products. It has been determined that Mr. Finn meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of William A. Finn to gauge imported petroleum and petroleum products in all Customs districts is approved.

EFFECTIVE DATE: October 14, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–2446).

Dated: October 14, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

[Published in the Federal Register, October 20, 1986 (51 FR 37250)]

19 CFR Part 111

(T.D. 86–192)

NOTICE OF DUE DATE OF CUSTOMS BROKERS' LISTS OF EMPLOYEES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Clarification of final rule and compliance date.

SUMMARY: This notice is to advise customs brokers when they must submit to each district director of Customs where the broker has a permit to transact customs business, the list of its employees. The notice also clarifies that brokers' employees who do not work directly in the brokerage portion of the business must be included on the list and that employees employed in several districts must be reported on the list of each district.

EFFECTIVE DATE: October 17, 1986.

FOR FURTHER INFORMATION CONTACT: Fred Burns O'Brien, Entry, Licensing and Restricted Merchandise Branch, (202–566–5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In T.D. 86–161, published in the Federal Register on August 26, 1986 (51 FR 30336), Parts 111, 171 and 178, Customs Regulations (19 CFR Parts 111, 171, and 178), were extensively revised to implement the statutory changes made by the Trade and Tariff Act of 1984 (Pub. L. 98–573), relating to the regulation of customs brokers. Section 111.28(b), Customs Regulations (19 CFR 111.28(b)), was amended to state that each broker shall submit, in writing, to each district director where the broker has a permit to transact customs business, a list of names of persons currently employed in that district by the broker. For each such employee, the broker shall also provide the current home address, last prior home address, social security number, date and place of birth, and if the employee has been employed by the broker for less than 3 years, the name and address of each former employer and dates of employment for the 3-year period preceding current employment with the broker.

Section 111.28(b) further provides that after an initial submission is made, the list shall be updated and submitted with the status report required by § 111.30(d), Customs Regulations (19 CFR 111.30(d)). However, no date was indicated in § 111.28(b) as the deadline for the initial submission. To give brokers ample time to prepare the list, Customs has now determined that initial submissions will not be required until January 31, 1987.

Regarding the employee lists, it is to be noted that the lists must include all employees who are employed by a broker in each dis-

trict. This means that even those employees who do not work in the brokerage portion of the business must be listed. Also, employees who are employed in several districts must be reported on the list of each district in which they work.

Dated: October 10, 1986.

JOHN P. SIMPSON,
Director, Office of
Regulations and Rulings.

[Published in the Federal Register, October 17, 1986 (51 FR 37002)]

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 127

PROPOSED CUSTOMS REGULATIONS AMENDMENT RELATING TO SALE OF UNCLAIMED AND ABANDONED IMPORTED MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to allow for the sale of unclaimed and abandoned merchandise in a district other than the district in which the merchandise was imported. It is expected that permitting sales in other districts would often result in higher bids for the merchandise at auction, and thus higher sales prices. Also, Customs would be able to consolidate the sales so that fewer Customs districts would be involved. This would allow for more efficient use of Customs personnel who organize and conduct such sales.

DATE: Comments must be received on or before December 16, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to, and inspected at, the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John Holl, Office of Cargo Enforcement Facilitation (202–566–8151).

SUPPLEMENTARY INFORMATION:

Background

Sections 490 through 493, Tariff Act of 1930, as amended (19 U.S.C. 1490–1493), set forth procedures to be followed whenever there has been an incomplete entry of imported merchandise, as well as procedures for the subsequent disposition of the merchandise. Whenever entry of any imported merchandise is not made within the time permitted by law or regulations, or whenever entry of such merchandise is incomplete because of the failure to pay the

estimated duties, or whenever, in Customs opinion, entry cannot be made for lack of proper documents or other cause, or whenever Customs believes that any merchandise is not correctly or legally invoiced, the merchandise is taken into Customs custody and sent to a bonded warehouse or public store. The merchandise, known as "general order", is held at the warehouse or public store at the risk and expense of the consignee until entry is made or completed and the proper documents are produced, or a bond given for their production.

If the general order merchandise remains in Customs custody for one year from the date of importation, without payment of all estimated duties and storage or other charges, it is then considered unclaimed and abandoned to the Government. The merchandise may then be appraised and sold by Customs at public auction. Gunpowder, explosives, or other merchandise subject to depreciation in value by damage, leakage, or other reasons, to such extent that the proceeds of the sale of the merchandise may be insufficient to pay the duties, storage, and other charges if it remains in a public store or a bonded warehouse for a period of one year, may be sold immediately.

Any merchandise which is subject to sale under these laws may be entered (but not for warehouse) or withdrawn for consumption at any time prior to sale, upon payment of all duties, storage, and other charges and expenses that may have accrued upon the merchandise. Also, there are separate provisions relating to the disposition of merchandise subject to internal revenue tax.

Sections 127.0 through 127.37, Customs Regulations (19 CFR 127–127.37), implement the laws concerning general order merchandise and the disposition of unclaimed and abandoned merchandise. Pursuant to § 127.22, relating to the place of sale of unclaimed and abandoned merchandise, the district director, in his discretion, may sell such merchandise at any port within his district.

It has come to Customs attention that unclaimed and abandoned merchandise could often be more advantageously sold if the sale were to occur in a district other than the one in which the merchandise was imported. This would allow Customs to consolidate the sales. Thus, fewer Customs districts would be involved, which would result in more efficient use of Customs personnel who organize and conduct such sales. It would also allow for more competition in the bidding (and therefore higher sales prices) since a greater number of prospective buyers would be present at these consolidated sales. In addition, certain merchandise, such as collector's quality firearms and rare birds, which appeal to specific kinds of buyers, would bring a higher price if they could be sold in a district with a concentration of these buyers. It is believed that the higher sales prices obtained in the consolidated sales would cover the costs of transportation of the merchandise to the district where the sale is to take place and still result in a greater return to the Government.

PROPOSED ACTION

It is proposed to amend § 127.22, Customs Regulations (19 CFR 127.22), to allow for the sale of unclaimed and abandoned merchandise in a district other than the one in which the merchandise was imported. The decision to transfer the merchandise for purposes of sale would be within the discretion of the district director in the district where the merchandise was imported. With the exception of certain merchandise as noted in 19 U.S.C. 1491 and 1492, only merchandise which has remained in general order for one year and is thereupon considered unclaimed and abandoned may be transferred to another district for sale.

The consignee of the merchandise would be notified of its transfer to another district for sale inasmuch as the consignee, pursuant to 19 U.S.C. 1491, has the option of making entry at any time prior to the sale, upon the payment of all duties, storage and other charges, and expenses that may have accrued on the merchandise. The costs of transfer would be assumed by Customs. They would be considered an expense of the sale, to be reimbursed to Customs out of the proceeds of the sale.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 522), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 127

Customs duties and inspection, Unclaimed and abandoned merchandise.

PROPOSED AMENDMENT

It is proposed to amend Part 127, Customs Regulations (19 CFR Part 127), as set forth below.

PART 127—GENERAL ORDER, UNCLAIMED, AND ABANDONED MERCHANDISE

1. The general authority citation of Part 127 is revised to read as follows:

Authority: 19 U.S.C. 66, 1311, 1312, 1484, 1485, 1490, 1491, 1492, 1506, 1559, 1563, 1623, 1624, 1646a; 26 U.S.C. 5733.

2. It is proposed to revise § 127.22 to read as follows:

§ 127.22 Place of sale.

All merchandise at a port other than a district headquarters port, which becomes subject to sale (including explosives, perishable articles and articles liable to depreciation), shall be promptly reported to the headquarters port for disposition. The district director at that port, in his discretion, may authorize the sale of such merchandise, as well as merchandise at the headquarters port which is subject to sale, at any port within his district, or in any other district. The consignee of any merchandise which is to be transferred from the district where it was imported to another district for sale, shall be notified of the transfer so that he may have the option of making entry for the merchandise before the transfer and sale.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: October 3, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 17, 1986 (51 FR 37043)]

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19 CFR Part 175

TARIFF CLASSIFICATION OF FIBER REINFORCED PLASTIC CELLULOSIC SAUSAGE CASINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed interpretive rule; solicitation of comments.

SUMMARY: A petition has been submitted on behalf of a domestic interested party regarding Customs rulings on the tariff classification of imported fiber reinforced plastic cellulosic sausage casings

composed of paper, regenerated cellulose and glycerin. The petitioner states that ruling letters which are the basis for the current classification of the product as sausage casings, not specially provided for, whether or not cut to length, other, erroneously reversed a prior interpretation of the TSUS. The petitioner claims these rulings were issued in disregard of a tariff provision which bars Customs from reversing or modifying a prior interpretation of the TSUS without the concurrence of the Attorney General or the Court of International Trade. The petitioner states that all cellulosic plastic sausage casings are to be classified as sausage casings, not specially provided for, whether or not cut to length, of cellulosic plastics material. This classification would subject the product to a higher rate of duty. The petition also challenges the current classification based on a determination of the product's component material of chief value. This document invites comments with respect to the correct classification of the product.

DATE: Comments must be received on or before December 15, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229 (202–566–8237).

FOR FURTHER INFORMATION CONTACT: Jeremy N. Baskin, Classification and Value Division, (202–566–8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a domestic interested party petition has been filed with respect to decisions which are the basis for Customs current classification of fiber reinforced plastic cellulosic sausage casings under item 790.47, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), as sausage casings not specially provided for, whether or not cut to length, other. This classification would subject the product to a column one rate of duty of 4.4 percent ad valorem.

On January 12, 1984, Customs issued Ruling 073604 which reaffirmed conclusions reached in Ruling 061462 dated May 27, 1983. Ruling 061462 was issued in response to Request for Internal Advice No. 162/79. Ruling 061462 held that the subject fiber reinforced cellulose tubing was composed of paper, regenerated cellulose and glycerin and that the correct classification of the product was dependent on its component material of chief value. The ruling also stated at what point in the manufacturing process the chief value determination was to be made. Based on these rulings, Customs has classified the product under item 790.47, TSUS.

On September 30, 1985, a petition was submitted on behalf of a domestic interested party representing a company which manufactures and wholesales a product similar to that classified in Ruling

061462. The petitioner contends that the ruling is incorrect for several reasons. First, the ruling was issued in disregard of § 502(b), Tariff Act of 1930, as amended (19 U.S.C. 1502(b)), which bars Customs from revising or modifying a prior interpretation of the TSUS without the concurrence of the Attorney General or the Court of International Trade. By issuing the 1983 ruling, the petitioner states Customs reversed rulings made on October 31, 1975 (038749) and May 12, 1977 (051718) without seeking such concurrence. In Rulings 038749 and 051718, Customs held that fiber reinforced cellulosic plastic sausage casings were classifiable under item 790.45, TSUS, as sausage casings, not specifically provided for, whether or not cut to length, of cellulosic plastics material.

The petitioner states that the legislative history of the Tariff Schedules Technical Amendments Act of 1965 (Pub. L. 89–241, 79 Stat. 933, amending 19 U.S.C. 1202) reflects the intent of Congress that all cellulosic plastics sausage casings, whether fiber reinforced or not, are to be classified under item 790.45, TSUS, which provides for a column one duty rate of 7.3 percent ad valorem—a higher rate than is provided for in item 790.47, TSUS. The petitioner further avers that the legislative history of items 790.45 and 790.47, TSUS, dictates that item 790.47, TSUS, be restricted to casings made from natural animal products rather than fibrous cellulosic materials. The petitioner argues that the chief value standard is inapplicable to the classification of the subject casings and that the correct determination is dependent upon the casings' essential character.

Finally, the petitioner contends that if the operative standard of determining classification is component material of chief value, and the paper and glycerin ingredients of the subject casings are treated as discrete components for purposes of that chief value determination, the component material of chief value remains cellulosic plastics material. In the case of the paper, only the cost of the paper itself, not costs subsequently incurred in the production process, should be considered in measuring the value of the paper. Glycerin, a plasticizer, should be included in the value of the cellulosic plastics material.

COMMENTS

Pursuant to § 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on this issue. The domestic interested party petition, as well as all comments received in response to this notice, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This notice is published in accordance with § 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: September 26, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 15, 1986 (51 FR 36703)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 86–99)

UNITED STATES, PLAINTIFF *v.* MECCA EXPORT CORP. AND INVESTORS INSURANCE CO. OF AMERICA, DEFENDANTS, AND INVESTORS INSURANCE CO. OF AMERICA, THIRD-PARTY PLAINTIFF *v.* MECCA EXPORT CORP., ET AL. THIRD-PARTY DEFENDANTS.

Court No. 85–5–00691

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Plaintiff's motion to sever, redesignate, and dismiss granted; third-party defendant's motion to dismiss denied.]

(Decided October 3, 1986)

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division *(Kenneth N. Wolf,* for the plaintiff.

Milton Reiss, for defendant Investors Insurance Company of America and third-party plaintiff Investors Insurance Company of America.

Grunfeld, Desiderio, Lebowitz & Silverman (Michael P. Maxwell), for third-party defendants Brach, Green, Fried and Granada Electronics, Inc.

CARMAN, *Judge:* The question before the Court is whether the Court may continue to hear a cross-claim or third-party claim where the main action is terminated on non-jurisdictional grounds, even if the cross-claim or third-party claim does not satisfy the requirement of Federal subject matter jurisdiction. The Court holds that it may.

Plaintiff, United States, moves to sever and redesignate the lead portion of this action as Court No. 85–5–00691S, and to dismiss this redesignated portion. Third-party defendants Brach, Green, Fried and Granada Electronics, Inc. move to dismiss the third-party complaint against them. Third-party plaintiff, Investors Insurance Company of America (Investors) opposes both motions. There appears to be no motion seeking the dismissal of the cross claim by Investors against Mecca Export Corporation (Mecca), although third-party defendants indicate in their papers they believe there is no jurisdiction for the cross claim.

BACKGROUND

Plaintiff United States filed on May 21, 1985 its complaint alleging defendant Mecca failed to redeliver certain merchandise required and as a result was liable to pay $45,000 in liquidated damages arising from the breach of its entry bond. A second cause of action alleged defendant Investors was liable in a like amount as surety on defendant Mecca's bond. Defendant Investors, the surety, subsequently tendered to plaintiff United States all monies due in full satisfaction of plaintiff's claim.

Subsequent to the settlement of plaintiff's action, the surety defendant Investors filed a cross claim against its principal, defendant Mecca, and filed a third-party complaint against third-party defendants Brach, Green, Fried and Granada Electronics, Inc.

Plaintiff United States contends that since all of its claims have been satisfied in full and since it has no interest in the outcome of the third-party indemnity claim, it should be permitted to extricate itself from the action. Third-party defendants urge that the Court lacks jurisdiction over the claims against them since these claims were not filed until after the action had been rendered moot as a result of the settlement between plaintiff United States and the surety Investors. Further, third-party defendants contend that this Court lacks jurisdiction since the claims of the surety third-party plaintiff sound in contract on the surety bond and do not involve an international trade dispute.

DISCUSSION

Section 1583 of Title 28, United States Code provides:

> **§ 1583 Counterclaims, cross-claims and third-party actions.**
>
> In any civil action in the Court of International Trade, the Court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim, or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

28 U.S.C. § 1583 (1982).

The legislative history pertaining to the section makes clear that Congress believed the administration of justice would be well served if the Court of International Trade entertained jurisdiction over cross-claims and third party actions arising out of a suit by the United States to recover on a bond.[1] The Court's remedial powers

[1] The House Report stated:

> The terms of most customs bonds specify that the bond principal and the surety are jointly and severally liable to the United States. As introducted, H.R. 6394 did not permit the adjudication of the rights of all of the interested parties involved in an action arising under proposed sections 1582(a)(2) and 1582(a)(3). For example, if a surety desired to

Continued

were broadened, authorizing the entry of money judgments against the United States as well as any other party on a counterclaim, cross-claim or third-party action in civil actions relating to import transactions.[2] Generally cross-claims in Federal District Courts under Rule 13g (Rule 13f of this Court) of the Federal Rules of Civil Procedure do not require independent grounds of federal jurisdiction. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 617 n. 14 (1966).[3] Indeed the treatment of cross-claims as part of the ancillary jurisdiction of the Court existed prior to the Federal Rules. *See, e.g., Republic Nat. Bank & Trust Co.* v. *Massachusetts Bonding & Ins. Co.*, 68 F.2d 445, 447–48 (5th Cir. 1934).[4] In *Hoosier Cas. Co. of Indianapolis, Ind.* v. *Fox*, 102 F. Supp. 214, 226–27 (1952), and quoted at 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1433 at 179, the court said:

> [I]t is evident that any claim which arises out of the transaction or occurrence that is the subject matter of the main claim is regarded by the courts as being ancillary to the main claim and will be supported for federal jurisdictional purposes by federal jurisdiction of the main claim * * *. However the fact that cross claims are permissive in character does not prevent them from being ancillary to the main claim. If they "arise out of the transaction or occurrence that is the subject matter" of the main claim, they are supported for federal court jurisdictional purposes by federal jurisdiction of the main claim.

Hoosier Cas. Co., 102 F. Supp. at 226–27.

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[1] *Continued*

seek reimbursement from the bond principal for a breach of contract, the surety would have to bring a separate civil action in State court or Federal district court.

The sureties stated that the administration of justice would be served best if the Court of International Trade was permitted to entertain cross-claims between the bond principal and the surety when both were named defendants in a section 1582(a)(2) or (a)(3) action. They also recommended that the court be given jurisdiction over third-party actions arising out of suits by the United States to recover on a bond or to recover customs duties. The inclusion of third-party action jurisdiction will protect both the bond principal and the surety when either is not named as a defendant in an action brought by the United States for recovery on a customs bond. Under their recommendation the authorization for cross-claims and third-party actions would be included in proposed section 1583. The sureties strongly believed that these changes will allow the Court of International Trade to fully adjudicate the rights of all interested parties and to develop a uniform body of law, particularly with regard to liability on customs bond.

Since the hearings, members of the private bar have concurred in the recommendations made by the surety companies. Although there was no formal ABA position, * * * [the] Chairman of the ABA's Standing Committee on Customs Law stated that:

> Such a procedure would contribute to the effectiveness of the judicial process, since it would permit the Court of International Trade to dispose of all claims arising out of the same underlying transaction in the one proceeding which it must conduct in any event.

The Justice Department also saw the logic in the principle that when a surety is sued by the United States, the surety should be entitled to bring its principal into the suit.

In addition, several witnesses suggested it would be wholly consistent with the underlying purposes for establishing cross-claim and third-party procedures, as well as the expansion of the Government's right to counterclaim, to permit private litigants to assert a counterclaim.

Accordingly, the Subcommittee further amended proposed section 1583 to authorize the assertion of any counterclaim, cross-claim or third-party action of any party, if (1) such claim or action involves imported merchandise that is the subject of a civil action before the court, or (2) such claim or action is to recover on a bond or customs duties relating to such merchandise.

H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 37–38, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3748–49.

[2] As noted by the Honorable Peter W. Rodino:

> Previously, when the court rendered a decision in favor of an importer, the court returned the appropriate papers to the Customs Service with an order that the entry be reliquidated in accordance with the decision of the court. This had the effect of requiring a refund of customs duties to the importer.

Rodino, *The Customs Court Act of 1980*, 26 N.Y. L. Sch. L. Rev. 459, 467 n. 56 (1981).

[3] In *Consolo* an intervenor of right was permitted to interpose a cross-claim without independent jurisdictional grounds. In *Coleman* v. *Casey County Bd. of Educ.*, 686 F.2d 428 (1982), the district court's refusal to exercise jurisdiction over a local school board's cross-claim against a state board seeking indemnity and contribution for amounts expended in defense of a civil rights suit when adjudication would have necessitated resolution of complex questions of state law was held not to be an abuse of discretion. *Id.* at 430.

[4] In *Republic Nat. Bank*, a diversity action brought by a surety, the court held that dependent jurisdiction existed only because and insofar as necessary to fully exercise jurisdiction on the main claim.

Once ancillary jurisdiction over a third-party claim has attached, several cases have considered whether or not such jurisdiction continues after the main action has been settled. The weight of authority is the court does not lose jurisdiction over the third-party claim and may continue with it. *See* 3 *Moore's Federal Practice* ¶14.26, at 14–113 (1985) and cited cases. In *Dery* v. *Wyer,* 265 F.2d 804 (2d Cir. 1959), the Second Circuit pointed out:

> * * * a rule that ancillary jurisdiction of a third-party claim terminates on a determination of the main claim will seriously impair the utilization of the Rule, breed confusion and generate many sterile jurisdictional disputes.

Id. at 809.

It would appear nevertheless that where the main action has been dismissed for lack of jurisdiction, a third-party indemnity claim should also fail unless it can be supported by independent jurisdictional grounds. *Illinois Central Gulf Railroad Co.* v. *Pargas Inc.,* 706 F.2d 633 (5th Cir. 1983); *Ferreira* v. *Sawayama-Kisen KK,* 171 F. Supp. 96 (S.D.N.Y. 1959).

It is important that while ancillary or pendent jurisdiction exercised in Federal District Courts has been liberally construed to encourage the settlement of disputes in one action to avoid multiplicity and the splitting of causes of action, this Court has primary jurisdiction conferred upon it by 28 U.S.C. 1583. The same considerations enunciated by numerous Federal Courts supporting liberal exercise of ancillary jurisdiction in Federal District Courts apply with even greater force in this case. Congress conferred primary jurisdiction on this Court in customs bond cases to insure as much as possible that all claims relating to such action be disposed of in one proceeding. Just as with ancillary jurisdiction questions, this Court as a matter of sound judicial administration and to insure consistent results should, in considering § 1583, endeavor to avoid multiplicity of actions. If the Court were to accept plaintiff's arguments, the result would discourage the proper settlement of cases by sureties with the government. Furthermore, litigants should not be able to divest the Court of jurisdiction by deciding in one case to settle, while in another case to continue jurisdiction merely by not settling. Public policy favors the Court determining whether or not jurisdiction should be exercised.

Plaintiff's motion to sever, redesignate and dismiss is granted. Third-party defendant's motion to dismiss is denied.

So ordered.

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T 17.6/3-4:

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U.S. Customs Service/BATF

Treasury Decision

(T.D. 86–193)

CUSTOMS/BATF AGREEMENT—SUPERVISION OF ALCOHOLIC BEVERAGE AND DISTILLED SPIRITS PLANT BONDED WAREHOUSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of transfer of supervision.

SUMMARY: This document sets forth a memorandum of understanding between the Customs Service (Customs) and the Bureau of Alcohol, Tobacco, and Firearms (BATF) whereby the BATF will perform, on behalf of Customs, spot-checks and audits of certain Customs bonded warehouses. The warehouses affected are those co-located at distilled spirits plants premises and those warehouses which store alcoholic beverages only. Implementation of the agreement will continue the Treasury Department's control of bonded warehouses at these locations while effecting an overall savings in Treasury Department resources. It will not require any changes in the regulations of either agency or have any significant impact on the bonded warehouse industry.

EFFECTIVE DATE: October 21, 1986.

FOR FURTHER INFORMATION CONTACT:

Customs:

Audit Aspects: Matthew J. Krimski, Regulatory Audit Division (202–566–2812);

Inspection Aspects: John Holl, Office of Cargo Enforcement and Facilitation (202–566–8151).

BATF:

Alan Graham, Director, Distilled Spirits Branch (202–566–7531).

Dated: October 15, 1986.

MARGARET M. O'ROURKE,
Acting Assistant Commissioner
(Office of Commercial Operations).

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
U.S. CUSTOMS SERVICE
AND THE
BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS
DEPARTMENT OF THE TREASURY

Purpose

To establish an agreement whereby the Bureau of Alcohol, Tobacco, and Firearms (BATF) will perform, on behalf of the U.S. Customs Service, inspector spot-checks and regulatory audits of certain Customs bonded warehouses. The warehouses involved are those used exclusively for the storage of alcohol beverages. At the present time, there are approximately 280 of these bonded warehouses in the United States.

Background

Customs and BATF have been engaged in a cooperative effort during the last several years to maintain effective supervision over bonded warehouses and distilled spirits plants. As a result of these efforts, Customs and BATF concurred in an agreement in March 1984, whereby BATF would verify imported bulk quantities of distilled spirits to Customs.

As an extension of this agreement, a pilot test was initiated in late 1984 to determine if BATF would assume responsibility for spot-checks and audits of Customs bonded warehouses co-located at distilled spirits plants premises. BATF personnel were trained in Customs procedures and successfully conducted spot-checks and audits during the course of the pilot test, which ended in 1985. Customs and BATF have agreed to transfer the responsibility for spot-checks and audits for these particular warehouses to BATF.

General Authorities

31 U.S.C. Section 321.
31 U.S.C. Section 1535.

Interagency Coordination

Detailed procedures have been developed for the coordination and identification of warehouses included in this program (appended). BATF will perform all Customs spot-check and audit procedures and will forward all appropriate reports to Customs when completed. Customs bonded warehouses under this agreement will be only those used exclusively for the storage of alcohol beverages approximately 280 warehouses nationwide. Customs will continue to bill the warehouses in the program for the annual fee and reimburse BATF.

Justification

Overall Treasury Department efficiency will be gained For warehouses co-located at DSP's, BATF will have to be onsite to perform their revenue protection audits at the DSP. By also conducting spot-

checks and/or audits at DSP's, BATF will save Customs the requisite travel costs and time that would otherwise be borne by Customs. This agreement will also increase ATF's enforcement presence at a time when contamination and tampering problems are increasing.

Periodic monitoring of this program will be carried out to ensure its continued cost efficiency and proper implementation of Customs bonded warehouse program.

Implementation

This agreement will not require any changes in regulations concerning bonded warehouse operations. The impact on the bonded warehouse industry should be minimal. One Treasury Officer will just be performing the same function of another Treasury Officer with resultant savings to the government. Notice to the bonded warehouse industry for these warehouses will be published in the Federal Register along with the procedures necessary to control the identification of the warehouses involved in the program and the Treasury organization responsible for the spot-checks and audits. Implementation date is projected at October 1, 1986, or publication date in the Federal Register, whichever is later.

WILLIAM VON RAAB,
Commissioner,
U.S. Customs Service.

Date: August 20, 1986.

STEPHEN E. HIGGINS,
Director,
Bureau of Alcohol, Tobacco, and Firearms.
Date: July 8, 1986.

PROCEDURES

Background

Customs and BATF have been engaged in a cooperative effort during the last several years to maintain effective supervision over bonded warehouses and distilled spirits plants. As a result of these efforts, Customs and BATF concurred in an agreement in March 1984, whereby BATF would verify imported bulk quantities of distilled spirits to Customs.

As an extension of this agreement, a pilot test was initiated in late 1984 to determine if BATF would assume responsibility for spot-checks and audits of Customs bonded warehouses co-located at distilled spirits plants premises. BATF personnel were trained in Customs procedures and successfully conducted spot-checks and audits during the course of the pilot test, which ended in 1985. Customs and BATF have agreed to transfer the responsibility for spot-checks and audits for these particular warehouses to BATF.

Additionally, Congress required, through the Department of the Treasury's legislation, that a study be conducted to determine the feasibility of BATF assuming jurisdiction over Customs bonded warehouses containing imported alcoholic beverage products only.

The study found and recommended that BATF assume inspector spot-check and audit responsibility for these warehouses. On June 13, 1986, the Department mandated Customs transfer these two specific responsibilities to BATF.

Customs will retain overall supervisory and administrative responsibility for bonded warehouses where BATF conducts audits and spot-checks. That is, Customs will receive and process warehouse entries and withdrawals, approve new warehouses, administer bonding requirements, assess liquidated damages on the basis of BATF reports, process petitions for relief, and suspend or revoke warehouse approvals. The application and annual fees for alcoholic beverage warehouses will be the same as for any other bonded warehouses.

Criteria for Participating Warehouses

Detailed procedures have been developed for the coordination and identification of warehouses included in this program. BATF will perform all Customs spot-check and audit procedures and will forward all appropriate reports to Customs when completed. Customs bonded warehouses under this agreement will be only those used exclusively for the storage of alcohol beverages approximately 280 warehouses nationwide. Customs will continue to bill the warehouses in the program for the annual fee and reimburse BATF. The term "bonded warehouse exclusively for the storage of alcoholic beverages" includes:

1. Any otherwise qualifying warehouse which contains domestic alcoholic beverages along with imported alcoholic beverages;
2. Any otherwise qualifying warehouse which contains advertising and/or promotional material related solely to alcoholic beverages, except:

   a. where any such material is restricted merchandise (textile products or other merchandise subject to quota or requiring a special permit as a condition of withdrawal for consumption);
   b. where the warehouse proprietor cannot carry the burden of proof that all of such material is actually advertising or promotional material related *solely* to alcoholic beverages; or
   c. where Customs has determined, on a case by case basis, that not more than 25% of the value of the merchandise in the warehouse during the business year consisted of advertising and promotional material.

Warehouses which are excluded are:

1. Any warehouse that cannot meet the criteria for inclusion noted above;
2. Any Class 6 warehouse;
3. Any warehouse where Customs has approved a blanket permit for withdrawal for exportation or aircraft/vessel supplies (duty-free stores or ships chandlers); (See Customs Directive 3260–04, dated December 13, 1983.)

4. Any warehouse containing non-beverage alcohol or alcohol products.

A specific listing of these warehouses has been sent to each region and will be updated on an annual basis.

Procedures To Control Switching Between Customs/BATF

The following procedures will be adopted to control Customs bonded warehouses under the program:

1. An initial listing of warehouses in the program has been developed by both agencies and forwarded to the regions. All warehouses on the list will be subject to spot-checks and audits by BATF utilizing Customs procedures. The warehouses will remain under BATF control until they are founc by spot-checks or audit to be ineligible for continued participation or they elect to revert to Customs control by bringing non-alcoholic beverage merchandise into the warehouse and notifying Customs in advance.

2. Any warehouse found by Customs or BATF to contain merchandise other than alcoholic beverages or small amounts of promotional material, that has not given prior notification to Customs, will revert to Customs control and be assessed liquidated damages for failure to comply with a proper Customs order, rule or regulation (19 CFR 19.3).

3. Such warehouses will remain in Customs control until the warehouse files an accurate CF 300, Warehouse Proprietor's Submission, which shows the activity for the past business year has only involved alcoholic beverages. Consequently, it may take a warehouse as much as 24 months and 15 days to qualify again for the program.

This time frame is based on the fact that the Customs Regulations require the CF 300 to be filed 45 days after the end of the proprietor's business year. Therefore, if a warehouse participating in the program is found to contain non-alcoholic beverage merchandise in month 1 of its business year it could take the balance of that business year (11 months) plus another business year (12 months) plus the total filing period provided (45 days or 1½ months) before a CF 300 could be filed demonstrating alcoholic beverage activity only. Conversely, a warehouse could revert to BATF supervision in as short a period as 12 months. This could occur if an infraction is discovered late in the 12th month of the first year and the proprietor files the CF 300 immediately after the end of the second business year.

4. New warehouses coming into existence after the effective date of the program's implementation will be considered under Customs supervision until they can file a warehouse proprietor's submission for a full year showing only alcoholic beverage activity. When that occurs, they will be transferred over to BATF.

5. Warehouses under BATF supervision which become aware that they will be storing non-alcoholic beverage merchandise will immediately notify the Customs district director of this fact. The

notification will be in writing at least 2 days prior to the filing of the warehouse or rewarehouse entry. The district director will then notify region and Headquarters Regulatory Audit by forwarding a copy of the notification letter to them. The district director will also notify the regional BATF coordinator of the notification. This notification will eliminate the possibility of the assessment of liquidated damages against the proprietor if the non-alcoholic beverage merchandise is found subsequently in the warehouse.

These warehouses will revert to Customs supervision and remain under that supervision until they can file a CF 300 Warehouse Proprietor's Submission which shows alcoholic beverage activity for 1 full year and become eligible for the program again.

6. For purposes of the program the warehouse proprietor will be allowed to store some promotional material associated with the alcoholic beverages. However, the promotional material cannot exceed more than 25 percent of the total value of the total merchandise in the warehouse at any given time. Promotional material may include coasters, glasses and napkins with advertising logo-types, cork screws, alcohol filled novelty decanters, etc. The promotional material must be clearly and solely alcohol beverage related, and not be restricted merchandise.

Previous Memorandum of Understanding

See T.D. 84–168 published in the Federal Register on August 1, 1984 (49 FR 30827).

[Published in the Federal Register, October 21, 1986 (51 FR 37362)]

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U.S. Customs Service/BATF

Treasury Decision

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